



CML Effective Governance Workshop: Open meetings laws

David Broadwell, CML General Counsel
June 18, 2021



COLORADO
MUNICIPAL
LEAGUE

A traditional civic value in Colorado

“The council shall
sit with open doors
...”



COLORADO
MUNICIPAL
LEAGUE

My first lawsuit . . .

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



COLORADO
MUNICIPAL
LEAGUE

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 not 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 not 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 and CORA 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 not 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!



COLORADO
MUNICIPAL
LEAGUE

Shout out to Nederland!



COLORADO
MUNICIPAL
LEAGUE

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!)

