

# FOIA Update: Executive Sessions

(June 2015)



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## Executive Session Requirements (resulting from *Donohue v City of North Augusta* June 2015)

The South Carolina Supreme Court held in the 2015 case of *Donohue v City of North Augusta* that a public body describing the purpose of an executive session as a "proposed contractual matter" is not specific enough to comply with the Freedom of Information Act when entering executive session pursuant to SC Code Section 30-4-70 (a) (2).

The Court noted that Section 30-4-70 (a) (2007) allows a public body to hold a closed meeting for any one of five reasons, provided that its "specific purpose" is announced in the open session (see back page).

As provided in Section 30-4-7 (b), "specific purpose" is defined as:

"a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70 (a) (1) or 30-4-70 (a) (5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated."

The Court observed that, during the council meetings at issue, city council did not invoke either Section 30-4-70 (a) (1) or (a) (5), the two subsections that specifically allow the identity of the individual or entity to be withheld. Rather, in each of the 11 executive sessions challenged by *Donohue*, the minutes reflect council invoked only Section 30-4-70 (a) (2) and merely stated that the specific purpose of the meeting was to be a "contractual matter." As such, the court determined that council had failed to satisfy the "specific purpose" requirement.

Although the Court's analysis confirms a distinction between what is required when going into closed session pursuant to (a) (1) or (a) (5) as opposed to the requirements when going into closed session pursuant to (a) (2) through (a) (4), it did not provide details regarding what council should include in its announcement before going into executive session under one as opposed to the other.

Due to the fact there are still many questions outstanding after this Court ruling, councils should discuss any questions regarding executive session with their city attorney. The Municipal Association will continue engaging with local government organizations, the SC Press Association, municipal attorneys and attorneys specializing in matters related to the Freedom of Information Act to determine whether more specific guidance is needed.

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## South Carolina state code sections authorizing executive session (Freedom of Information Act - *Section 30-4-70*)

**SECTION 30-4-70 (a)** A public body may hold a meeting closed to the public for one or more of the following reasons:

**Section 30-4-70 (a) (1)**

Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body; however, if an adversary hearing involving the employee or client is held, the employee or client has the right to demand that the hearing be conducted publicly. Nothing contained in this item shall prevent the public body, in its discretion, from deleting the names of the other employees or clients whose records are submitted for use at the hearing. *(The identity of the individual or entity being discussed is not required to be disclosed)*

**Section 30-4-70 (a) (2)**

Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

**Section 30-4-70 (a) (3)**

Discussion regarding the development of security personnel or devices.

**Section 30-4-70 (a) (4)**

Investigative proceedings regarding allegations of criminal misconduct.

**Section 30-4-70 (a) (5)**

Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body. *(The identity of the individual or entity being discussed is not required to be disclosed.)*

**Section 30-4-70 (b)**

Before going into executive session, the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) return to public session.