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## Coates' Canons Blog: Who May Attend a Closed Session?

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Two new members have been elected to the Pleasantville town council and are scheduled to be sworn in at the December meeting. A special meeting has been called for November 25, at which the current board plans to address several matters in closed session. As set out in the meeting notice, those matters are:

- Discussion with the town attorney regarding pending litigation (Jones v. Town of Pleasantville) [G.S.143-318.11 (a)(3)]
- Personnel matter [G.S.143-318.11 (a)(6)]
- Consideration of economic incentives [G.S. 143-318 (a)(4)]

To promote a smooth transition for the new board, the council would like to invite the council-members elect to join them for the discussion of these matters. Is it legal for them to attend? The answer turns on whether confidential information will be viewed or discussed in the closed session.

### The General Rule

As a general rule, a public body may allow selected people who are not members of the public body to attend a closed session. The authority for closed sessions in G.S. 143-318.11 essentially allows a public body to hold meetings without allowing the general public to attend. The statute does not specifically prohibit the body from allowing individual members of the public to attend, but some of the reasons for meeting in closed session involve matters that are confidential. In those cases, attendance must be limited to those who legally may hear or view the confidential information. In all other cases, the board may include any person it deems appropriate to attend the meeting. As David Lawrence notes in *Open Meetings and Local Governments in North Carolina* "without some logical basis for the distinction, [a public body] may not allow some members of the public to attend and not others." So if the board allows members of the public to attend, it should have a reason for doing so that is related to the purpose of the closed session.

### Applying the Rule

Let's consider whether members-elect may be included in the three discussion items for the Pleasantville meeting listed above.

#### **Discussion with the town attorney regarding pending litigation (Jones v. Town of Pleasantville) [G.S.143-318.11 (a)(3)].**

The authority to meet in closed session under the G.S. 143-318.11 (a)(3) is for the purpose of preserving the attorney client privilege. Only those people who are within the privilege may legally attend. If anyone else attends, the privilege no longer exists. The board members-elect are, until they take the oath of office, still members of the general public. They are not yet a client of the attorney and therefore may not legally attend this part of the closed session.

#### **Personnel matter [G.S.143-318.11 (a)(6)]**

Public bodies have broad authority to discuss personnel matters in closed session. In some, but not in all cases, such discussions will involve information that is confidential under the personnel privacy statutes (G.S. 160A-168 for cities; G.S. 153A-98 for counties). If the discussion involves information that is in a personnel file (defined as records gathered by the unit in connection with a particular employee – not just things that are literally in a particular physical file), then only those who legally may have access to that information may be invited to participate in the discussion. In most cases, that could include the employee in question, the manager, or others who have supervisory authority over the employee. The council

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members-elected could not attend.

There are situations, however, where the discussion involves personnel matters that do not derive from the personnel file. Indeed, the statute allows but does not always *require* public bodies to discuss employees in closed session. If the council simply wants to discuss an employee without reference to any confidential information, the council is free to invite the members-elect to attend the closed session. For example, the council may want to let the members-elect know about the council members' favorable assessment of the manager and suggest that she be given a raise in next year's budget. Or the council may express their view that the manager's poor performance, if it continues, may warrant termination. Such discussions must be limited to the independent views or information the council members bring to the meeting, and must be carefully undertaken so as to avoid disclosing information drawn from the confidential personnel file.

### **Consideration of economic incentives [G.S. 143-318 (a)(4)]**

Pleasantville is fairly far along with a proposed economic development project, and the council wants to brief the members-elect on the status of the project without publicly disclosing information that has been withheld to date upon the request of the company involved. Like the closed session provision for discussing employees, the exception for economic development matters allows, but does not always *require* a closed session. The board is generally free to invite members-elect, or other selected members of the public (such as representatives of the company, members of the business community, or experts in economic development or other related fields) who might be useful in the discussion.

The rule is different, however, when the discussion involves confidential economic development information. There are several types of economic development information that may be withheld from public access. Under G.S. 132-6(d), records relating to pending economic development projects are not subject to public access. This provision does not *prohibit* the release of the information, however, and the council may be free to share it with the members-elect. (Note that some local government boards sign confidentiality agreements under which they agree to maintain confidentiality to the extent allowed by law. Sharing this information with members-elect may violate those agreements.) Information that constitutes a trade secret of private companies, however, is confidential under state law (see, G.S. 132-1.2). If the closed session involves trade secret information, the members-elect would have to be excluded.

### **Other Exceptions**

These examples highlight the key question to ask when determining who may attend a closed session: Will confidential information be viewed or discussed? If a session is closed under the exception to prevent the disclosure of confidential information [G.S. 143-318.11(a)(1)] then attendance will necessarily be limited to those who may legally have access to the information involved. Under other exceptions, where confidentiality is not an issue, the public body may invite members-elect or other selected members of the public in.

## **Links**

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.11](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.11)
- [www.sog.unc.edu/publications/books/open-meetings-and-local-governments-north-carolina-some-questions-and-answers-eighth-edition-2017](http://www.sog.unc.edu/publications/books/open-meetings-and-local-governments-north-carolina-some-questions-and-answers-eighth-edition-2017)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-168](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-168)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-98](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-98)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1.2](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1.2)