

AUDIO OR VIDEO RECORDING OF EXECUTIVE SESSIONS

Effective Jan. 1, 2004, all public bodies, including Community College Boards, must keep a "verbatim record" of closed (executive) sessions through an audio or video recording. Although each Board of Trustees has competent legal counsel, here are some SUGGESTIONS that you might want to consider:

1. The Board secretary should be put in charge of operating whatever audio or video recording device you choose. Board members should be able to say that the secretary was in charge of making the audio or video recording. Board members or Presidents should not be involved with any audio or video recording equipment or tapes.

2. The Board secretary should identify each audio or video tape at the beginning of the executive session by stating the date, time, the name of the Board, place of the executive session meeting, the exceptions to the Open meeting Act utilized in the Open Session to go into executive session, and the individuals present. "This is a recording of an executive session held on Jan 19th, 2004 of the _____ College Board of Trustees, held in the _____ Room of _____ College, _____ IL. The Board went into executive session under Open Meeting Act exceptions 2(c)(1), 2(c)(6), and 2(c)(21). Present are Board members A,B,C,D,E, F and G, and President H and board secretary I. Also joining the board in the executive session are J, K and L. The executive session began at 8:46 pm." The Board secretary should note on the audio or video recording the time of arrival of any person not present at the beginning of the meeting and state the time of departure of any person leaving the meeting.

3. At the conclusion of the executive session, the Board secretary should conclude the audio or video recording of the executive session by providing all the information provided in the beginning and the time the executive session adjourned. "This is a recording of the executive session held on _____ 2004 of the _____ Board of Trustees. The executive session was attended by Board members A, B, C, D, E, F and G and President H and board secretary I. Others who arrived later, or who left before the conclusion of the meeting are noted on the recording. The executive session concluded at ___pm."

4. The statute does not require that board members identify themselves before speaking. Under generally accepted rules for written minutes taken by a board secretary, the board secretary has only to note what was discussed, not who discussed the topic. The tape or video recording may be considered in the same fashion. However, some attorneys are recommending that board members identify themselves by voice if there is an audio recording or appear individually on camera if there is a video recording. This is an issue that you will want to discuss with your board attorney. The Courts will eventually develop rules on this matter

5. Use 120-240 minute audio or video tapes. The Board does not want to have to explain any interruptions made while changing tapes. Buy tapes long enough to record the entire executive session. If you have to change tapes, the board secretary should state the time prior to the end of the tape and then identify the new tape with all the details as was done at the beginning of the executive session, making clear the start time of the new tape.

6. The audio or video recording of executive sessions will not be open for public inspection or subject to discovery in any proceeding other than an action to enforce the Open Meetings Act. In such an action, the Judge will review the audio or video tape in private in order to determine if there has been a violation of the Act. If the Judge determines the complaint for non-compliance is valid, then that portion of the audio or video recording applicable to the suit will be released. Therefore, there should only be one executive session on a tape. Do not combine executive meetings on the same tape. If the Board or Board secretary is required to produce an audio or video recording, the Board will want to send to the Court only the one executive session being requested. Start a new tape for each executive session. Tapes are cheap. Litigation is expensive.

7. The Board secretary WILL HAVE TO PREPARE EXECUTIVE SESSION MINUTES JUST AS HE/SHE HAD DONE IN THE PAST. Since the tapes are only required to be kept 18 months, the Board will need a permanent WRITTEN copy of the minutes of the executive session.

8. The statute allows the destruction of audio or video tapes without the approval of the local records commission or any other authority. However, the audio or video recordings cannot be destroyed until 18 months after the meeting; the destruction must be specifically authorized by the board; and can only take place after the Board approves adequate written minutes of the executive session involved. This written-minutes requirement only means that the executive session minutes have to be approved, but not that they have to be opened for public review.

9. The Board should consider developing a program of destroying the audio or video tapes. There should be only one permanent record of what happened in executive session. The written notes taken by the board secretary should eventually be the only record in existence. Some Boards may not want to adopt such a policy, but please note that if the Board decides to eventually open the audio or video tapes, the statute specifically states, "The provisions of this subsection do not supercede the privacy or confidentiality provisions of state or federal law." Before releasing any audio or video recordings, make very sure that you have complied with all state and federal privacy and confidentiality acts. This includes the privacy and confidentiality rights of the individual members of the Board, the College Administration, and all district employees. This is a large burden and that is why it is recommended that the recordings be destroyed.

10. The Board should consider making a separate motion concerning the audio or video recording of an executive session. A Board member might want to make a motion, "I move to approve the (audio or video) recording made of the executive session of _____, 2004 and that the secretary of the Board make provisions for its safe keeping, that it be made available only upon the proper order of a court and a finding by a Judge that such audio or video tape should be released. This audio or video recording shall be destroyed 18 months after the date of the meeting if the Board has adopted written minutes of the executive session in question."

11. A second motion would be, " I move that the written minutes of the executive session held on _____2004 be approved, and be opened to the public"/ or, "and they shall remain closed to public view." whichever is appropriate to the occasion.

12. The Board is required by law to make a semi-annual review of executive session minutes. The new statute requiring the audio or video recording of executive sessions also requires the semi-annual review of audio and video recordings. Following the review of both written and audio or video recording, a motion could be made stating "The Board has conducted its semi-annual review of executive session written minutes and finds that the need for confidentiality as to all or part of these minutes no longer exists and therefore the written closed meeting minutes of ____2004, ____2004 may be opened to the public. Further the Board finds that the need for confidentiality as to all or part of the written executive session minutes of _____and _____ still exists and that these written executive session minutes shall remain closed. Further, the Board notes that no lawsuit has been filed, and no valid court order has been received, requiring the release of any audio or video recordings of any executive session, and therefore, pursuant to the statutory requirements, none are to be released."

This memo is an attempt at being constructive and helpful. There are many unresolved issues that should be reviewed with your legal counsel. The opinions expressed are solely those of the author.

Prepared November 19, 2003 by:
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