



TO: Mayor and Members of the Town Council

FROM: Thad W. Renaud,
Town Attorney

DATE: April 26, 2022

RE: Colorado Open Meetings Law

One state statute that all local government officials should be aware of is the Colorado Open Meetings Law (§ 24-6-401 *et seq.* C.R.S.). I have prepared this memorandum on that law to assist you in considering issues as they arise in the future.

The Colorado Open Meetings Law contains as its “Declaration of Policy” that:

It is declared to be a matter of statewide concern that the formation of public policy is public business and may not be conducted in secret.

The Colorado Supreme Court has described the Open Meetings Law as “reflect[ing] the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny.” *Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1978).

The purpose of this memorandum is to answer the most common questions concerning the requirements of the Open Meetings Law, including:

1. Who is covered by the law?
2. What is a “meeting?”
3. When are “executive sessions” permitted?
4. What happens when the law is violated?

1. Who is covered by the law?

The operative provision of the Open Meetings Law states that “All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.” § 24-6-402(2)(b) C.R.S. In turn, the statute defines a “local public body” to include any board, committee, commission or other policymaking, rulemaking, advisory or formally constituted body of a political subdivision of the state, such as a municipality. § 24-6-402(1)(a), C.R.S. However, “persons on the administrative staff” of a local public body are specifically excluded from the definition of a “local public body.”

2. What is a “meeting?”

The statute broadly defines a “meeting” as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” In a recent case, the Colorado Supreme Court explained that for a gathering to be subject to the Open Meetings Law requirements “there must be a demonstrated link between the meeting and the policy-making powers of the government entity holding or attending the meeting.” *Board of Commissioners of Costilla County v. Costilla County Conservancy District*, 88 P.3d 1188, 1194 (Colo. 2004). This holding is consistent with the provision of the Open Meetings Law that provides that the Open Meetings Law “does not apply to any chance meeting or social gathering at which discussion of public business is not the central purpose.” § 24-6-402(2)(e), C.R.S.

In response to technological advances, in recent years the General Assembly amended the Open Meetings Law to include “electronic” as well as “other means” of communication under the statutory definition of a “meeting.” At the time of this writing, no reported Colorado case has discussed the requirements of public notice of an “e-mail” meeting, or the way in which an interested member of the public might be privy to such a “meeting.” Many municipal attorneys presume, however, that a serial e-mail that travels between three or more members of a local public body and discusses public business may well constitute a “meeting” for which public notice must be given.

3. When are “executive sessions” permitted?

Because the underlying principle of the Open Meetings Law is that the formation of public policy is public business, and therefore cannot be conducted in secret, the exceptions to the statute are limited and strictly tailored to situations where the General Assembly has determined that private discussions could serve the public interest. The statute limits private meetings, referred to “executive sessions” to the following situations:

Real and Personal Property: An executive session may be held to discuss the purchase, acquisition, lease, transfer, or sale of property interests, so long as the executive session is

not held to conceal an official's personal interest in the property. § 24-6-402(4)(a), C.R.S.

Attorney Conferences: Although the mere presence of an attorney does not justify the executive session, the governing body may call an executive session for the purpose of receiving legal advice on specific legal questions. § 24-6-402(4)(b), C.R.S.

Confidential Matters Under State or Federal Law: If any state or federal law requires confidentiality of a particular matter to be discussed, an executive session may be called. When announcing that it will go into an executive session for this purpose, the governing body must announce the specific statutory citation or rule that requires the confidentiality of the matter to be discussed. § 26-4-402(4)(c), C.R.S.

Security Arrangements or Investigations: The specialized details of security arrangements or investigations may be discussed in an executive session. § 24-6-402(4)(d), C.R.S.

Negotiations: A governing body may call an executive session to determine positions relative to matters that may be subject to negotiations, to develop a strategy for negotiations, or to instruct negotiators. § 24-6-402(4)(e).

Personnel Matters: Personnel matters may be discussed in an executive session. However, if the discussion involves a particular employee, that employee must receive advance notice and may insist that the discussion be held in an open meeting. Also, by definition, a "personnel matters" does not include discussions of any member of a local public body, any elected official, the appointment of any person to fill a vacancy in a local public body or elected office, or discussion of personnel policies that do not require the discussion of particular employees. § 24-6-402(4)(f)(I) and (II), C.R.S.

Documents Protected Under the Open Records Law: Discussions of documents protected under the mandatory non-disclosure provisions of the Open Records Act may be held in an executive session. However, discussion of documents protected under the "work product" or "deliberative process" privileges in the Open Records Act must occur in an open meeting unless an independent basis for an executive session concerning such documents exists. § 24-6-402(4)(g), C.R.S.

The statute also contains detailed provisions concerning the procedure for calling an executive session. Before going into an executive session, the governing body must first announce the topic of discussion, including a specific citation to the section of the Open Meetings Law that authorizes consideration of the announced topic in executive session, as well as "identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized." § 24-6-402(4). An executive session may be held only after an affirmative vote of two-thirds of a quorum present at the meeting. *Id.* These procedures are of particular importance as The Colorado Court of Appeals has held that failure to comply

with the procedural requirements can result in an executive session not being convened. Instead, the session is simply a part of the *open* meeting, and the record of such session is open to public inspection under the Colorado Open Records Act. *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004).

4. What happens when the law is violated?

The underlying goal of the Open Meeting Law is to create an atmosphere of openness in public matters, not to “punish” those who violate its provisions. In keeping with that philosophy, the Open Meetings Law contains no criminal sanctions for non-compliance. However, any action taken at a meeting that does not comply with the Open Meetings Law requirements is void. § 24-6-402(8), C.R.S. Courts may also enforce the requirements of the Open Meetings Law through an injunctive order. § 24-6-402(9), C.R.S. Of course, the most serious problem that can arise from an Open Meetings Act violation is the loss of confidence in the government that can arise when official actions are invalidated because laws aimed at assuring open government are violated.

In addition, after an *in camera* review of an executive session record, the court may make public any portions of the record that reveal the body getting substantially off topic or engaging in unlawful decision-making while in executive session. § 24-72-204(5.5) C.R.S.

Finally, if the court finds that a public body has violated the Open Meetings Law, it *must* award the prevailing citizen’s costs and reasonable attorney fees. *Id.* A prevailing public body, on the other hand, may only be awarded its costs and attorney fees if the court finds that the action was frivolous, vexatious, or groundless. § 24-6-402(9), C.R.S.

In conclusion, I would appreciate your noting the fact that Colorado courts have not been called upon to examine many aspects of the Open Meetings Law. Accordingly, judicial guidance when interpreting the statute is somewhat limited. This memorandum is intended to serve as a guide to some of the more fundamental aspects of the law, and I very much encourage you to consult with the Town Manager or me concerning specific questions that may arise from time to time. As always, I am happy to answer any questions or discuss further any of the issues addressed in this memorandum.