

DEPARTMENT OF EXAMINERS OF PUBLIC ACCOUNTS

The Do's and Don'ts:
A Handbook for Alabama Municipalities

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PUBLIC RECORDS

What is a public record?

“Such a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens.” *Stone v. Consolidated Pub. Co.*, 494 So.2d 678, 681 (Ala. 1981).

“[A]ll written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state...or other subdivisions of government in the transactions of public business...” *Ala. Code* § 41-13-1.

Public records include records in all media, including electronic media.

Public records include records filed with or generated by the courts and their officers.

Who has access to public records?

Alabama law grants citizens the right to inspect and take a copy of any public record in Alabama, except as may be otherwise provided by statute. *Ala. Code* § 36-12-40. The right to inspect and copy records is afforded to citizens of the state of Alabama. *McBurney v. Young*, 133 S.Ct. 1709 (2013).

Many of the rules regarding access to public records are derived from interpretations of the law by the Alabama Supreme Court and by the state’s Attorney General. In *Stone v Consolidated Pub. Co.*, the Alabama Supreme Court named some records that can be excluded from public access:

- Recorded information received by a public officer in confidence
- Sensitive personnel records
- Pending criminal investigations
- Records the disclosure of which would be detrimental to the best interests of the public.

404 So.2d 678, 681 (Ala. 1981). With that said, “[c]ourts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue influence.” *Id.*

The law, the courts, and the Attorney General have taken the position that public disclosure of all records is required, unless information in the records is restricted, either directly in the law, or is restricted according to their opinions.

- Public has no right to records that are more personal than public. *Blankenship v. City of Hoover*, 590 So.2d 245 (Ala. 1991).
- A.G. No 2015-057 states although names should be available for public inspection, home addresses, telephone numbers, and social security numbers are more personal than public and may not be subject to disclosure.

If there is a condition where disclosure of information in the records could create a liability, it would be advisable to seek legal counsel and possibly an Attorney General's Opinion before disclosing information in the records.

The Attorney General has issued numerous opinions as to whether a particular record is a public record. These can be accessed by searching the opinions section of the Attorney General's Internet website at <http://ago.alabama.gov/Opinions.aspx> using the search term "public record". For example:

- A.G. No. 2007-001 states that a state agency is not required to distribute public records in the manner that a requestor specifies.
- A.G. No. 2003-052 contains a good discussion of exceptions to the open records law.
- A.G. No. 2002-205 states that all documents pertaining to the award of a contract are public records.
- A.G. No. 2002-342 states that public records must be kept in the office where the records were created or in a depository approved by the Local Government Records Commission.
- A.G. No. 2001-269 states that personnel records of former employees are subject to disclosure under the public records law.
- A.G. No. 2000-077 states that a city does not have to provide a list of insurance companies delinquent in paying a tax, but that the statements filed by the insurance companies from which such a list could be made are public documents.
- A.G. No. 98-00157 states that information on a diskette is a public record, and that access cannot be denied because a person intends to use the record for personal gain.
- A.G. No. 96-0003 provides a good discussion of the kinds of personnel information that are required to be disclosed.
- A.G. No. 90-00288: states the Dept. of Public Safety did not have to sort driver's license information and provide it on computer disc.

What restrictions can be imposed on the process of inspecting records?

Any office has the right to create reasonable rules for inspection of records, such as requiring:

- Inspection by appointment,
- Completion of a form naming the records to be inspected,
- Inspection of records at specific times.

Can there be a charge for providing a copy of public records?

A custodian of public records may recoup reasonable costs incurred in making a copy of public records, however:

- A.G. No. 2009-076 and 2004-108 states charges for copies cannot be influenced by the intended use of information obtained from the records
- A.G. No. 98-00161 states costs must be limited to the costs of providing copies, not the cost of maintaining the record and providing access; no attorney's time or fees may be recouped.

- A.G. No. 98-00157 states access to records cannot be influenced by the intended use of information obtained from the records.

LOCAL GOVERNMENT RECORDS COMMISSION

The Local Government Records Commission was established to oversee the preservation and disposal of county, municipal and other local government records in Alabama. *Ala. Code* § 41-13-22. “No county, municipal, or other local government official shall cause any county, municipal, or other government record to be destroyed or otherwise disposed of without first obtaining the approval of the Local Government Records Commission.” *Ala. Code* § 41-13-23.

To obtain guidance concerning the preservation or disposition of records, the commission can be contacted through the Alabama Department of Archives and History (“ADAH”) at (334) 242-4435 or by email at becky.hebert@archives.alabama.gov.

ADAH’s website is <http://archives.alabama.gov>. This website provides information about the commission and its duties and authority. This website also contains downloadable files that provide instruction on the retention and destruction of various types of local government records.

OPEN MEETINGS LAW

On October 1, 2005, Alabama’s Sunshine Law was repealed and replaced by a new Open Meetings Law. *Ala. Code* §§ 36-25A-1 through 36-25A-11. Except for executive sessions permitted by the law or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body must be open to the public, and no meetings of a governmental body (with some minor exceptions) may be held without providing prior notice.

The Attorney General has held training sessions on the Open Meetings Law around the state. General information about all open meetings is available at open.alabama.gov.

Who is subject to the Open Meetings Law?

The Open Meetings Law applies to governmental bodies, as defined in the Open Meetings Law. Governmental bodies are defined in the law as:

- All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds;
- All multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, 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 state or its political subdivisions, counties, or municipalities;
 - All quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the governmental body.

Ala. Code § 36-25A-2(4).

The term “governmental body” does not include any of the following:

- Legislative party caucuses or coalitions.
- Alabama appellate or trial courts, except as required by the constitution of Alabama or any body governed by rules of the Alabama Supreme Court.
- Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.

Id.

What is a Meeting?

Gatherings of a quorum of a governmental body subject to the Open Meetings Law may not always be meetings. Gatherings which are not meetings are not subject to the requirements for meetings provided in the Open Meetings Law. The Open Meetings Law defines a meeting as:

- The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body at a time and place which is set by law or operation of law.
- The prearranged gathering of a quorum of a governmental body or a quorum of a committee or 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.
- 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 body at a later date.
- 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.

Ala. Code § 36-25A-2(6)

The term “meeting” does not include:

- 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.

- 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.
- Occasions when two members of a governmental body, including two members of a governmental body which has three members, gather for the sole purpose of exchanging background and education information or for the sole purpose of discussing an economic, industrial, or commercial prospect or incentive that does not include a conclusion as to recommendations, policy, decision, or final action on the terms or request or an offer of public financial resources.

Id.

What is a Quorum?

Definition of a Quorum:

- A quorum is the number of members required to be present before a board, commission, council, etc. can conduct business. A quorum is a simple majority of members, unless otherwise provided by law. An official meeting cannot be convened without a quorum because a quorum is necessary to conduct any official business, whether or not voting occurs. Even the act convening a meeting cannot occur without a quorum present.
- Alabama’s Open Meetings Act defines a quorum as “a majority of the voting members of a governmental body.”
- Alabama’s Administrative Procedure Act defines a quorum this way, “[n]o less than a majority of the members of a multimember agency shall constitute a quorum authorized to act in the name of the agency, unless otherwise provided by statute.”

Necessity for a Quorum:

- “The attendance of a quorum is a condition precedent to everything. Until then there is an absolute incapacity to consider or act in any way upon any matter.” *Penton v. Brown-Crummer*, 222 Ala. 155, 160, 131 So. 14, 18 (1930).

Vacancies:

- In his Opinion No. 93-095, the Attorney General stated that if vacancies occur on a board, a majority of the remaining members constitute a quorum. However, if a quorum is required by law or regulation to be a specific number of members, then that specific number is not changed by a vacancy.

Physical Presence:

- Attorney General’s Opinion 2004-072 provides a good discussion of the issue of physical presence. The opinion states that:
 - Physical presence of members is necessary.
 - The presence of members cannot be made by the telephone, speakerphone, videoconferencing, teleconferencing, etc.
 - Because members must be physically present, the use of proxies or letters of intent are not allowed.

- Also, Attorney General’s Opinion 2006-071 states that to be counted towards establishing a quorum, board members attending meetings that are subject to the Open Meetings Act are required to be physically present.

Which meetings must be open to the public?

All gatherings that meet the definition of meetings must be open to the public, except during executive (closed to the public) sessions held for reasons named in the law. *Ala. Code* § 36-25A-1(a) Executive sessions cannot be held for reasons other than those named in the Open Meetings Law. *Id.*

What are the reasons for which executive sessions can be held?

The reasons for which executive sessions can be held are listed in *Ala. Code* § 36-25A-7(a)(1 through 9). No other reasons are acceptable.

There are some matters named in the law for which executive sessions are specifically prohibited.

- Discussions of the job performance of specific public officials or specific public employees must be discussed in public session if the person;
 - Is an elected or appointed public official,
 - Is an appointed member or a state or local board or commission,
 - Is a public employee who is one of the classification of public employees required to file a statement of economic interests with the Alabama Ethics Commission.
 - With some exceptions, the salary, compensation, and job benefits of specific public officials or specific public employees must be discussed in public session.
- The advice of legal counsel can be received in executive session on matters of litigation to which the governmental body is or may be a party; however, once members begin deliberating which actions to take relating to pending or threatened litigation, the executive session must be terminated and the deliberations must be done in public session.

Are executive sessions required?

The Open Meetings Law itself does not require executive sessions, but allows executive sessions for the reasons named in the law. *Ala. Code* § 36-25A-7(a). However, other law may cause an allowable executive session to be considered prudent or necessary.

Are there specific procedures for going into executive session?

The Open Meetings Law requires that a regular open session must first be convened. *Ala. Code* 36-25A-7(b). A vote must then be taken to determine whether or not to go into executive session. *Id.* The reason for the executive session must be named and recorded within the motion calling for the executive session. *Id.* The vote of each member on the motion must be recorded in the minutes. *Id.*

Prior to calling the executive session to order, the presiding officer must state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene. *Id.*

Particular attention should be paid to *Ala. Code* 36-25A-7(a)(1 through 9), which describes the allowable reasons for going into executive session. Going into executive session for some of the reasons requires additional specific actions such as a written or oral declaration. *Id.*

Prior Notice for Meetings

“Governmental bodies,” as defined in the Open Meetings Law, must post prior notice of every meeting. *Ala. Code* § 36-25A-3. However, there is no notice requirement for meetings of advisory bodies created solely to make recommendations on public policy issues and composed of persons who do not receive compensation for their service from public funds. *Id.*

How is prior notice to be given?

Requirements as to where and when prior notice is to be given is found in *Ala. Code* § 36-25A-3. Notice requirements vary according to the type of governmental entity involved and the nature of the meeting for which notice is to be given.

The Attorney General has adopted the position that actions of a governmental body are invalid if taken at a meeting which was held without the appropriate prior notice.

When and how can voting occur during meetings?

Voting can occur according to the parliamentary procedure adopted by the governmental body, so long as the procedure does not conflict with the law. *Ala. Code* § 36-25A-5.

All votes must be taken in open session, unless otherwise provided by the state’s constitution or by other law. *Id.* The Open Meetings Law, specifically *Ala. Code* § 36-25A-7, provides one exception in that a governmental body acting in a quasi-judicial capacity to consider evidence or testimony presented during a hearing may vote in executive session only if;

- It votes on its decision in an open meeting or
- It issues a written decision that may be appealed to a body which has the authority to conduct a hearing or appeal which is open to the public.

Voice votes are allowed.

Secret ballots are not allowed, unless specifically authorized by the state’s constitution or by law applicable to the governmental body.

Attorney General's Opinions-Open Meetings

The Attorney General issues opinions to public bodies on issues surrounding the law. A public body can request an opinion from the Attorney General on its prospective actions relative to the Open Meetings Act. The Office of the Attorney General may be contacted at (334) 242-7300.

The following are Attorney General's Opinion excerpts from the full text of opinions related to the Open Meetings Act. The full texts of these opinions, as well as additional opinions, are available at www.ago.alabama.gov.

A.G. No. 2006-068 – Deliberations by regional planning and development commissions concerning credit and financial records of applicants for revolving fund loans must be conducted in open public meetings under the Alabama Open Meetings Act. There is no specific exemption in the Alabama Open Meetings Act or under federal law that allows the commissions to enter into executive session to discuss credit and financial records of applicants.

A.G. No. 2006-071 – To be counted towards establishing a quorum, board members attending meetings that are subject to the Open Meetings Act are required to be physically present.

A.G. No. 2006-088 – The Open Meetings Act 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 and only those portions of the meeting that involve the general reputation and character, physical condition, professional competence, mental health, and job performance of the employee are 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.

A.G. No. 2006-108 – A volunteer fire department certified by the Alabama Forestry Commission is subject to the Open Meetings Act. A county volunteer fire association is subject to the act. A quorum of the governing body of a committee or subcommittee of a certified volunteer fire department or county fire association at a prearranged gathering required by law; a prearranged gathering at which it can exercise its powers or approve the expenditure of public funds; or a gathering at which it deliberates specific matters expected to come before the body, committee, or subcommittee at a later date, is a meeting subject to the act.

A.G. No. 2006-122 – A county hospital board, the meetings of which are appointed by the county governing body, is subject to the Open Meetings Act of 2005.

ETHICS LAW

Alabama's Ethics law is found in *Ala. Code* §§ 36-25-1 through 36-25-30. The law seeks to protect the public interest against conflicts of interest and to establish appropriate ethical standards for public officials where such conflicts exist. The law creates a state agency under the direction of a five-member Ethics Commission to carry out the provisions of the state ethics law.

Ethics Commission members are appointed by the Governor, the Lieutenant Governor and the Speaker of the House of Representatives.

Conflict of Interest

A conflict of interest on the part of a public official or public employee is a conflict between private interests and official responsibilities. *Ala. Code* § 36-25-1(8).

More specifically, a conflict of interest is:

- Any action; any inaction; or any decision by a public official or public employee in the discharge of his or her official duties which would materially affect:
 - His or her financial interest;
 - The financial interest of his or her family members; or
 - The financial interest of any business with which he or she is associated. *Id.* The term “business with which he or she is associated” is defined as “[a]ny business of which the person or a member of his family is an officer, owner, partner, board of director member, employee or holder of more than five percent of the fair market value of the business.” *Ala. Code* § 36-25-1(2)

However, if the material financial effect will be felt generally and uniformly rather than disproportionately to the public official or public employee or his or her family or associated business, there is no conflict of interest.

A conflict of interest shall not include any of the following:

- A loan or financial transaction made or conducted in the ordinary course of business.
- An occasional nonpecuniary award publicly presented by an organization for performance of public service.
- Payment of or reimbursement for actual and necessary expenditures for travel and subsistence for the personal attendance of a public official or public employee at a convention or other meeting at which he or she is scheduled to meaningfully participate in connection with his or her official duties and for which attendance no reimbursement is made by the state.
- Any campaign contribution, including the purchase of tickets to, or advertisements in journals, for political or testimonial dinners, if the contribution is actually used for political purposes and is not given under circumstances from which it could reasonably be inferred that the purpose of the contribution is to substantially influence a public official in the performance of his or her official duties.

Use of Public Position for Personal Gain is Prohibited

“No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control

over, or otherwise converts to personal use the object constituting such personal gain.” *Ala. Code* § 36-25-5(a).

“A member of a legislative body may not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest.” *Id.* at (b). “A conflict of interest shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation; or who is an officer or director for any such corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation.” *Id.* at (f).

“No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in [Ala. Code] [§] 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy.” *Id.* at (c).

“No person shall solicit a public official or public employee to use or cause to be used equipment, facilities, time, materials, human labor, or other public property for such person's private benefit or business benefit, which would materially affect his or her financial interest, except as otherwise provided by law.” *Id.* at (d).

“No public official or public employee shall, other than in the ordinary course of business, solicit a thing of value from a subordinate or person or business with whom he or she directly inspects, regulates, or supervises in his or her official capacity.” *Id.* at (e).

Disclosure of Confidential Information for Personal Gain

“No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter [25, Title 36], shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business.” *Ala. Code* § 36-25-8.

Revolving Door Law

Absent the exceptions enumerated in *Ala. Code* § 36-25-13, for two years after leaving employment or office:

- No public official shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, department, or legislative body, of which he or she is a former member.
- No public official elected to a term of office shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer, before the board, agency, commission, department, or legislative body of which he or she is a former member.
- No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee or worked pursuant to an arrangement such as a consulting agreement, agency transfer, loan, or similar agreement.
- No public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee
- No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business, corporation, partnership, or individual.
- No former public official or public employee of the state may, within two years after termination of office or employment, act as attorney for any person other than himself or herself or the state, or aid, counsel, advise, consult or assist in representing any other person, in connection with any judicial proceeding or other matter in which the state is a party or has a direct and substantial interest and in which the former public official or public employee participated personally and substantially as a public official or employee or which was within or under the public official or public employee's official responsibility as an official or employee.

Notice of Contract to be filed with the Ethics Commission

If a public official or employee, or a member of their households, or a business with which they are associated contracts with a state or local governmental entity;

and,

The contract is required to be bid according to Alabama's competitive bid laws;

and,

The contract is to be paid in whole or in part with state, county, or municipal funds;

then

A copy of the contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into. *Ala. Code* § 36-25-11.

Statements of Economic Interest

The ethics law provides for the filing of a statement of economic interests with the Ethics Commission by persons holding certain positions no later than April 30 of each year covering the period of the preceding calendar year, including,

- All elected public officials at the state, county, or municipal level of government or their instrumentalities.
- Any person appointed as a public official and any person employed as a public employee at the state, county, or municipal level of government or their instrumentalities who occupies a position whose base pay is seventy-five thousand dollars (\$75,000) or more annually, as adjusted by the commission by January 31 of each year to reflect changes in the U.S. Department of Labor's Consumer Price Index, or a successor index.
- All candidates, provided the statement is filed on the date the candidate files his or her qualifying papers or, in the case of an independent candidate, on the date the candidate complies with the requirements of *Ala. Code* § 17-9-3.
- Members of the Alabama Ethics Commission; appointed members of boards and commissions having statewide jurisdiction (but excluding members of solely advisory boards).

Ala. Code § 36-25-14.

Additional persons must file whether or not elected and whether or not paid \$75,000 or more annually (partial list)

- All full-time non-merit employees, other than those employed in maintenance, clerical, secretarial, or other similar positions.
- Chief clerks and chief managers
- Chief county clerks and chief county managers
- Chief administrators
- Chief county administrators
- Any public official or public employee whose primary duty is to invest public funds
- Chief administrative officers of any political subdivision
- Chief and assistant county building inspectors
- Any county or municipal administrator with power to grant or deny land development permits
- Chief municipal clerks
- Chiefs of police
- Fire chiefs
- City and county school superintendents and school board members
- City and county school principals or administrators
- Purchasing or procurement agents having the authority to make any purchase
- Chief financial and accounting directors
- Chief grant coordinators
- Each employee of the Legislature or of agencies, including temporary committees and commissions established by the Legislature, other than those employed in maintenance, clerical, secretarial, or similar positions.

- Each employee of the Judicial Branch of government, including active supernumerary district attorneys and judges, other than those employed in maintenance, clerical, secretarial, or other similar positions.
- Every full-time public employee serving as a supervisor.

Id.

Reporting of Violations

If you are a governmental agency head and you become aware of a possible ethics violation, there are specific reporting requirements that you must follow or you can be charged with violation of the Ethics Law. The law requires governmental agency heads to file a report with the Ethics Commission within 10 days on any matters that come to his or her attention in his or her official capacity which constitute a violation of the state ethics law. The law further requires governmental agency heads to cooperate in every possible manner in connection with any investigation or hearing, public or private, conducted by the Ethics Commission. *Ala. Code* § 36-25-17.

Ethics Commission Opinions

The Ethics Commission issues opinions to public bodies relative to the state's ethics laws. *Ala. Code* § 36-25-4(9). These opinions are posted on the commission's Internet website at <http://ethics.alabama.gov> and can be downloaded. A public body can obtain an opinion from the Ethics Commission concerning real or hypothetical circumstances which might violate the ethics law. *Id.*

The Ethics Commission offers training on the ethics law. The commission can be contacted at (334) 242-2997 or by e-mail at info@ethics.alabama.gov.

Examples of Ethics Commission Opinions

The following excerpts were obtained from Ethics Commission opinions downloaded from the commission's Internet website. The full text of the opinions can be found there.

Ethics Commission Opinion 2006-03 – A former Engineering Technician with the City of Huntsville's Engineering Division may, upon his retirement, contract back with the City of Huntsville's Engineering Division to inspect bridges on an as-needed basis, when prior to his retirement from the City of Huntsville, he did not hold a position of authority, did not have the authority to make purchases, approve or grant contracts, nor was involved in the hiring process.

Ethics Commission Opinion 2006-04 – A member of the Enterprise City Council, who owns a health care related business, may contract with the city-owned health care facility to provide health care services and products; provided that the business is done through some type of bid process; and, that the council member does not vote to appoint or otherwise participate in the appointment of Health Care Authority Board members, when he has a contract pending between

his business and the Health Care Authority, should appointments arise during the contract negotiation period.

Ethics Commission Opinion 2006-06 – The Jefferson County Commission may not, for a period of two years after her retirement, re-employ the former Principal Accountant, as she held a position of authority prior to her retirement.

Ethics Commission Opinion 2006-13 – “Ditch dirt” not otherwise reusable by Calhoun County or appropriate for resale, may be disposed of on property owned by Calhoun County public officials, employees or their family members: provided, that they have no opportunity to obtain this “ditch dirt” that is not available to all residents of Calhoun County, who may desire having the dirt disposed of on their property.

AUDITS

Municipalities are required to have annual audits. *Ala. Code* § 11-43-85. (see below) This section places the responsibility to arrange for an audit with the Mayor. There are some other provisions contained in Title 11 of the *Ala. Code* that address audits of certain type municipalities which may apply to a specific municipality rather than 11-43-85.

§ 11-43-85. Financial examinations.

“In cities and towns, the mayor, at least once a year, shall appoint an independent public accountant or the department of examiners of public accounts to conduct an examination in accordance with general accepted auditing standards of all books and accounts of the city or town since the preceding examination and to make a full report thereof in writing, under oath, to be submitted to the council at its first meeting after the completion of such report, and the same shall be spread upon the minutes of the council. For his service said independent public accountant or the department of examiners of public accounts shall be paid such sum as may be agreed upon.”

REPOSITORY LAW

In 1994, the Legislature established a repository of audit reports for entities receiving or disbursing public funds with the Department of Examiners of Public Accounts. The purpose was to facilitate public disclosure and access to audit reports. A copy of each audit report should be forwarded to the Department in order to comply with Act 94-414 (House Joint Resolution 236). The HJR is reproduced below.

HOUSE JOINT RESOLUTION 236

ESTABLISHING THE DEPARTMENT OF EXAMINERS OF PUBLIC ACCOUNTS AS A REPOSITORY FOR AUDIT REPORTS OF ENTITIES RECEIVING OR DISBURSING, OR BOTH, PUBLIC FUNDS.

WHEREAS, the Legislature of Alabama annually appropriates millions of dollars to various entities to provide services and programs for the benefit of the citizens of Alabama; and

WHEREAS, the accountability of these entities is of paramount importance to the Legislature, and

WHEREAS, audits are an integral part of the accountability of these entities to the citizens; and

WHEREAS, the Legislature desires that audit reports of entities receiving or disbursing, or both, public funds be available to the public to the maximum extent possible; and

WHEREAS, the Department of Examiners of Public Accounts issues public audit reports on the entities that it audits; now therefore,

BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That all entities receiving or disbursing, or both, public funds forward a copy of every audit report issued on the entity to the Department of Examiners of Public Accounts at the time of its receipt by the entity; and that the Department of Examiners of Public Accounts shall establish a repository of audit reports received, provide notice to the public weekly of reports received by the repository, and provide copies of audit reports in the repository to the public upon request.

Approved April 12, 1994

LEAGUE OF MUNICIPALITIES

The League is a state association of municipalities. They have attorneys on staff to assist municipalities with legal questions and also offer other services on programs to benefit municipalities.

GASOLINE TAXES

Municipalities receive distributions from the State Department of Revenue for their share of the various highway gasoline excise taxes. The municipalities may use the proceeds from these gasoline excise taxes as provided in *Ala. Code* § 8-17-91(a)(2)c 5. Other uses of the proceeds that were previously permitted by statute have been repealed in *Ala. Code* § 40-17-78(3) (repealed in 2012) and Section 40-17-224(3) (repealed in 2013). In most cases these funds may not be commingled with any other funds.

MUNICIPAL COURTS

Minimum Accounting Requirements for municipal courts were codified as Rule 43 in the Judicial Administration Rules effective October 1, 2002. These minimum accounting requirements provide that municipal courts have:

- Written procedures for internal controls over cash collections.
- Written procedures for maintenance and control of court records similar to those procedures required for circuit and district courts.

- Separate bank accounts for municipal court receipts and a prohibition against the commingling of court receipts with other municipal funds. Municipalities are not to use court receipts for operating purposes but are to distribute collections monthly to the agencies due these funds.
- Prescribed forms and logs for municipalities issuing parking tickets similar to those required for uniform traffic tickets.

Municipal courts collect significant revenue for the State of Alabama. The Department of Examiners of Public Accounts periodically reviews the amounts remitted to the State by municipalities and visit selected municipalities to review the collection and remittance of court fees to the State.

CONSTITUTION OF ALABAMA, SECTION 94

Municipalities not to grant public money or lend credit to private persons or corporations.

“The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise.”

This section prohibits:

- Loans to employees
- Loans to private organizations
- Unsettled travel advances

BORROWING FUNDS

At times it is necessary for municipalities to borrow funds for capital improvements. When this is necessary the municipality should consult their attorney to research the law that governs a municipality’s ability to issue warrants. Municipalities may issue general obligation warrants or limited obligation warrants. Limited obligation warrants usually require the pledge of a specific revenue source. Proceeds from the issuance warrants should always be spent in accordance with the provisions of the bond indenture. Municipalities should be financially responsible in insuring that debt repayment schedules do not extend past the useful life of the assets acquired.

SAFE PROGRAM (COLLATERALIZATION OF FUNDS) --Ala. Code § 41-14A-1 et seq.

Municipalities, including its agencies, departments, boards, school districts, commissions, and courts, are required to deposit their funds in financial institutions that have been designated as qualified public depositories under the SAFE Program include: Time Deposits (savings accounts), demand deposits and all certificates of deposit (negotiable and non-negotiable). Securities and other investment vehicles (i.e., bonds, notes, bills, warrants, common trust funds, money market mutual funds and other mutual funds, investments trusts), repurchase and reverse purchase agreements and similar instruments are considered investments and are not covered under the SAFE program.

Listing of financial institution that have been designated as qualified public depositories can be found by visiting the State Treasurers' website at <http://treasury.alabama.gov> . This website also contains rules and regulations for the operation of the SAFE Program, including the responsibilities of qualified public depositories and covered public entities.

INVESTMENT OF MUNICIPAL FUNDS

Generally, investments by municipalities are governed by *Ala. Code* §§ 11-81-19 and 11-81-21. There may also be local laws, which govern investments by municipalities. Generally, under *Ala. Code* § 11-81-21, Municipal Funds not presently needed may be invested in any obligation in which sinking funds may be invested to include:

- Direct obligations of the U.S. Department of Treasury
- Obligations of Federal Agencies (FHA, GSA, U.S. Maritime Administration, SBA, GNMA, HUD, and Federal Housing Administration)
- U.S. dollar denominated deposit accounts and certificates of deposit with banks or savings associations which are qualified public depositories under Chapter 14A of Title 41U.S. Dollar denominated deposit accounts and certificates of deposits that are fully insured by the FDIC or pledged collateral
- Pre-funded public obligations*
- Interests in any common trust fund or other collective instrument maintained by a national or state chartered bank, trust company or savings and loans association – mutual funds would be included in this category* (Note: there are limitations on the composition of investments in this category)

*See applicable *Ala Code* § 11-81-21(4) and (5) for complete description and understanding of these items.

LEVY OF MUNICIPAL AD VALOREM TAXES

Municipal governing bodies are required “during the month of May of each year, by resolution or ordinance, to levy a tax on the property situated in such municipality for the next succeeding tax year at a rate in no event in excess of the constitutional limit authorized to be levied by such municipality on the value of such property as assessed for state taxation as shown by the books of assessment for the state and county tax year ending September 30 next succeeding the levy.” *Ala. Code* § 11-51-42.

“The levy so made by the council, board of commissioners, or other governing body of such municipality shall go into force and effect as of October 1 next succeeding the levy and shall become a lien on October 1 next succeeding such levy and not before. After such levy is made it shall be the duty of the mayor or other presiding officer or clerk or other clerical officer of such municipality on or before June 1 next succeeding the levy to certify and deliver to the tax assessor of such county in which such municipality is situated a copy of the resolution or ordinance passed by such council, board of commissioners, or other governing body in and by which taxes are levied for such municipality for the next succeeding tax year commencing on the

next succeeding October 1; provided, that in case such council, board of commissioners, or other governing body shall fail any year thereafter to make such levy and give such notice then the levy for the preceding year shall be continued and the taxes shall be assessed in accordance with the provisions of this article.” *Id.*

COMPETITIVE BID LAWS AND PUBLIC WORKS LAW

Competitive Bid Laws

- *Ala. Code* § 16-13B-1, et seq.
 - Applies to city boards of education or any combination of city and county boards of education
 - Applies to all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars (\$15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars (\$15,000) or more.
- *Ala. Code* § 41-16-50, et seq.
 - Applies to the governing bodies of municipalities of the state, governing boards of instrumentalities of municipalities, including waterworks boards, sewer boards, gas boards, and other like utility boards and commissions.
 - Applies to all expenditure of funds of whatever nature for labor, services, work, or for the purchase of materials, equipment, supplies, or other personal property involving fifteen thousand dollars (\$15,000) or more, and the lease of materials, equipment, supplies, or other personal property where the lessee is, or becomes legally and contractually, bound under the terms of the lease, to pay a total amount of fifteen thousand dollars (\$15,000) or more.

Public Works Law

- *Ala. Code* § 39-1-1 et seq.
 - Applies to any governmental board, commission, agency, body, authority, instrumentality, department, or subdivision of the state, its counties and municipalities.
 - Applies to any construction, repair, or renovation of public buildings, structures, sewers, waterworks, roads, bridges, docks, underpasses, and viaducts as well as any other improvement to be constructed, repaired, or renovated on public property and to be paid, in whole or part, with public funds or with financing to be retired with public funds in the form of lease payments or otherwise.

Expenditure Thresholds

Competitive Bid Law: Titles 16 and 41
\$15,000

Public Works Law
\$50,000

Advertising Requirements

Competitive Bid Law: Titles 16 and 41

Post notice on bulletin board outside purchasing office

Mail or Electronic notice to those requesting notice of bids

Governing body can mandate advertisement in newspaper (Title 41 only)

Public Works Law

Advertise in a newspaper of general circulation published in the municipality at least once in the municipality or municipalities of improvement; if no newspaper, outside the purchasing office

Mail notice to those requesting notice of sealed bids

Additional requirement for contracts over \$500,000 – once in 3 newspapers of general circulation throughout the state

Bid Lists

Competitive Bid Law: Titles 16 and 41

All vendors who have requested to bid

Public Works Law

All vendors who have requested to bid

Bid Bonds/Cashier's Checks

Competitive Bid Law: Titles 16 and 41

Awarding authority may require bidders to furnish a bid bond

No guidance in law as to amount of bond - 5% to 10% of contract recommended

Public Works Law

Must be drawn on an Alabama bank or surety company

At least 5% of bid, not to exceed \$10,000

Performance Bonds

Competitive Bid Law: Titles 16 and 41

No requirement in law

Public Works Law

A bond (from an Alabama Surety Co.) equal to 100% of the contract must be furnished within 15 days of the contract being presented to the bidder for

signature

Payment Bond

Competitive Bid Law: Titles 16 and 41

No requirement in law

Public Works Law

A bond equal to 50% of the contract plus reasonable estimate of attorney's fees

Only One Bid Received

Competitive Bid Law: Title 41 only

May negotiate downward

Public Works Law

May negotiate downward

Length of Contract Terms

Competitive Bid Law:

Purchase of personal property or contractual service contracts – limited to 3 years (Title 41)

Public Works Law

No term limits

Purchase of personal property or contractual service contracts – limited to 5 years (Title 16)

Leasing of motor vehicles by local governing bodies – limited to 5 years (Title 41)

Lease-purchase contracts for Capital improvements and repairs to real property – limited to 10 years (Titles 16 and 41)

All other lease-purchase contracts – Limited to 10 years (Title 16)

Provisions for Mistakes by Vendors

Competitive Bid Law: Titles 16 and 41

No provisions

Public Works Law

Clerical or calculation errors – low bidder must provide written notice of withdrawals within 3 days

City has 10 days after receipt to reach decision

Withdrawing bidder cannot: work on project in any way or bid on same project if it is readvertised for letting

Project Completion

Competitive Bid Law: Titles 16 and 41
No provisions

Public Works Law
Contractor must give notice of project completion by advertising 4 successive weeks in a newspaper of general circulation published within the city or county in which the work has been done

Provisions for Retainage

Competitive Bid Law: Titles 16 and 41
No provisions

Public Works Law
No more than 5% of estimated work done and value of materials shall be retained up to 50% of work completed

No additional retainage withheld after 50% of work completed

Retainage held until project completion and acceptance

Professional Services

Competitive Bid Law: Titles 16 and 41
Attorneys, Physicians, Architects, Teachers, Superintendents of Construction, Artists, Appraisers, Engineers, Consultants, Certified Public Accountants, Public Accountants and others possessing a high degree of professional skill where personality plays a decisive part – exempted from the bid process

Public Works Law
Architects, Engineering, Construction Management, Program Management, and Project Management – exempted from the bid process

Emergencies

Competitive Bid Law: Titles 16 and 41
No advertising required

Public Works Law
No advertising required

Must still follow other bid law requirements – per *General Electric Co. v. City of Mobile*, 585 So.2d 1311 (Ala. 1991).

Must still follow other requirements – *Ala. Code* § 39-2-2(e)

Sole Source

Competitive Bid Law: Titles 16 and 41
No bid required

Public Works Law
Satisfaction of State Building Commission

Recommended by Architect or Engineer

Maintain documentation for public inspection

Force Account

Competitive Bid Law
Not applicable

Public Works Law
If municipality or city board of education uses own labor and equipment, All materials and supplies governed by bid thresholds of Title 16 and 41. (\$15,000 or more)