



COLORADO
MUNICIPAL
LEAGUE

**ANNUAL SEMINAR
ON MUNICIPAL LAW**

Colorado Open Meetings Law

**The Colorado
Sunshine Act of 1972**

Overview of the OML

Colorado Open Meetings Law is codified under Section 24-6-401 and 402, C.R.S.
The OML applies to state and local public bodies.
The OML was amended in 1991 to include local public bodies.

The OML requires:

- Full and timely notice before holding or attending a public meeting for the purpose of discussing public business that is proposed or pending before the local public body.
- Minutes to be taken at any public meeting of a local public body.
- Minutes of the public meeting shall be recorded and open to public inspection.
- Executive session only during a regular or special meeting.
- Strict compliance with the pre-convening executive session procedure.
- Electronic recording except as allowed otherwise by the OML.

Declaration of Policy

C.R.S. § 24-6-401, “It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret.”

The OML is intended to “afford the public access to a broad range of meetings at which public business is considered.” *Benson v. McCormick*, 578 P.2d 651, 652 (Colo. 1978).

“Our [OML] ... reflects the considered judgment of the Colorado electorate that democratic government best serves the commonwealth if its decisional processes are open to public scrutiny.” *Benson* at 653.

“The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests.” *Cole v. State*, 673 P.2d 345, 349 (Colo. 1983).



Local Public Bodies

C.R.S. § 24-6-402(1)(a)(I)

“Local public body” means any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state *and* any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.

C.R.S. § 24-6-402(1)(c)

“Political subdivision of the state” includes, but is not limited to, any county, city, city and county, town, home rule city, home rule county, home rule city and county, school district, special district, local improvement district, special improvement district, or service district.

***Cole**

_____ *v. State*,
673 P.2d 345 (Colo. 1983)

“De facto” policy-making bodies that formulate legislative policy that is of governing importance to the citizens of this state are subject to the OML even if the entity itself may not be an official policy-making body.

***Cole v. State*, 673 P.2d 345 (Colo. 1983)**

The Colorado Supreme Court considered whether a legislative caucus meeting was subject to the OML. The reasoning of the Court is applicable to local public bodies even though this case dealt with a state public body.

In this case, the appellant argued that the OML was not applicable to legislative caucus meetings because the meetings were beyond the intended reach of the OML. The district court ruled that legislative caucuses are de facto bodies of the General Assembly and are subject to the OML. The Colorado Supreme Court upheld the district court's ruling, concluding, "While a legislative caucus is not an official policy-making body of the General Assembly, it is, nonetheless, a "de facto" policy-making body which formulates legislative policy that is of governing importance to the citizens of this state."

Reaffirming *Bagby* and *Benson*, the Court interpreted the OML broadly to further the legislative intent that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process which affects, both directly and indirectly, their personal interests.

The Court relied on facts provided by testimony of other legislators that the legislative caucuses have a critical role in the law-making process, and that caucuses take binding positions, which means the vote is settled and predetermined before voting occurs on the assembly floor.

The Court reasoned that providing public access to a meeting to watch a vote that is predetermined does not allow the public to intelligently participate in the legislative decision-making process.

Further, without providing much discussion, the Court concluded, if it was the intent of the General Assembly to exempt caucus meetings from the requirements of the OML, then it could have done so by expressly exempting the meetings.

Based thereon, the Court held that legislative caucus meetings are meetings of policy-making bodies that are subject to the regulations of the OML.

v. El Paso County Ret. Plan,
961 P.2d 597 (Colo. App. 1998)

A private plan that avails itself of public entity tax and health benefits, and uses county purchasing accounts, facilities, and seal, and which receives public financial contributions from public entities that participate in the plan, and which is authorized to levy a retirement tax on all of the taxable property within the county to pay for the costs of the employer [county] contributions to the plan, is operating as an agency or instrumentality of the county, and even though the plan performs fiduciary functions and does not establish public policy, it is subject to the OML as an agency of the county.

***Zubeck**

_____ v. *Colo. Dep't of Pub. Health & Env't*,
451 P.3d 851 (Colo. 2019)

State agencies, such as the CDPHE, are not a “state public body” and are not subject to the requirements of the OML.

The Court’s analysis may apply to divisions or departments of local public bodies, which are, arguably, already exempted from the OML as “administrative staff” under §24-6-402(1)(a)(I).

***Doe 1**

A Gathering (but not a Public Meeting)

C.R.S. § 24-6-402(1)(b) - “Meeting” means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.

C.R.S. § 24-6-402(2)(e) - This part 4 does not apply to any chance meeting or social gathering at which discussion of public business is not the *central* purpose.

“Every casual encounter of [local public body] members does not fall within the [OML].” *Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974).

*Costilla

Bd. of County Comm'rs, _____ County v. _____ County Conservancy Dist., 88 P.3d 1188 (Colo. 2004)

A meeting must be part of the *policy-making process* to be subject to the requirements of the OML. A meeting is part of the policy-making process if it concerns a matter related to the policy-making function of the local public body that is holding or attending the meeting. If, as a threshold matter, a meeting is part of the policy-making process of the public body, then the requirements of the OML must be met.

For a meeting to be subject to the OML, the record must demonstrate a *meaningful connection* between the meeting itself and the policy-making powers of the public body holding or attending the meeting.

Bd. of County Comm'rs, Costilla County v. Costilla County Conservancy Dist., 88 P.3d 1188 (Colo. 2004)

The Colorado Supreme Court considered whether the Board of County Commissioners for Costilla County (the “Board”) violated the OML when it did not provide full and timely notice of a meeting attended by a quorum of the Board. The meeting was not convened by the Board, nor was the meeting convened for the purpose of discussing public business pending before the Board.

The meeting at issue (the “Meeting”) was called by the Colorado Department of Public Health and Environment (“CDPHE”), the Department of Natural Resources, and Battle Mountain Resources, Inc. (“Battle Mountain”), an operator of a private mine located in Costilla County. The purpose of the Meeting was for Battle Mountain to report to the CDPHE on its remediation of mining waste that had seeped into a stream located in Costilla County. The Meeting was not open to the public, but an employee of Battle Mountain invited the Board to attend the Meeting along with officials and representatives of other public entities and groups. Two commissioners of the Board (a quorum) attended the Meeting without providing notice of the Meeting to the public.

The Costilla County Conservancy District (“District”) filed suit claiming that the Board failed to comply with the notice requirements of the OML, specifically Sections 24-6-402(2)(b) and (c), C.R.S.

The Court began its analysis by considering the plain language of 402(2)(b) and (c), and it agreed that, when read in isolation, each subsection implied that the Board was required to provide notice to the public before attending the Meeting. However, the Court did not agree with this interpretation because, “[T]he effect would be to make an already broad statute virtually limitless.” Thus, it would lead to an absurd result.

Costilla, cont.

The Court reasoned that, as a threshold issue, a meeting must be convened for the purpose of discussing public business for it to be subject to the OML. “Public business” is not defined in the OML. To determine the meaning of “public business,” the Court considered the OML as a whole and prior cases construing the OML. The Court concluded that a meeting is convened to discuss public business when the meeting has a meaningful connection to the local public body’s policy-making process.

The Court explained, “A meeting is part of the policy-making process if it concerns a matter related to the policy-making function of the local public body that is holding or attending the meeting.” Further, for a court to conclude that a meeting is part of the policy-making function of a public body, the record must demonstrate a meaningful connection (a link) between the meeting itself and the policy-making powers of that public body. A meaningful connection between a meeting and the policy-making powers of a public body exists if the record shows that: (1) the meeting is convened to discuss or act on a rule, regulation, ordinance, or other formal action pending before the public body; or (2) the meeting was held for the purpose of discussing a pending measure or action before the public body, which is subsequently “rubber stamped” by the public body holding or attending the meeting.

Applying the threshold test to the facts in this case, the Court concluded that the record failed to establish a meaningful connection between the Meeting and the policy-making function of the Board. The Meeting was not called by the Board. The purpose of the Meeting was to discuss matters of public concern (remediation of mining waste in a water stream), but it did not involve the policy-making powers of the Board because the Board was not discussing or considering a matter pending before the Board. The Board did not act at a subsequent public meeting of the Board to “rubber stamp” a decision made at the Meeting. Therefore, the Court concluded that the Meeting was not part of the Board’s policy-making process.

The Court held the Board did not violate the OML by not providing public notice of the Meeting before a quorum of the Board attended the Meeting because, as a threshold issue, the Meeting was not subject to the OML because it was not part of the Board’s policy-making process.

_____ *v. Colo. Pub. Utils. Comm.*,
298 P.3d 1027 (Colo. App. 2012)

E-mails exchanged between members of a public body that are related to proposed legislation that is not connected to the public body's policy-making function do not fall within the OML's definition of "meeting" and are not subject to the OML.

**Intermountain
Rural Elec. Ass'n**

***IREA**

***Intermountain Rural elec. Ass'n v. Colo. Pub. Utils. Comm.*, 298 P.3d 1027 (Colo. App. 2012)**

The Colorado Court of Appeals considered whether email discussions between members of the Colorado Public Utilities Commission (“PUC”) (*i.e.*, a public body subject to the OML) about proposed state legislation were “meetings” subject to the OML.

The emails exchanged between the PUC members included detailed discussion about the bill regarding various topics, the potential impact of the bill on the PUC’s authority, and the procedural requirements that the legislation would place on the PUC. The PUC’s opinion on the pending legislation, which was formed through the emails, was not binding on the General Assembly, and the PUC did not have the power to enact the legislation.

Plaintiff filed suit seeking a declaration that: (1) the e-mail communications were “meetings” subject to the OML; (2) the PUC violated the OML when it failed to provide notice of the “meetings,” make the meetings public, or enter an executive session; and (3) any formal action arising out of the e-mails was invalid. Plaintiff also sought a mandatory injunction requiring the PUC to make the e-mails public.

Applying the Colorado Supreme Court’s analysis in *Costilla*, the COA explained that a meeting is not part of a public body’s policy-making process if the meeting does not involve a matter that is rationally related to the public body’s policy-making function. A public body’s policy-making function is engaged when the meeting is connected to the public body’s policy-making responsibilities. A public body’s policy-making responsibilities are connected to the public body’s policy-making powers. The policy-making powers of a public body are limited to its authority to create public policy through its enactment of ordinances, rules, regulations, or take other formal action on matters pending before the public body. Thus, to establish a meaningful connection between a meeting and a public body’s policy-making process, a plaintiff must show: (1) the public body has the authority to create the public-policy that is the subject of the meeting; (2) the public-policy matter is pending or proposed before the public body; and (3) the meeting was convened or attended by the public body to discuss the pending or proposed matter or to take formal action on the pending or proposed matter.

The COA held that, although the email communications constituted a “gathering” within the meaning of the OML, the emails were not a “meeting” subject to the OML, reasoning that the PUC did not have the authority to enact the proposed legislation that was the subject of the email communications, thus the legislation was not within the PUC’s policy-making powers or policy-making responsibilities, so the emails were not part of the PUC’s policy-making function, and therefore, the emails were not part of the PUC’s policy-making process.

Public Meetings

C.R.S. § 24-6-402(2)(b) – 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.

***HB 21-1025**

C.R.S. § 24-6-402(2)(d)(III) - If elected officials ~~use~~ EXCHANGE electronic mail to discuss pending legislation or other public business among themselves, the electronic mail ~~shall be~~ IS subject to the requirements of this section. Electronic mail communication ~~among~~ BETWEEN elected officials that does not relate to THE MERITS OR SUBSTANCE OF pending legislation or other public business, INCLUDING ELECTRONIC MAIL COMMUNICATION REGARDING SCHEDULING AND AVAILABILITY OR ELECTRONIC MAIL COMMUNICATION THAT IS SENT BY AN ELECTED OFFICIAL FOR THE PURPOSE OF FORWARDING INFORMATION, RESPONDING TO AN INQUIRY FROM AN INDIVIDUAL WHO IS NOT A MEMBER OF THE STATE OR LOCAL PUBLIC BODY, OR POSING A QUESTION FOR LATER DISCUSSION BY THE PUBLIC BODY, shall not be considered a “meeting” within the meaning of this section. FOR PURPOSES OF THIS SUBSECTION (2)(D)(III), “MERITS OR SUBSTANCE” MEANS ANY DISCUSSION, DEBATE, OR EXCHANGE OF IDEAS, EITHER GENERALLY OR SPECIFICALLY, RELATED TO THE ESSENCE OF ANY PUBLIC POLICY PROPOSITION, SPECIFIC PROPOSAL, OR ANY OTHER MATTER BEING CONSIDERED BY THE GOVERNING ENTITY.

For an overview of electronic meetings, see the presentation by Sam Light, Electronic Communications and the Law of Transparency, CML 2023 Annual Conference.

*Bagby

 v. Sch. Dist. No. 1, Denver,
528 P.2d 1299 (Colo. 1974)

Regardless of whether formal action is taken, when a ‘conference’ (or any other kind of gathering) is preceded by notice, and held with regularity at specific times and places for the purpose of discussing business of the local public body, it is a ‘meeting’ that is subject to the OML.

“No rubber stamping.”

Bagby v. Sch. Dist. No. 1, Denver, 528 P.2d 1299 (Colo. 1974)

The “conferences” at issue were held following notice by someone in authority, with regularity at a particular designated time and place, for the purpose of dealing with one or more items of concern to the local public body, and the conferences were usually followed by regular meetings of the local public body at which very little discussion took place before formal vote on matters previously discussed.

“Since much of the work of the public meeting was already done at the conference, the public and news media were deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the [local public body] and influenced the vote announced without discussion at the later public meeting. One has not participated in a public meeting if one witnesses only the final recorded vote.”



_____ *v. State Auditor's Office*,
797 P.2d 764 (Colo. App. 1990)

The fact that the Board was acting in a quasi-judicial capacity did not negate its obligation to comply with the OML.

***Lanes**

Public Meeting Notice

C.R.S. § 24-6-402(2)(c)(I) – Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public. In addition to any other means of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body’s first regular meeting of each calendar year. The posting shall include specific agenda information where possible.



v. Town of Nederland,
934 P.2d 848 (Colo. App. 1996)

The Court held that a local ordinance that allowed the Town Board to call and hold an emergency meeting without providing prior public notice did not conflict with the OML. The Court reasoned that the detailed procedures in the local ordinance that required the ratification of any action taken at an emergency meeting at either the next regular or special meeting where public notice of the emergency has been given, represent reasonable satisfaction of the “public” conditions of the OML under emergency circumstances.

***Lewis**

_____ v. *Hous. Auth. of City of Pueblo*,
985 P.2d 97 (Colo. App. 1999)

Publication of notice for a meeting in a local newspaper of general circulation six days before the meeting took place met the requirements of OML notice 24-6-402(2)(c) because the OML does not establish the manner in which notice must be given.

***Van
Alstyne**

*Darrien

Town of Marble v. _____,
181 P.3d 1148 (Colo. 2008)

Establishes an objective standard for determining whether a public notice provides “full” notice.

Notice satisfies the OML’s requirement of providing “full” notice “as long as the items actually considered at the meeting are reasonably related to the subject matter indicated by the notice.”

Further, because the notice contained the agenda information available at the time of posting, it satisfied the OML’s requirement that “specific agenda information” be included “where possible.”

Notice – Posting Online

C.R.S. § 24-6-402(2)(c)(II)

(A) It is the intent of the general assembly that local governments transition from posting physical notices of public meetings in physical locations to posting notices on a website, social media account, or other official online presence of the local government to the greatest extent practicable;

(B) It is the intent of the general assembly to relieve a local government of the requirement to physically post meeting notices, with certain exceptions, if the local government complies with the requirements of online posted notices of meetings; ...



Notice – Posting Online

C.R.S. § 24-6-402(2)(c)(III)

On and after July 1, 2019, a local public body shall be deemed to have given full and timely notice of a public meeting if the local public body posts the notice, with specific agenda information if available, no less than twenty-four hours prior to the holding of the meeting on a public website of the local public body. The notice must be accessible at no charge to the public. The local public body shall, to the extent feasible, make the notices searchable by type of meeting, date of meeting, time of meeting, agenda contents, and any other category deemed appropriate by the local public body and shall consider linking the notices to any appropriate social media accounts of the local public body. A local public body that provides notice on a website pursuant to this subsection (2)(c)(III) shall provide the address of the website to the department of local affairs for inclusion in the inventory maintained pursuant to section 24-32-116. A local public body that posts a notice of a public meeting on a public website pursuant to this subsection (2)(c)(III) may in its discretion also post a notice by any other means including in a designated public place pursuant to subsection (2)(c)(I) of this section; except that nothing in this section shall be construed to require such other posting. A local public body that posts notices of public meetings on a public website pursuant to this subsection (2)(c)(III) shall designate a public place within the boundaries of the local public body at which it may post a notice no less than twenty-four hours prior to a meeting if it is unable to post a notice online in exigent or emergency circumstances such as a power outage or an interruption in internet service that prevents the public from accessing the notice online.

Public Meeting – Noncompliance

C.R.S. § 24-6-402(8) – No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section.

Examples of Noncompliance:

1. Failure to make a public meeting open to the public. C.R.S. § 24-6-402(2)(b).
2. Failure to provide full and timely notice to the public of a public meeting prior to holding or attending a public meeting. C.R.S. § 24-6-402(2)(c)(I).
3. Taking formal action outside of a public meeting.
4. Voting by secret ballot without meeting the permitted exceptions. C.R.S. § 24-6-402(2)(d)(IV).
5. Failure to take meeting minutes in compliance with C.R.S. § 24-6-402(2)(d)(II)



**Wisdom
Works
Counseling
Services**

***Wisdom**

 v. Colo. Dept. of Corr.,
360 P.3d 262 (Colo. App. 2015)

The OML does not prescribe when, where, or how often any particular public body must meet; but any action taken without a public meeting is void under the OML.

The COA held that the *OML does not allow public bodies to establish uniform practices or adopt regulations that allow a public body to take a formal action outside of public meeting*, and it ruled that: [1] plaintiffs can use the OML to challenge formal actions taken by, or in the name of, a public body that takes a formal action outside of a public meeting; [2] the act is invalid and has no effect; and [3] the plaintiff is entitled to attorneys fees and costs.

_____ *v. City of Arvada*,
361 P.3d 1069 (Colo. App. 2015)

Except as expressly allowed by the OML, secret voting that leads to a lack of knowledge about how the members of a public body vote is an injury under the OML and not allowed.

***Weisfield**

C.R.S. § 24-6-402(2)(d)(IV) does allow a local public body to vote by secret ballot to elect *leadership of itself*, and a secret ballot may be used in connection with the election by a local public body of *members of a search committee*.

Search Committees

C.R.S. § 24-6-402(3.5), as amended by ***HB 21-1051**.

A search committee of a state public body or local public body shall establish job search goals, including the writing of the job description, deadlines for applications, requirements for applicants, selection procedures, and the time frame for appointing or employing a chief executive officer of an agency, authority, institution, or other entity at an open meeting. The state or local public body shall NAME ONE OR MORE CANDIDATES AS FINALISTS FOR THE POSITION OF CHIEF EXECUTIVE OFFICER. THE STATE OR LOCAL PUBLIC BODY SHALL make public the list of ~~a~~ FINALIST OR finalists under consideration for the position of chief executive officer no later than fourteen days prior to appointing or employing ~~one of the finalists~~ A FINALIST to fill the position. No offer of appointment or employment shall be made prior to this public notice. Records submitted by or on behalf of a finalist for such position shall be subject to ~~the provisions of~~ section 24-72-204 (3)(a)(XI). ~~As used in this subsection (3.5), “finalist” shall have the same meaning as in section 24-72-204 (3)(a)(XI).~~ Nothing in this subsection (3.5) shall be construed to prohibit a search committee from holding an executive session to consider appointment or employment matters not described in this subsection (3.5) and otherwise authorized by this section.

**Prairie
Mtn. Publ'g
Co.**

***PMPC**

 v. Regents of the Univ. of Colo.,
491 P.3d 472 (Colo. App. 2021)

Board of regents acted within its right to treat the person chosen as the new university president as the only finalist made public pursuant to OML.

Subsequent to this case, the General Assembly adopted HB 21-1051 into law and clarified that CORA and the OML allow a public body to publicize the name of only one “finalist.”

Colo. Med. Bd. v. _____,
451 P.3d 841 (Colo. 2019)

Even if an underlying policy is adopted in violation of the OML, the issuance of a subpoena is still valid if there is a lawfully authorized purpose to support the validity of the subpoena.

***McLaughlin**

Public Meeting – Curing Noncompliance

- The OML does not address whether a public body can cure a violation of the OML related to public meetings.
- The purpose of the OML requires a public body's policy-making process to be open to the public.
- The purpose of the OML is not to permanently condemn a decision made in violation of the statute.
- A procedure violation of the OML related to convening executive sessions cannot be cured.

**Colo. Off-
Highway
Vehicle
Coalition**

***COHVC**

 v. Colo. Bd. of Parks and Outdoor Recreation,
292 P.3d 1132 (Colo. App. 2012)

A public body may “cure” a prior violation of the OML by holding a subsequent meeting that is not a mere “rubber stamping” of an earlier decision.

Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks and Outdoor Recreation, 292 P.3d 1132 (Colo. App. 2012)



The Court determined that *Bagby* and *Van Alstyne* imply that a public body may “cure” a prior violation of the OML by holding a subsequent meeting that complies with the OML, provided that the subsequent meeting is not a mere “rubber stamping” of an earlier decision made in violation of the OML.

The Court concluded that the subsequent meeting cured the prior meeting violations because it was properly noticed and, at the meeting, the Board heard comment from several key parties, heard public comment from many interested parties of the public, and engaged in renewed deliberations among the members of the Board before announcing its ultimate decision.

_____ *v. State Auditor's Office*,
797 P.2d 764 (Colo. App. 1990)

Once the failure to hold an open meeting was challenged, Lanes' "after the fact" approval of the Board's executive session was not sufficient to validate the Board's meeting.

Lanes

Executive Sessions

- General purpose of the OML is to provide citizens the opportunity to obtain information about and to participate in the policy-making process.
- A local public body may invoke an exception to the general rule by convening an executive session.
- Procedure to convene an executive session must be strictly followed.
- Failure to strictly comply with the executive session procedural requirements is treated by courts as if the public body never left the public meeting, and the public body may not avail itself of the protections afforded by the executive session exception. *Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004).

Executive Session

C.R.S. § 24-6-402(4)

The members of a local public body subject to this part 4, upon the announcement by the local public body to the public of the topic for discussion in the executive session, including specific citation to this subsection (4) authorizing the body to meet in an executive session and 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, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the following matters [set for in parts (a) – (i)]; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, except the review, approval, and amendment of the minutes of an executive session recorded pursuant to subsection (2)(d.5)(II) of this section, shall occur at any executive session that is not open to the public: *[parts (a) – (i) are omitted from this presentation]*.



Executive Session

C.R.S. § 24-6-402(2)(d.5)(II)

(A) **Discussions that occur in an executive session of a local public body shall be electronically recorded.** If a local public body electronically recorded the minutes of its open meetings on or after August 8, 2001, the local public body shall continue to electronically record the minutes of its open meetings that occur on or after August 8, 2001; except that electronic recording shall not be required for two successive meetings of the local public body while the regularly used electronic equipment is inoperable. A local public body may satisfy the electronic recording requirements of this sub-subparagraph (A) by making any form of electronic recording of the discussions in an executive session of the local public body. Except as provided in sub-subparagraph (B) of this subparagraph (II), the electronic recording of an executive session shall reflect the **specific citation to the provision in subsection (4) of this section that authorizes the local public body to meet in an executive session and the actual contents of the discussion during the session.** The provisions of this sub-subparagraph (A) shall not apply to discussions of individual students by a local public body pursuant to paragraph (h) of subsection (4) of this section.

(E) ... the record of an executive session of a local public body recorded pursuant to sub-subparagraph (A) of this subparagraph (II) shall be **retained for at least ninety days after the date of the executive session.**



Executive Session

C.R.S. § 24-6-402(2)(d.5)(II)(B)

If, in the opinion of the attorney who is representing the local public body and **who is in attendance at an executive session *that has been properly announced pursuant to subsection (4) of this section***, all or a portion of the discussion during the executive session constitutes a privileged attorney-client communication, no record or electronic recording shall be required to be kept **of the part of the discussion that constitutes a privileged attorney-client communication. The electronic recording of said executive session discussion shall reflect that no further record or electronic recording was kept of the discussion based on the opinion of the attorney representing the local public body**, as stated for the record during the executive session, that the discussion constituted a privileged attorney-client communication, *or* the attorney representing the local public body may provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged attorney-client communication in the opinion of the attorney.



Executive Session

C.R.S. § 24-6-402(2)(d.5)(II)

(C) If a court finds, upon application of a person seeking access to the record of the executive session of a local public body in accordance with section 24-72-204 (5.5) and after an in camera review of the record of the executive session, that the local public body engaged in substantial discussion of any matters not enumerated in subsection (4) of this section or that the body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of subsection (4) of this section, the portion of the record of the executive session that reflects the substantial discussion of matters not enumerated in subsection (4) of this section or the adoption of a proposed policy, position, resolution, rule, regulation, or formal action shall be open to public inspection pursuant to section 24-72-204 (5.5).

(D) No portion of the record of an executive session of a local public body shall be open for public inspection or subject to discovery in any administrative or judicial proceeding, except upon the consent of the local public body or as provided in sub-subparagraph (C) of this subparagraph (II) and section 24-72-204 (5.5).

NOTE: Failure to strictly comply with pre-executive session announcement procedures of 24-6-402(4) means that an executive session did not occur, and therefore, the provisions above are not applicable.



A large teal circle is positioned on the left side of the slide, partially overlapping the white background. The word "Zubeck" is written in white, bold, sans-serif font across the middle of this circle.

Zubeck

_____ *v. El Paso County Ret. Plan,*
961 P.2d 597 (Colo. App. 1998)

Meeting minutes cannot be redacted; failure to follow statutory requirement for calling an executive session means the meeting was not held in an executive session and the minutes are accessible to the public.

Gumina v. City of Sterling, 119 P.3d 527 (Colo. App. 2004)

Non-complying Executive Session Procedure in Gumina: (1) Council announced its intent to convene an executive session as defined in § 34-6-402(4). (2) The Council minutes indicate the Council voted unanimously to convene an executive session *before any topic of discussion was announced*. (3) After the vote, the mayor distributed a written form which included the topics of discussion. (4) Before going into executive session, Gumina was not informed that her employment would be a topic of discussion during the executive session.

The Court concluded that, because the Council did not strictly comply with the requirements for convening an executive session, the executive sessions were open meetings, and the minutes and recordings thereof must be open to public inspection.



Hanover Sch. Dist. No. 28 v. _____,
171 P.3d 223 (Colo. 2007)

Any decision made during an executive session has no binding effect, and all communications or actions arising from such decision cannot have any effect.

***Barbour**

v. Bd. of County Comm'rs of Boulder County,
487 P.3d 1015 (Colo. App. 2019)

The OML does not permit executive sessions to be convened outside a regular or special meeting, and there is no emergency exception in the OML that allows otherwise.

***Bjornsen**

Bjornsen v. Bd. of County Comm'rs of Boulder County, 487 P.3d 1015 (Colo. App. 2019)



Bjornsen, a resident of Boulder County, brought suit against the Board of County Commissioners of Boulder County (“Board”), alleging: (1) the Board held executive sessions in violation of the OML by failing to announce the topic to be discussed prior to convening in executive session and failing to record the executive sessions; and (2) the Board improperly withheld requested documents in violation of the OML. The district court granted the Board’s request for summary judgment on the executive session claim. The COA ruled that the district court erred on granting summary judgment because the undisputed material facts did not establish that the Board was entitled to judgment as a matter of law.

In its motion for summary judgment, the Board had argued that its executive sessions always complied with the requirements of the OML. The only admissible evidence before the COA on appeal was a ten-page joint affidavit from three county employees. The affidavit included a statement that, in the rare and unavoidable situations when an executive session is necessary, the Board may convene an emergency executive session outside of a regular or special meeting.

The COA concluded that the OML does not permit executive sessions to be convened outside a regular or special meeting, and there is no emergency exception in the OML that allows otherwise. Therefore, based on the evidence before the COA, the affidavit did not establish that the Board was entitled to judgment as a matter of law because the affidavit stated that the Board may have convened an executive session in violation of the OML.

*Guy

_____ *v. Whitsitt*,
469 P.3d 546 (Colo. App. 2020)

[1] Failure to identify subject matter for “legal advice” to be discussed in executive session does not comply with OML.

[2] Failure to notify public of who will be discussed in an executive session under the topic of “personnel matters” does not comply with OML.

[3] When the process followed to convene an executive session does not strictly comply with the OML, the executive session is a public meeting, and the minutes (recordings) thereof are subject to CORA request without show cause or in camera review.

Guy v. Whitsitt, 469 P.3d 546 (Colo. App. 2020)



[1] Legal advice. The COA performed an analysis of the scope of the attorney-client privilege as it relates to complying with convening an executive session under the OML. The COA determined that the attorney-client privilege does not, ordinarily, encompass information about the subject matter of the attorney-client communication.

Therefore, absent the very limited situation where the very subject matter itself is protected by the attorney-client privilege, announcing the subject matter of what is to be discussed in the executive session under the topic of legal advice is required to comply with the statutory requirement of identifying “a particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized.”

Guy v. Whitsitt

[2] Personnel Matters. The Town Council asserted that, under the terms of its contract with the Town Manager, the Town risked being sued if it provided the public any notice about anything related to the Town Manager's employment.

The COA opined that, within the scope of their employment, public employees must have a narrower expectation of privacy than other citizens, and the public has an interest in knowing public employee compensation and, in certain instances, employee work performance.

Per the COA, the simple answer to this issue is that the Town may not, by contract, evade its statutory obligations. The Town's desire to limit its exposure to a possible legal action by the Town Manager did not justify negating the public's right to know the subject of what its public officials would be discussing in the executive session.

Therefore, the Town's announcement should at least have notified the public that the personnel matters that would be discussed in executive session concerned the Town Manager.

Penalties

C.R.S. § 24-6-402(9)(a) - Any person denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation of this part 4.

C.R.S. § 24-6-402(9)(b) - The courts of record of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state. In any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees. In the event the court does not find a violation of this section, it shall award costs and reasonable attorney fees to the prevailing party if the court finds that the action was frivolous, vexatious, or groundless.



Penalties

Attorney fees and costs are not to be awarded if complaint is filed AFTER the violation was cured. *Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132 (Colo. App. 2012).

Award of attorney fees and costs is proper when a complaint is filed BEFORE the public body has cured the failed notice. *Van Alstyne v. Hous. Auth. City of Pueblo*, 985 P.2d 97 (Colo. App. 1999).





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Thank You!

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