



# A SELECTED READING

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## The Open Meetings Act

The Alabama Open Meetings Act (OMA), codified at Sections 36-25A-1 through 36-25A-11, Code of Alabama 1975, was originally passed in 2005 and was most recently amended by the Alabama Legislature in 2015. As originally passed, it replaced what was commonly known as the Sunshine Law, Section 13A-14-2, Code of Alabama 1975. Although the OMA specifically repealed the former Sunshine Law, all specific references in the Code of Alabama 1975 to Section 13A-14-2, are preserved and are now considered to refer to the OMA instead. The idea behind this is to preserve any exclusion or inclusion from the requirement to hold public meetings that existed prior to the change in the law. This article summarizes the OMA and how it impacts the way municipalities conduct business.

### Who is Covered?

Meetings of all “governmental bodies” are subject to the OMA. While there is no question that municipal governing bodies must conduct open meetings pursuant to the requirements of the OMA, what other municipal entities must hold open meetings? And which gatherings of these entities are subject to the new law? With regard to municipalities, the OMA defines governmental bodies to include the following:

1. All municipal “boards, bodies, and commissions” which “expend or appropriate public funds”; and,
2. All municipal “multimember governing bodies of departments, agencies, institutions, and instrumentalities “including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by” the municipality.

Thus, any municipal board or agency that has the power to expend or appropriate public funds must conduct open meetings pursuant to the requirements of the OMA. Additionally, the OMA applies to any instrumentality, including separate corporations, whose membership is composed of at least a majority of members who were appointed by the municipality. The term “governmental body” does not include “voluntary membership associations comprised of public employees, retirees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by Legislature or Governor.” Section 36-25A-2(4)(c), Code of Alabama 1975.

A volunteer fire department certified by the Alabama Forestry Commission is subject to the OMA. AGO 2006-108. Further, the provisions of the OMA apply to community action agencies that are established by a county, a municipality, a combination thereof, or a private, nonprofit agency newly established by local ordinance. Such entities may either voluntarily or as a result of requirements placed on the agency by the Department of Economic and Community Affairs follow the requirements of the OMA. AGO 2007-039. A public hospital board created by municipal ordinance pursuant to Section 22-21-5, Code of Alabama 1975, is subject to the OMA. AGO 2015-043. The Greater Birmingham Convention and Visitors Bureau is subject to the Open Meetings Act. AGO 2015-043.

Section 36-25A-2(6), Code of Alabama 1975, defines a “meeting” as any of the following:

1. “The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body at a time and place which is set by law or operation of law”;
2. “The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the full governmental body, committee or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds”;

3. “The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental at a later date” and
4. “The gathering, whether or not it was prearranged, of a quorum of a committee or subcommittee of a governmental body during which the members of the committee or subcommittee deliberate specific matters relating to the purpose of the committee or subcommittee that, at the time of the exchange, the participating members expect to come before the full governmental body, committee, or subcommittee at a later date.”

The term “meeting” does not include the following:

1. “Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, association meetings and events or gathers for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body , or otherwise gathers so long as the subcommittee, committee, or full governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full governmental body at a later date”;
2. “Occasions when a quorum of a subcommittee, committee, or full governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the subcommittee, committee, or full governmental body.”; and
3. “Occasions when a quorum of a subcommittee, committee, or full governmental body, including two members of a full governmental body having only three members, gathers to discuss an economic, industrial, or commercial prospect or incentive that does not include a conclusion as to recommendations, policy, decisions or final action on the terms of a request or an offer of public financial resources.”

In addition, the OMA specifically provides that two members of a governmental body may talk together, without deliberation and that nothing in the OMA prevents a mayor, who is not a voting member of the council, from talking or deliberating with a member of the municipal council. This provision, in the League’s opinion, would allow a mayor, in a municipality over 12,000 population, to discuss any municipal matters with individual council members even if he or she ultimately discusses the same matter with every individual council member. We would advise caution here, however, to make sure that the provisions of the OMA with regard to serial meetings are taken into account.

These definitions make it clear that there must be a quorum present for there to be a “meeting” under the OMA unless it is covered by the serial meeting provisions discussed below. The quorum requirement applies to both the governing body itself and all subcommittees and committees of the governing body. However, a quorum alone is not the full requirement for a meeting under the Act. A “meeting” under the OMA would include a quorum gathered at a “prearranged gathering” such as a regular or special called meeting. Under the definition, a meeting would also include any gathering, prearranged or otherwise, of a quorum where members engage in deliberations of actions that are expected to come before the subcommittee, committee or full governmental body at a later time.

Fortunately, the OMA also makes it clear that there are certain types of get-togethers that are not covered, even if a quorum is present. This allows members to attend social events or conventions, or similar activities, together, provided that they do not deliberate matters that are expected to come before the body later.

With regard to serial meetings, the Alabama Supreme Court, in *Slagle v. Ross*, 125 So.3d 117 (Ala. 2012), narrowed the scope of the definition of a meeting by holding that a “meeting” occurs only if a committee or subcommittee meets for the purpose of deliberating on a matter that will come back before *that* particular committee or subcommittee. Further, the Court determined that a plain reading of Section 36-25A-2(6)(a)(3), Code of Alabama 1975, yielded the conclusion that a “meeting” occurs when a majority of the members of a governmental body come together at the same time. As such, the Court held that in the case of the back to back meetings as presented under the facts of the case, there was no gathering of a majority of the board so as to constitute a meeting of the board within the meaning of Section 36-25A-2(6)(a)(3) because there was not a quorum present “at the same time.” While this case has a fairly narrow holding, it ultimately resulted in the Legislature making changes to the OMA in 2015 with the passage of Act 2015-340. In fact, one of the primary motivations for the 2015 amendments to the OMA was to specifically prohibit “serial meetings”

Act 2015-340, codified at Section 36-25A-2(13), Code of Alabama 1975, defines a “serial meeting” as “any series of gatherings of two or more members of a governmental body, at which:

1. Less than a quorum is present at each individual gathering and each individual gathering is attended by at least one member who also attends one or more other gatherings in the series.
2. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum.
3. There is no notice or opportunity to attend provided to the public in accordance with the Alabama Open Meetings Act.
4. The members participating in the gatherings deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee or full governmental body at a later date.
5. The series of gatherings was held for the purpose of circumventing the provisions of this chapter.
6. At least one of the meetings in the series occurs within seven calendar days of a vote on any of the matters deliberated.”

Four types of gatherings are specifically exempted from the definition of a “serial meeting.” Of interest to municipal government, the following do not constitute a serial meeting:

1. Gatherings, including a gathering of two members of a full governmental body having only three members, at which no deliberations were conducted or the sole purpose was to exchange background and education information with members on specific issues...;
2. A series of gatherings related to a search to fill a position required to file a statement of economic interests with the Alabama Ethics Commission pursuant to Section 36-25-14 until the search has been narrowed to three or fewer persons under consideration.
3. A gathering or series of gatherings involving only a single member of a governmental body.

The Attorney General has opined that a quorum of a governing body may attend a committee meeting, where notice was properly given for the committee meeting under the OMA, without also providing notice of a meeting of the governing body, as long as the governing body does not deliberate matters at the committee meeting that it expects to come before the governing body at a later date. If a quorum of the governing body has prearranged a meeting to occur in conjunction with the committee meeting, the governing body must provide notice of this meeting under the OMA. A quorum of the governing body may not hold an impromptu meeting at the committee meeting, at which it deliberates specific matters expected to come before the governing body at a later date, without violating the OMA. AGO 2011-014

To be counted towards establishing a quorum, members of a governing body covered by the OMA are required to be physically present. There is no provision for obtaining a quorum by telephone conference. AGO 2006-071. Further, even if a quorum is physically present, additional members of a governmental body that are not present may not participate or vote in meetings through electronic means. A member of the governmental body may, however, listen to a meeting through electronic means. AGO 2010-070. A limited exception to the requirement for physical presence was added by Section 36-25A-5.1. This Section provides that members of a governmental body as defined in Section 36-25A-2, Code of Alabama 1975, that is comprised of members from two or more counties, may participate in a meeting of that governmental body by means of telephone conference, or other similar communications equipment which allows all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at the meeting for all purposes, provided that at least three members, or a majority of a quorum of members, whichever is less, are physically present at the physical meeting location. Only those members physically present may participate in an executive session of that governmental body. Another limited exception to the physical presence requirement was added by Act 2022-421. This Act, codified at Section 36-25A-5.2, allows members of a governmental body as defined in Section 36-25A-2 that is of a county or a municipality or is an entity established by or whose members are appointed by a county or municipality to participate in a meeting of that governmental body by means of telephone or videos conference or other communication equipment that allows participants to hear one another at the same time; provided, that both of the following are fulfilled:

1. No less than a quorum of the members of the governmental body are physically present at the physical location; and
2. The members of the body participating by electronic means are unable to be physically present at the meeting due to illness.

Participation by such means shall constitute presence in person at the meeting for all purposes, except for the establishment of a quorum. However, for a governmental body to utilize this limited exception, at least 45 days prior to utilization of the exception, the body shall adopt an electronic meeting policy detailing the procedures and communications equipment that will used, how the public may access the meeting, and how voting will be conducted.

An e-mail sent by one member of a governing body to other members expressing an opinion on a matter before the body does not, in and of itself constitute a meeting under the OMA so long as there is no “deliberation.” If an e-mail is a unilateral declaration of a member’s idea or opinion, then it is not a “deliberation” and without deliberation there is no meeting under the OMA. *Lambert v. McPherson*, 98 So.3d 30 (Ala.Civ.App. 2012).

## Meeting Notice

The public must be provided notice of meetings which are subject to the OMA. See Section 36-25A-3, Code of Alabama 1975. Municipal governing bodies provide notice of regular meetings by posting notice on a public bulletin board at city hall at least seven days prior to the date of the regular meeting. A separate corporation where a majority of the membership is appointed by the municipality which has an office at a location other than city hall may instead provide notice on a public bulletin board in the principal office of the corporation. All other governmental bodies must post notice of each meeting in a location that is reasonably accessible by the public, or in some other method that is convenient to the public.

It should be pointed out that there is a small ambiguity in the notice requirements under Section 36-25A-3(a)(3). Separate corporations are permitted to post notice at their principal office, if they have one separate from the city hall. The notice provision then states that the public bulletin board must be at the office of the corporation or other instrumentality. It is unclear what other instrumentalities are covered. The League recommends that unless the entity in question is a separate corporation with an office at a location other than city hall, notice should be posted on a public bulletin board at city hall. Note that any entity may satisfy the notice requirement by posting at city hall. Additional notice may also be provided if desired.

Any change of the location or method for posting notices must be approved by the members of the governmental body at an open meeting and announced to the public at an open meeting. Section 36-25A-3(a)(5). Note that this is a two-step process. Both steps, though, can be performed at the same open meeting.

Section 36-25A-3(b), Code of Alabama 1975, sets out notice requirements for meetings other than regular meetings. For special called meetings, notice must be posted as soon as practicable after a meeting is called. The notice must be posted no less than 24 hours before the scheduled start of the meeting, unless:

1. Notice cannot be given due to emergency circumstances requiring immediate action to avoid physical injury to persons or damage to property; or
2. The notice relates to a meeting to be held solely to accept the resignation of a public official or employee.

In these instances, notice must be given as soon as practical, but in no case less than one hour before the meeting is to begin.

The Attorney General has ruled that at least seven days’ notice is required by the OMA, for a regularly scheduled meeting of the city council or standing committee of the city when a meeting is established by organizational ordinance or resolution. As to meetings of the city council or standing committee that do not have regularly scheduled meetings set by ordinance or resolution, as well as meetings that are called pursuant to Section 11-43-50 of the Code of Alabama 1975, notice is to be posted as soon as practicable after the meeting is called, but in no event less than 24 hours before the meeting is scheduled to begin. AGO 2006-027.

Section 36-25A-3(c) provides that the notice must include the time, date and place of the meeting. If a preliminary agenda is created, the agenda must be posted as soon as practicable in the same location or manner as the notice. AGO 2006-027. If a preliminary agenda is not available, the posted notice shall include a general description of the nature and purpose of the meeting. Please note, though, that the OMA specifically provides that the governing body may still discuss at a meeting additional matters not included in the preliminary agenda. The Alabama Supreme Court has held that a governmental body did not violate the OMA by considering and voting on, at a special meeting, a resolution that was not on the agenda. *Underwood v. Alabama State University*, 51 So.3d 1010 (Ala.2010)

The posting by a municipal governing body of its organizational ordinance or resolution specifically stating the place, date, and time of regular council meetings and standing committee meetings, and a general description of the nature and purpose of those meetings is sufficient to meet the notice requirements of the OMA.

If practicable, the governing body must also provide direct notification of a meeting to any member of the public or news media who has registered to receive notification of meetings. Section 36-25A-3(a)(6), Code of Alabama 1975. The municipality may require the person requesting notice to pay the actual cost of issuing notices, if there is one, in advance. Direct notice to persons who have registered shall, at a minimum, contain the time, date, and place of the meeting. This notice must be given at the same time the general notice is provided.

The governing body may promulgate reasonable rules and regulations necessary for the uniform registration and payment for direct notice and for the distribution of the notices. The governmental body has the authority to choose the method of

providing direct notice. This may include using electronic mail, telephone, facsimile, the United States Postal Service, or any other method reasonably likely to provide the requested notice.

If a member is participating in a meeting of a governmental body by electronic means as authorized by Section 36-25A-5.1(a), the governmental body shall ensure that means of access to the electronic communication is published in the same manner as the notice of the meeting is published.

### **Minutes**

The Act requires all entities subject to the OMA to keep accurate records (minutes) of all meetings. Section 36-25A-4, Code of Alabama 1975. The minutes shall include the date, time, place of the meeting, which members were present or absent, and any action taken at the meeting. The minutes must be maintained as a public record and be made available to the public as soon as practicable after approval. Minutes are not required for executive sessions. It is important to note here that under the OMA, most “work sessions” or similar “pre-council” gatherings meet the definition of a “meeting” as discussed above. As such, there should be a record of work sessions and pre-council meetings.

### **Conducting Meetings**

All covered entities must adopt rules of parliamentary procedure and follow them during the meeting. Section 36-25A-5, Code of Alabama 1975. Unless specifically allowed by statute, votes shall not be taken during an executive session, nor may the body vote by secret ballot. All votes on matters before a governmental body, including, but not limited to, votes to appropriate or to authorize an employee to spend public funds without further authorization of the governmental body, to levy taxes or fees, to forgive debts to the governmental body, or to grant tax abatements, shall be made during the open or public portion of a meeting for which notice has been provided pursuant to this act. Voice votes are allowed.

### **Recording Meetings**

The League has frequently been asked whether members of the public may make audio or video recordings of a meeting. Section 36-25A-6 specifically allows any person in attendance at a meeting to make a recording provided the recording does not disrupt the conduct of the meeting. AGO 2018-022. This does not apply to executive sessions. The governmental body may adopt reasonable rules for the implementation of this provision.

### **Executive Sessions**

The OMA specifically states that executive sessions are not required for any reason. Section 36-25A-7(a). It does, however, permit the body to enter into executive sessions for certain specified reasons. Unlike the Sunshine Law, the OMA provides a number of exceptions. These exceptions, as set forth in Section 36-25A-7(a), Code of Alabama 1975, include the following:

1. To discuss the general reputation and character, physical condition, professional competence or mental health of individuals, or to discuss the job performance of certain public employees. The entity may not go into executive session to discuss the job performance of an elected or appointed public official, an appointed member of a state or local board or commission, or any public employee who must file a Statement of Economic Interests with the Alabama Ethics Commission pursuant to Section 36-25-14, Code of Alabama 1975. The salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

The Attorney General has ruled that this exception permits governmental boards to convene an executive session to interview current public employees in connection with promoting these employees to fill vacant positions when those positions do not require the interviewee to file a Statement of Economic Interests with the Alabama Ethics Commission. Only the portions of the meeting that involve the general reputation and character, physical condition, professional competence, mental health, and job performance of the employee may be discussed in executive session. The professional competence of a person may be discussed in executive session only when that person’s position qualifies as a profession as specified in Section 36-25A-2(8) of the Code of Alabama. AGO 2006-088. Further, the AG found that the OMA permits the Alabama Aviation Hall of Fame Board to convene an executive session to discuss the general reputation and character of nominees for induction into the Hall of Fame and only those portions of the meeting that involve general reputation and character may be discussed in executive session. AGO 2010-011

2. To consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body, if an executive session is expressly allowed by federal law or state law.

3. To discuss with the attorney the legal ramifications of and legal options for:
  - a. Pending litigation;
  - b. Controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action; or
  - c. To meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body.

Prior to voting to convene an executive session under this exception, an attorney licensed in Alabama must provide a written or oral statement reflected in the minutes that this exception applies to the planned discussion. This declaration does not constitute a waiver of attorney/client privilege. However, any deliberation between the members regarding what action to take relating to pending or threatened litigation based upon the advice of counsel must be conducted in the open portion of the meeting.

4. To discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, the public disclosure of which could reasonably be expected to be detrimental to public safety or welfare. If the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure must be given notice and an opportunity to attend the session.

5. To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person, other than a public official, who is alleged or charged with specific criminal misconduct allegations or against whom charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint.

Prior to entering executive session for any of these purposes, the entity must obtain a written or oral declaration entered on the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session from a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the Attorney General or an assistant Attorney General.

6. To discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. However, the material terms of the contract must be disclosed in the public portion of a meeting prior to the execution of the contract. Only persons representing the interests of the governmental body in the transaction may be present during an executive session held pursuant to this exception. The entity cannot hold an executive session for this purpose if:

- a. Any member of the entity involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property; or
- b. A condemnation action has been filed to acquire the real property involved in the discussion.

7. To discuss preliminary negotiations involving matters of trade or commerce in which the entity is in competition with private individuals or entities or other governmental bodies in Alabama or other states or foreign nations, or to discuss matters or information defined or described in the Alabama Trade Secrets Act.

Prior to holding an executive session pursuant to this exception, a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matters or information defined or described in the Alabama Trade Secrets Act must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or upon the location, retention, expansion, or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or would disclose information protected by the Alabama Trade Secrets Act.

8. To discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Prior to holding an executive session pursuant to this exception, a person representing the interests of a governmental body involved in the negotiations must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session.

9. To deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer,

an administrative board, court, or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public.

Deliberations by a regional planning commission concerning credit and financial records of applicants for revolving fund loans must be conducted in an open public meeting under the OMA. There is no specific exemption under the act or under federal law that allows commissions to enter into executive session to discuss the credit and financial records of applicants. AGO 2006-068.

The OMA also spells out a specific procedure for entering into an executive session, other than one held for a quasi-judicial or contested case hearing. The procedure pursuant to Section 36-25A-7(b), Code of Alabama 1975 is as follows:

1. A quorum of governmental body must first convene a meeting as defined in the OMA.
2. A majority of the members of the governmental body present must adopt, by recorded vote, a motion calling for the executive session. The motion must state the reason for the executive session. If the stated reason requires an oral or written declaration to justify the executive session as set out above, the oral or written declaration must be made prior to the vote.
3. The vote of each member, as well as the written or oral declaration, shall be recorded in the minutes.
4. Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

A general statement in the minutes of unanimous consent of board members on a roll call vote to enter executive session satisfies the requirement in Section 36-25A-7(b) of the Code of Alabama that the vote of each member be recorded if the minutes reflect the names of the members in attendance and that each voted yes. AGO 2018-014.

### **Immunity**

The OMA specifically states that members of the covered entity and any of its employees participating in a meeting complying with the law have an absolute privilege and immunity from suit for any statement made during the meeting which relates to a pending action. This immunity is in addition to all others that may apply. Section 36-25A-8, Code of Alabama 1975.

### **Enforcement**

The process for enforcing the OMA is significantly different from that followed for enforcing the former Sunshine Law. The Sunshine Law was part of the Alabama criminal statutes, and violations were enforced as criminal offenses, specifically misdemeanors. Instead, the new OMA is enforced as a civil violation as provided in Section 36-25A-9, Code of Alabama 1975.

The civil action must be brought in the county where the governmental body's primary office is located. Suit may be brought by any media organization, any Alabama citizen impacted by the alleged violation to an extent which is greater than the impact on the public at large, the Attorney General, or the district attorney for the circuit in which the governmental body is located. However, no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body for an alleged violation. If an action is filed by an Alabama citizen, the complaint shall state specifically how the person is or will be impacted by the alleged violation to an extent which is greater than the impact on the public at large.

An action alleging a violation of the OMA must be brought within 60 days of the date that the plaintiff knew or should have known of the alleged violation. In any event, though, any action under the OMA must be brought within two years of the alleged violation. The complaint must be verified and name in their official capacity all members of the governmental body who remained in attendance at the alleged meeting. The complaint must also specifically state one or more of the following the reasons for the complaint:

1. That the defendants disregarded the notice requirements for holding the meeting, as spelled out above.
2. That the defendants disregarded the provisions of the OMA during a meeting, other than during an executive session.
3. That after voting to go into executive session, the defendants discussed during the executive session matters other than those subjects included in the motion.
4. That the defendants intentionally violated some other provision of the OMA.

Members of a governmental body who are named as defendants must serve an initial response to the complaint within seven business days of receiving personal service of the complaint. A preliminary hearing on the complaint must be held no later than 10 business days after the date of the filing of the defendants' initial response to the complaint or, if no response

is filed, no later than 17 business days after the filing of the complaint, or on the nearest day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties.

In the preliminary hearing on the complaint, the plaintiff must establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting. Additionally, to establish a *prima facie* case the plaintiff must present substantial evidence proving the alleged violation.

If the court finds that the plaintiff has met its initial burden of proof, the court shall establish a schedule for discovery and set the matter for a hearing on the merits. If, at the preliminary hearing, the plaintiff establishes a *prima facie* case that the defendants discussed matters during the executive session other than those included in the motion to go into the executive session, the burden of proof at the hearing on the merits shifts. The defendants must then prove by a preponderance of the evidence that the discussions during the executive session were limited to matters related to the subjects included in the motion.

During a proceeding involving claims alleging that matters beyond the motion were discussed, the court shall conduct an in camera (a private hearing) proceeding or adopt another procedure as necessary to protect the confidentiality of the matters discussed. If there is a determination that the executive session was proper, items discussed during the executive session shall not be disclosed or utilized in any other legal proceeding by any individual or attorney who attends the in camera portion of the proceedings.

Upon proof by a preponderance of the evidence of a violation, the circuit court shall issue an appropriate final order including, if appropriate, a declaratory judgment or injunction. Prior to a final determination of the merits, temporary restraining orders or preliminary injunctions may be issued upon proper motion and proof as provided and required in the Alabama Rules of Civil Procedure. The court must issue a final order on the merits within 60 days after the preliminary hearing unless all parties and the court consent to allow a longer period.

The court may invalidate any action taken during a meeting held in violation of the OMA, provided that:

1. The complaint is filed within 21 days of the date when the action is made public,
2. The violation was not the result of mistake, inadvertence, or excusable neglect, and
3. Invalidating the action taken will not unduly prejudice third parties who have changed their position or acted in good faith reliance upon the challenged action of the governmental body.

No action taken at an open meeting conducted in a manner consistent with the OMA shall be invalidated because of a violation that took place prior to the meeting. A final order issued against a defendant shall state specifically upon which claim or claims the ruling is based. For each meeting proven to be held in violation of the OMA, the court must impose a civil penalty, up to one thousand dollars (\$1,000) or one half of the defendant's monthly salary for serving on the governmental body, whichever is less. The minimum penalty shall be one dollar (\$1). If the claim relates to improper discussions during executive sessions, monetary penalties may only be assessed against members of the governmental body who voted to go into the executive session and who remained in the executive session during the improper discussion. See Section 36-25A-9(g), Code of Alabama 1975.

Penalties imposed against a member of a governmental body found to have acted in violation of this act shall not be paid by nor reimbursed to the member by the governmental body he or she serves. If more than one cause of action is filed pursuant to this chapter, all causes of action based on or arising out of the same alleged violation or violations shall be consolidated into the action that was first filed and any party may intervene into the consolidated action pursuant to the Alabama rules of Civil Procedure, and no member found to have acted in violation of this chapter by a final court order and assessed a penalty as authorized shall be subject to further liability or penalty to the same or different plaintiffs in separate causes of action for the same violation or violations. And finally, a governmental body is authorized to pay for or provide for the legal expenses of present or former members of the body named as defendants in any action alleging a violation of the OMA. Section 36-25A-9(h), Code of Alabama 1975.

The Alabama Supreme Court held that a bill allegedly passed by the Legislature in violation of the OMA was not ripe for adjudication. The bill had not been signed by the Governor and had not become law. *Marsh v. Pettway*, 109 So.3d 1118 (Ala.2013). In another decision, the Court ruled that former directors of a public television station lacked standing to bring an action under the OMA against the public television commission because the directors did not allege any "continuing or imminent violation" of the OMA. *Ex parte Alabama Educ. Television Com'n.*, 151 So.3d 283 (Ala.2013).