

CML Effective Governance Workshop: Open meetings laws

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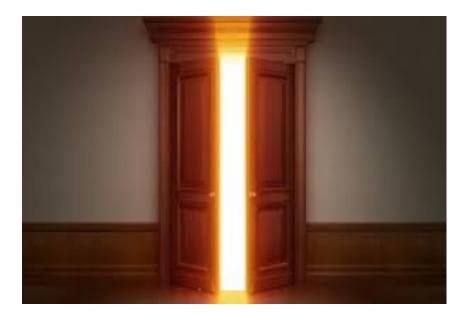


A traditional civic value in Colorado

"The council shall sit with open doors

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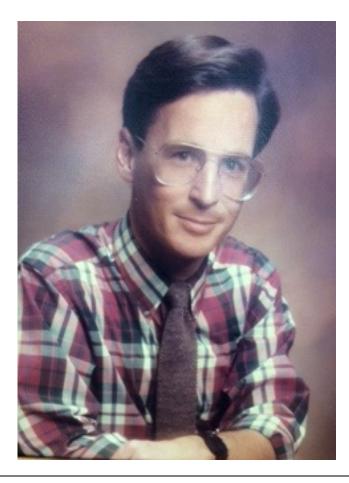




My first lawsuit . . .

"At least they can afford the inexperienced Broadwell, who graduated from college only two years ago . . ."







Overview of Colorado Open Meetings Law (OML)

- Adopted in 1991, and frequently amended and refined ever since
- Purports to apply to both statutory and home rule municipalities
- Municipalities in the appellate courts since '91: Nederland, Pueblo, Marble, Arvada, Ft. Morgan, Sterling, and Basalt



Consequences for violating the OML

- Invalidation of an action or decision
- Liability for attorney fees

 \$115,000 in Town of Basalt case (2020)
- Disclosure of executive session records

 City of Sterling case (2004)
- Loss of public trust and confidence
- Difficulties with "curing" a violation
 Pueblo Housing Authority case (1999)



What is a "public body"?

"... any board, commission, taskforce, authority or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state ... to which a political subdivision, or an official thereof, has delegated a governmental decision-making function"



What is <u>not</u> a "public body"?

- "...persons on the administrative staff of a local public body ..."
- CEOs and their appointees (like strong mayors, governors, district attorneys, etc.)
 – JeffCo D.A. case (2003)
- Departments and agencies of governments
 CDPHE case (2020)
- Any entity that is not "formally constituted"



What is a "meeting"?

- "... any kind of gathering, convened to discuss public business, in person, by telephone, or by other means of communication..."
- "... a quorum or 3 or more members of the local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken"
- Retreats, work sessions, study sessions, etc. definitely included



What is <u>not</u> a "meeting"?

- "... any chance meeting or social gathering at which discussion of public business is not the central purpose"
- Attendance at a meeting which is not part of the public body's own "policy making process"
 Costilla County case (2004)
- One-to-one communications between members of the body



Meeting via group e-mail, texting, or teleconferencing

- The new frontier; fraught with potential for OML <u>and CORA</u> pitfalls
- OML amended to expressly address emails (but not text messages)
 - Query: How would the public "attend" a meeting conducted over email or texting?
- The "REPLY ALL" trap vs. serial emails or texts between members of the body



When group emails are <u>not</u> OML violations (HB 21-1025)

Email communication between elected officials is not considered a meeting if:

- It does not relate to the merits or substance of pending legislation or other public business
- It merely relates to scheduling or availability
- It is sent by an elected official for purposes of
 - forwarding information
 - Responding to an inquiry from a person who is not a member of the public body
 - Posing a question for later discussion by the public body



Advance notice of public meetings

- 24-hour rule
- Trend toward electronic posting in lieu of physical posting
- Authority for "emergency" meetings
 - Nederland case (1996)
 - No authority for emergency executive sessions; Boulder County Case (2020)
- Notice must include "specific agenda information where possible"
 - Town of Marble case (2008)



Shout out to Marble!





Shout out to Nederland!





Executive session pitfalls

- Executive session can only occur in the context of a lawful public meeting
- Announcement of legal basis and topic of the executive session including "... 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"
- No straying from the topic of executive session
- No voting in executive session
- No "rubber stamping" of a de facto decision made in executive session



Executive session pitfalls (cont.)

- Matters of Attorney-Client Privilege
 - Mere presence of attorney not enough
- Personnel matters
 - Includes discussion of individuals only (who can opt for public discussion instead)
 - Does not include general personnel policies
 - Does not include appointments to the body
- Matters subject to negotiation
 - "directing" negotiators, not actually engaging in a negotiation



OML Special Topics

- Appointment of chief executive officers
 - Special requirements for search committees and developing search criteria
 - HB 21-1051 and the "sole finalist" controversy
 - 15-day rule for announcing finalist
- No secret balloting by public body
 - Fort Morgan case (2011)
 - Exception for electing head of body



Questions? (Check out our book!)

Open Meetings, Open Records

Colorado's Sunshine Laws and Municipal Government



