

# OPEN MEETINGS, OPEN RECORDS

COLORADO'S SUNSHINE LAWS AND MUNICIPAL GOVERNMENT



*The Voice of Colorado's Cities and Towns*

2013 EDITION

## EXECUTIVE SESSIONS

Because the underlying principle of the Open Meetings Law is that the formation of public policy is the public's business and, therefore should not (generally) be conducted in secret, the exceptions to "openness" provided in the OML, are limited to topics where the General Assembly has determined that private discussion may better serve the public interest.

### Topics of executive sessions

Executive sessions are private meetings of the public body from which the general public is excluded. Executive sessions are permitted under the OML for consideration of the following topics:

- *Property transactions*

An executive session may be held to discuss the purchase, acquisition, lease, transfer or sale of real, personal, or other property interests so long as the executive session is not held to conceal an official's personal interest in the property.<sup>45</sup>

- *Attorney conferences*

Although the mere presence of an attorney does not justify an executive session, the governing body may call an executive session "for the purposes of receiving legal advice on specific legal questions."<sup>46</sup>

- *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 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.<sup>47</sup>

- *Security arrangements or investigations*

The specialized details of security arrangements or investigations may be discussed in executive session.<sup>48</sup>

- *Negotiations*

A governing body may call an executive session to "determine positions relative to matters that may be subject to negotiations," develop a "strategy for negotiations," and instruct the negotiators.<sup>49</sup>

- *Personnel matters*

Personnel matters may be discussed in executive session; however, if the discussion involves a specific employee, that employee may request an open meeting. If the discussion involves more than one employee, an executive session may be held unless all of the employees request that the meeting be open to the public.<sup>50</sup> While "personnel matters" is not defined, it is provided that this term 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 discussion of particular employees.<sup>51</sup>

- *Documents protected under Open Records Act*

Discussion that involves consideration of documents protected by the mandatory nondisclosure provision 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.<sup>52</sup>

The sections of the Open Meetings Law specifying the permitted topics for discussion in executive session have not been interpreted by the courts, and many are open to varied interpretations. Councils or boards often consider other factors beyond the legal question of whether an executive session may lawfully be held when determining whether to close a meeting to the public. Executive sessions are often controversial. While the statute may permit an executive session for discussion of a particular topic, sometimes the most politically productive way to confront an issue is during an open meeting.

45 C.R.S. § 24-6-402(4)(a).

46 C.R.S. § 24-6-402(4)(b).

47 C.R.S. § 24-6-402(4)(c). See, e.g., *Gillies v. Schmidt*, 556 P.2d 82, 86 (Colo. App. 1976).

48 C.R.S. § 24-6-402(4)(d).

49 C.R.S. § 24-6-402(4)(e). This is an apparent exception to the general prohibition on adoption of a formal position in executive session. See C.R.S. § 24-6-402(4).

50 C.R.S. § 24-6-402(4)(f)(I). See also *Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004). (Finding, by extension, that prior notification of employee to be discussed is a condition precedent to a lawful executive session, if the session is announced to discuss personnel matters).

51 C.R.S. § 24-6-402(f)(II).

52 C.R.S. § 24-6-402(4)(g); See also *infra* pages 11 to 14 (discussing items falling under the mandatory nondisclosure provisions of the Open Records Act).

### Procedure for calling an executive session

The governing body may only call an executive session at a regular or special meeting.<sup>53</sup> While the Open Meetings Law requires "full and timely notice" of the regular or special meeting, nothing in the statute requires any particular notice of the governing body's intention to hold an executive session as part of that meeting. Thus, there is apparently no notice requirement that would impair the governing body from spontaneously calling an executive session during one of its meetings.

The governing body must first announce the topic of discussion, including the specific citation to the OML 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." The body must then vote on whether to hold the session for discussion of the topic(s) announced. Two-thirds of the quorum present must vote affirmatively before the governing body can close the meeting to the public.<sup>54</sup> The minutes of the regular or special meeting must reflect the topic of discussion at the executive session.<sup>55</sup>

Colorado's Court of Appeals has held that failure to comply with the procedural prerequisites of an executive session can result in an executive session not being convened. The session is simply part of the open meeting, and the record of such session is thus open to full public inspection, under the Colorado Open Records Act.<sup>56</sup>

*Sample executive session procedures are provided in Appendix 1.*

### Deliberation is the purpose ...

The purpose of calling an executive session is merely to deliberate on sensitive matters that could be compromised by premature public disclosure, and no "adoption of any proposed policy, position, resolution, rule, regulation, or final action" may be taken in executive session.<sup>57</sup> The discussion on the record at the open meeting must indicate what policy considerations and motivations led to the final decision.<sup>58</sup>

Further, the governing body cannot utilize a subsequent open meeting to simply "rubber stamp" the position adopted by it while in executive session.<sup>59</sup> The public cannot "participate in a public meeting if [it] witnesses only the final recorded vote."<sup>60</sup>

### The executive session record

The Open Meetings Law requires that executive sessions be electronically recorded.<sup>61</sup> The executive session record must be retained for at least 90 days following the date of the executive session.<sup>62</sup> The record may then be disposed of, as are other government records, consistent with the local government's records retention policy.<sup>63</sup>

The requirement that a record be made of the executive session is solely to permit policing of the requirements that discussion in an executive session focus solely on the matter(s) for which the session is called and that the session be used for deliberation only, rather than for decision making. Thus, the Open Meetings Law provides that the executive session record is not a public record<sup>64</sup> and may only be reviewed by a judge, following certain preliminary showings, to determine if the body stayed substantially "on topic" and did not engage in unlawful decision making.<sup>65</sup>

53 C.R.S. § 24-6-402(4).

54 *Id.*

55 C.R.S. § 24-6-402(2)(d)(II). Prior to a 1996 amendment this statute required the minutes to reflect the "general topic" of the executive decision. The effect of this amendment is unclear. Presumably, the minutes should indicate the topic of discussion at the executive session with at least the same specificity as the public announcement of the topic prior to the session pursuant to C.R.S. § 24-6-402(4).

56 *Gumina*, 119 P.3d at 527.

57 C.R.S. § 24-6-402(4); *Hudspeth v. Board of County Comm'rs*, 667 P.2d 775, 778 (Colo. App. 1983); *Einarsen v. City of Wheat Ridge*, 604 P.2d 691, 693 (Colo. App. 1979). *But see* Note 49 regarding negotiating positions.

58 *Hudspeth*, 667 P.2d at 778.

59 *Littleton Educ. Assoc. v. Arapahoe Cnty. Sch. Dist. No. 6*, 553 P.2d 793, 798 (Colo. 1976); *Bagby v. School Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974); *Hudspeth*, 667 P.2d 775 (Colo. App. 1983). *But see*: comment on page 4 regarding right to cure OML violations recognized by Court of Appeals.

60 *Bagby*, 528 P.2d at 778.

61 C.R.S. § 24-6-402(2)(d.5)(II)(A).

62 C.R.S. § 24-6-402(2)(d.5)(II)(E).

63 Required pursuant to C.R.S. §§ 24-80-101-112.

64 C.R.S. § 24-6-402(2)(d.5)(II)(D).

65 *See generally* C.R.S. § 24-72-204(5.5). The Open Records Act requirements concerning how executive session records are reviewed are discussed on page 17.

## PENALTIES FOR VIOLATION OF OPEN MEETINGS LAW

The underlying goal of sunshine laws is to create an atmosphere of openness in public matters, not to "punish" those who violate the provisions. In keeping with this prevailing philosophy, the Colorado law contains no criminal sanctions for noncompliance. Persons seeking redress for alleged violations of the Open Meetings Law must satisfy conventional "standing" requirements, that is, they must show an "injury in fact to a legally protected interest."<sup>66</sup>

Although members of governing bodies do not risk criminal punishment for transgressions, any action taken at a meeting that does not comply with the Open Meetings Law requirements is void.<sup>67</sup> Courts may also enforce the requirements of the Open Meetings Law through injunction.<sup>68</sup> Of course, there is also the potential for a serious loss of confidence in the government when official actions are invalidated because laws aimed at assuring open government are violated.

Furthermore, after 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.<sup>69</sup>

Finally, if the court finds that a public body has violated the Open Meetings Law, it must award the prevailing citizen or citizen's costs and reasonable attorney fees.<sup>70</sup> A prevailing public body, on the other hand, may only be awarded costs and attorney fees if the court finds the action frivolous, vexatious or groundless.<sup>71</sup>

## SPECIAL PROVISION REGARDING CHIEF EXECUTIVE OFFICER SEARCH COMMITTEE PROCEDURES

A "search committee" of a local public body is required to take the following steps in connection with a search for a "chief executive officer of an agency, authority, institution, or other entity" in an open meeting:

- establish job search, including writing the job description;
- set the deadline for applications; and
- formulate the requirements for applicants, the selection procedures, and the time frame for appointing or employing the chief executive officer.<sup>72</sup>

A list of finalists must be made public no less than 14 days prior to the date on which one of the finalists is appointed or employed.<sup>73</sup>

<sup>66</sup> *Pueblo School Dist. v. Colorado High School Activities Assoc.*, 30 P.3d 752, 753 (Colo. Ct. App. 2000). (Plaintiff with actual notice of meeting lacks standing to complain of district's alleged failure to provide "full and timely notice.")

<sup>67</sup> C.R.S. § 24-6-402(8); See *Gray v. City of Manitou Springs*, 598 P.2d 527, 529 (Colo. Ct. App. 1979).

<sup>68</sup> C.R.S. § 24-6-402(9).

<sup>69</sup> C.R.S. § 24-72-204(5.5) and page 30 *infra*.

<sup>70</sup> C.R.S. § 24-72-204(5.5). Furthermore, this award does not require that the violation be "knowing or intentional." *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 601-602 (Colo. App. 1998).

<sup>71</sup> C.R.S. § 24-6-402(9).

<sup>72</sup> C.R.S. § 24-6-402(3.5). Among the questions raised by this language is the extent to which this statute may apply when a local government does not formally designate a "search committee," as when the governing body itself conducts the process of hiring a chief executive officer. Also unclear is the potential scope of the term "chief executive officer;" it seems clear that at least city managers in municipalities utilizing the council-manager form of government would be included.

<sup>73</sup> C.R.S. § 24-6-402(3.5). The statute does not specify how this list is to be made public. For the definition of "finalist," as used in this statute, see C.R.S. § 24-72-204(3)(a)(XI).