JSNE
Educating the Community

Colorado Legislature and Governor continue multi-year stream of new legislation intended to shade legislative activities from the public March 14, 2024

JSNE Comment. In 1985, by a margin of 20%, Colorado voters approved the Sunshine Law, an open government ballot initiative. In recent years, the Colorado General Assembly and Governor have chipped away at Sunshine with new countering laws /revisions that directly weaken government transparency. This week, Governor Polis signed SB24-157 which removes any form of written communications between members from classification as public business. HB23-1306, enacted in 2023, draws a line between officials' public and private social media pages, allowing public officials to remove public posts/comments from their social media not paid for by state monies. HB24-1296, currently in committee, allows records custodians to declare a CORA requestor as vexacious for purposes of charging for release of public records.

In 2023, two sitting House Representatives filed and settled a suit against legislative leadership, calling out violations of the open meeting law. In retaliation, within months, they were removed from key House committees. **The following articles provide an overview of the situation.**

March 15, 2024 - Just when you thought public trust in government couldn't get any lower
Colorado Newsline Commentary – Steve Zanberg & Jeffery Roberts

03/11/2024 - Happy National Sunshine Week, Everybody; Next with Kyle Clark
Next 9News - Kyle Clark

03/11/2024 - Bill exempting state lawmakers from provisions of the Colorado Open Meetings Law sent to governor's desk
Colorado Freedom of Information Coalition - Jeffery Roberts

10/06/2022 - Fifty years ago, voter approval of the Sunshine Law ushered in a new era of government transparency in Colorado. It also meant no more beer for the state Capitol press corps
Colorado Freedom of Information Coalition- Jeffery Roberts

03/05/2024 - Amended CORA bill requires a government entity to prove a records requester is 'vexatious'
Colorado Freedom of Information Coalition (CFOIC) - Jeffery Roberts

06/09/2023 - With first-of-its-kind law, Colorado officials can now block you on social media

Denver Post – Seth Klamann

09/05/2024 - Settlement reached in lawsuit alleging "pervasive" violations of open meetings laws in Colorado House

Colorado Sun – Jesse Paul and Elliot Wenzler

12/05/2023 - Legislators removed from Judiciary Committee months after suing Colorado House leaders

Westword – Hannah Metzger

01/09/2024 - Rep. Marshall calls his inclusion in Colorado Open Meetings Law case 'hit job'

CCM Highlands Ranch Herald - Haley Lena and McKenna Harford

06/16/2023 - Judge Jeffrey Holmes rules against members of Douglas County School Board for a second time

Douglas County News – McKenna Harford

March 15, 2024 - Just when you thought public trust in government couldn't get any lower

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https://coloradonewsline.com/2024/03/15/just-when-you-thought-public-trust-in-government-couldnt-get-any-lower/

90% of all future discussions of potential bills at Colorado Legislature could occur outside public view

Irony is the juxtaposition of one conceptual proposition with a directly contrary reality, like a "vegetarian butcher" or something that's "seriously funny." Or the swift enactment — during Sunshine Week — of a new state law that lets members of the Colorado General Assembly discuss and formulate public policy outside of public view.

You heard that right. Legislators and Gov. Jared Polis chose the very week in which journalists and transparency advocates annually celebrate federal and state open-government laws to essentially exempt the state Legislature from much of the Colorado Open Meetings Law, first initiated by the voters in 1972.

The open meetings law declares it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret."

Our state's appellate court judges have recognized the underlying intent of the statute is to ensure that the public is not "deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by [a public body]." The law is meant to provide "the public access to a broad range of meetings at which public business is considered; to give citizens an expanded opportunity to become fully informed on issues of public importance, and to allow citizens to participate in the legislative decision-making process that affects their personal interests."

Colorado Senate President Steve Fenberg, photographed at the state capitol in Denver, March 8, 2023, was the Senate sponsor of Senate Bill 24-157 (Kevin Mohatt for Colorado Newsline)

We acknowledge that some provisions in the 52-year-old law required updates as they pertained to the business of the state Legislature. It's not easy to comply with a mandate that meetings concerning public business between two members of a legislative chamber must be open to the public, with minutes "taken and promptly recorded." But Senate Bill 24-157 was rushed, and some organizations including the Colorado Freedom of Information Coalition were excluded from the sponsors' stakeholder process. Our suggested amendments after the bill's introduction were ignored.

The bill, signed into law by the governor just a day after final passage, goes too far and will undermine public confidence in the Legislature's actions.

The new law encourages and legalizes legislators engaging in an endless series of sub-quorum discussions of pending bills and amendments, via emails, text messages, phone calls or in-person meetings, without providing notice to the public or the keeping of any minutes of such policy making conversations. In other words, the public will be left in the dark about "the motivations, policy arguments and other considerations" around legislation that affects them directly.

Don't worry, elected officials tell us, because the emails, text messages, etc., exchanged between lawmakers are accessible, after the fact, "pursuant to the Colorado Open Records Act." That's what the newly passed law says. But here's the catch: CORA declares that all communications by, or "assembled for" any state legislator that "relates to" the drafting of bills or amendments are not public records at all. So, there's no need for legislators to hold onto, much less to make public, those electronic written communications, because they are not public records.

It is safe to assume that more than 90% of all future discussions of potential bills, amendments, appointments, resolutions, rules, etc., in both chambers of our state Legislature will occur outside of public view. Not only will such policies be far more likely to be the product of backroom wheeling and dealing, but even ordinary non-tainted policies will rightfully be subject to suspicion and skepticism by the general public.

Forty-one years ago, Colorado's Supreme Court held that legislative caucus meetings must abide by the open meetings law, stating that the act was "designed precisely to prevent the abuse of secret or star chamber sessions of public bodies." By exempting the General Assembly from a transparency law applicable to every other public body in the state, legislators have greatly reduced the level of public trust in that institution and cast a veil of secrecy over whatever legislation is produced.

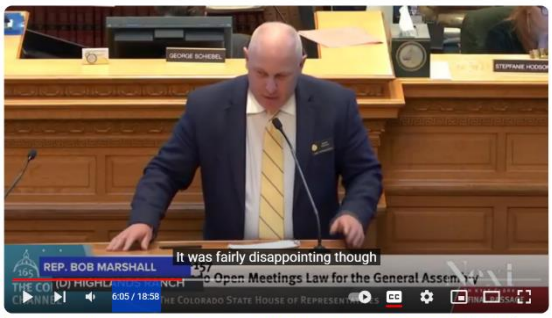
Ironic for sure that this happened during Sunshine Week. And a sad day, of any week, for the people of this state.

(Home)

03/11/2024 - Happy National Sunshine Week, Everybody; Next with Kyle Clark

Next 9News - Kyle Clark

https://www.youtube.com/watch?v=8w35MjZuNdE



"Democrats move to pull some shade over National Sunshine Week. - And the Governor has a power that flies under the radar - but not today.

(go to 5:15). Democrats at the state capitol are exempting state legislators from some open meetings laws over the strong objection of open records advocates and journalists. The bill that now heads to the governor's desk will redefine what counts as public business allowing legislators to debate bills privately with one another via text and email. Marshall and EPPS were part of a small minority of Democrats who joined with Republicans in opposing the bill as it advanced today." (Home)

03/11/2024 - Bill exempting state lawmakers from provisions of the Colorado Open Meetings Law sent to governor's desk

Colorado Freedom of Information Coalition - Jeffery Roberts

https://coloradofoic.org/bill-exempting-state-lawmakers-from-provisions-of-the-colorado-open-meetings-law-sent-to-governors-desk/

"Update: Gov. Jared Polis signed SB 24-157 into law on Tuesday, March 12. The governor wrote in a signing statement: "As a coequal branch of government, the Executive should rarely intrude on the inner workings of the Legislature, and the Executive Branch warrants the same deference from the Legislature on its internal operations."

State lawmakers Monday sent a bill to Gov. Jared Polis that narrows the definition of "public business' in the Colorado Open Meetings Law as it applies to the legislature and lets members of the General Assembly communicate by email and text message without it being a "meeting" under the law.

Senate Bill 24-157 is necessary because the open meetings law, **enacted by the voters of Colorado in 1972**, "clearly does not meet the way we do business in a modern legislative workplace," said House Speaker Julie McCluskie, a primary sponsor of the measure.

"We exist now in a digital age, where cellphones, email communication, written communication happens at a lightning pace and is something that a 1972 law could never contemplate or imagine," the Dillon Democrat told fellow legislators during second reading on the bill Friday. "The democratic process thrives when we make connections, invest in understanding each other, listen to one another, connect and learn."

But opponents of the bill, which passed the House on a 39-22 final vote, are concerned it will make the legislative process less transparent for the public and press. The legislature has been sued twice in the past year over open meetings law issues, with a judge ruling in January that its use of an anonymous "quadratic voting" system to rank bills violated the statute and the House agreeing last September to bar representatives from auto-deleting messages exchanged among themselves.

"We have an opaque process. Even with the CORA (Colorado Open Records Act), we have a very opaque process," said Rep. Ken DeGraaf, R-Colorado Springs. "This is going to make it more opaque. That is not the way to build trust with the people of Colorado."

In committee testimony, the Colorado Freedom of Information Coalition said the bill will encourage state lawmakers to formulate and debate public business in an unlimited way via email, text message and ephemeral messaging apps such as Signal without the public's knowledge and scrutiny.

If such electronic communications haven't already been deleted, we stressed, they likely would not be available to request because CORA excludes "all documents prepared or assembled by a member of the general assembly relating to the drafting of bills or amendments" from the definition of "public records." Those are considered "work product."

For the past 52 years, the open meetings law has declared it 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 law requires state public bodies such as the legislature and its committees to open meetings of two or more members at which public business is discussed or formal action is taken. For state public bodies, "full and timely" notice is required before meetings at which the adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or at which a majority or quorum is expected to be in attendance. Minutes must be "taken and promptly recorded."

Subject to the law are meetings held "electronically," which covers email and text-message conversions about public business, defined by Colorado courts to mean that a "demonstrated link" exists between the meeting's content and the public body's policy-making responsibilities. As currently written, the statute lets elected officials exchange emails about scheduling and their availability, and pose questions for later discussion, but they can't discuss the "merits or substance" of pending legislation or public business without risking a violation of the law.

If SB 24-157 is signed by the governor, "any form of written communication, electronic or otherwise, exchanged by two or more members of the General Assembly" would not be subject to the open meetings law, but any records of those communications would still be subject to disclosure "to the extent required by the Colorado Open Records Act." Notice and minutes would not be required for meetings where a quorum is not "contemporaneous," also exempting communications by email, text message or other electronic means.

The definition of "public business," as it pertains to the legislature, is limited in SB 24-157 to introduced legislation and other matters before a committee. It could also mean draft legislation discussed by a quorum of a committee during a legislative session or by a quorum of an interim committee.

Rep. Bob Marshall, one of two legislators who sued the House last year over open meetings issues, said the bill "may have overshot the goal" by applying the law only to contemporaneous quorums. In floor debate, the

Highlands Ranch Democrat mentioned his **successful lawsuit** against four members of the Douglas County school board who were found by a judge to have violated the Sunshine Law by firing the superintendent in a series of one-on-one meetings.

"The contemporaneous component is a difficult one to thread, but it's very important because we've already just given a roadmap to basically violate the entire open meetings law's purpose without some kind of guardrails around that," he said.

Reforms are needed, added Marshall, who said he believes electronic communications never should have been considered meetings under the open meetings law. "But without any retention requirement for those documents, go right back to automatic deletion and they will never be open and transparent to individuals who might want the ability to see what we're doing."

Republican House members tried unsuccessfully Monday to have SB 24-157 sent back to the House Judiciary Committee for further consideration. "We don't feel that our constituents and stakeholders were fully involved in the process," said Rep. Ty Winter, R-Trinidad, the assistant minority leader. "And I truly believe that we missed an opportunity for both sides, along with our citizens, to get together and try to come up with a piece of legislation that would make all sides happy."

But Rep. Chris deGruy Kennedy, a Lakewood Democrat who co-sponsored SB 24-157, said, "Everyone knows what's in the bill. We're ready to vote on it."

"As we reflect on the three things we're doing in the bill, none of this is shielding the public from being able to see what we're doing," Kennedy added. "I think that it is fair to say that these are clarifications and definitions of how this bill is supposed to operate … We're not trying to pretend that we got it perfectly right, but I have not yet heard better solutions."

As amended in the Senate, SB 24-157 requires legislative leaders over the next three years to discuss the open meetings law as it applies to the General Assembly during meetings of their **executive committee** and to take public comment during such meetings." (Home)

10/06/2022 - Fifty years ago, voter approval of the Sunshine Law ushered in a new era of government transparency in Colorado. It also meant no more beer for the state Capitol press corps

Colorado Freedom of Information Coalition- Jeffery Roberts

https://coloradofoic.org/fifty-years-ago-voter-approval-of-the-sunshine-law-ushered-in-a-new-era-of-government-transparency-in-colorado-it-also-meant-no-more-beer-for-the-state-capitol-press-corps/

One day in October 1985, the late Neil Westergaard, then The Denver Post's state Capitol bureau chief, introduced me to the ancient rolltop desk I would use for the next five years as a statehouse reporter for the newspaper.

Rummaging in the drawers and cubby holes, I found rubber bands, paper clips, old "pink book" guides to past legislative sessions and something else — several bottle openers with the Coors logo on them. The openers and an office refrigerator that no longer worked, I learned, were relics of a bygone era that had started to fade away 13 years earlier — now 50 years ago next month — with the passage of Colorado's Sunshine Law

Approved by Colorado voters in November 1972, the Sunshine Law ushered in a new era of government transparency in our state, establishing stricter rules for open meetings at the Capitol and providing the basis for the more wide-ranging transparency law that now dictates how all public bodies statewide conduct business.

It also required lobbyists to disclose how much money they spend to influence legislation in Colorado. And that included William R. Spencer, lobbyist for the Colorado Beer Distributors Association.

"When the first quarterly lobbyist reports were filed, I pored over them at the Secretary of State's office and wrote down everything that looked interesting — including, in the spirit of transparency, how much the state alcohol lobby spent to keep the refrigerator in the press room stocked with beer," recalled retired Denver Post politics editor Fred Brown, a longtime board member and secretary of the Colorado Freedom of Information Coalition.

Near the end of a **story** published on Apr. 15, 1973, Brown reported that Spencer had spent about $140 a month to provide "beer for Statehouse press corps."

"That pretty much ended the beer distribution," Brown wrote in an email to CFOIC, "and also had a chilling effect on the afternoon poker games, and on my warm relationships with my colleagues — at least for a while. (And then, when The Post became a morning paper, that definitely put the kibosh on the carefree, boozy afternoons.)"

Promoted by Common Cause, the Colorado Sunshine Act of 1972 appeared on the ballot as a citizen-sponsored initiative and passed with 491,073 votes in favor to 325,819 against.

The **law** had three primary elements: 1) requiring elected state officials and judges to file financial disclosures with the state attorney general's office; 2) requiring lobbyists to register with the secretary of state's office and file detailed financial disclosure forms that are "open and readily accessible for public inspection" for five years; and 3) opening meetings of two or more members of any board or other policy-making body of the legislature or state agency "at which any public business is discussed, or at which any formal action is taken."

The open meetings provision broadly declared state policy to be "that the formation of public policy is public business and may not be conducted in secret." It mandated that meetings at which a quorum or a majority are in attendance be held "only after full and timely notice to the public." Minutes had to be "promptly recorded" and open for public inspection. No action taken at a meeting not open to the public would be valid. And "any citizen of this state" could seek an injunction in court to enforce the law.

Plus, according to the **1972 Blue Book analysis** of ballot proposals by Legislative Council, state government boards could no longer meet behind closed doors, in executive session, as permitted by a **three-paragraph public meetings law enacted in 1963**.

The Sunshine Law "is perhaps the most significant single act of legislative reform in Colorado's history," wrote Craig Barnes, director of Common Cause's Colorado Project, in a **Dec. 12, 1972, letter** to the organization's founder, John Gardner.

Some state officials were surprised by the Sunshine Law's passage, according to accounts in The Denver Post and the Rocky Mountain News. "There was substantial opposition ...," says Barnes' letter, which is kept in the special collections of the Princeton University Library, "but the additional issues on the ballot diverted our opponents' attention and advertising money." Noting "cries of anguish" from Gov. John Love, the lieutenant

governor, several lawmakers and some judges, he predicted Common Cause would "have to fight extremely hard to hold onto" the Sunshine Law.

Barnes was right. Sen. Hugh Fowler, a Littleton Republican, sponsored an unsuccessful bill in 1973 to repeal the entire Sunshine Law. What The Post described as "a more moderate approach" from Senate Majority Leader Joe Schieffelin, a Lakewood Republican, and Sen. Ralph Cole, a Littleton Republican, also failed. It would have restored the right of legislators to meet in closed party caucuses and eliminated a requirement that legislators report the financial interests of family members.

State Attorney General John Moore issued a 13-page **legal opinion** on the eve of the 1973 legislative session, declaring that the open meetings provisions didn't apply to local governments or school boards. Those provisions also didn't prevent Love from discussing public business with his staff behind closed doors, nor did they prevent the AG or his assistants from discussing legal strategy in private with state department heads.

But if two or more legislators from the same committee met anywhere to discuss pending business of that committee, the law required them to provide notice. "Any such meetings designed to subvert the intent of the open-meetings law are unlawful," Moore declared. And the legislature's political party caucuses could no longer make decisions on floor voting and legislative policy in secret.

The Sunshine Law's application to party caucuses would be an issue in the courts for the next decade.

In a **lawsuit**, Cole asserted the law was unconstitutional and shouldn't be applied to legislative caucuses. It violated his freedom-of-speech rights guaranteed by the First Amendment and the Colorado Constitution, he contended.

But in 1983, the Colorado Supreme Court upheld a lower court's declaratory judgment that legislative caucus meetings are subject to the law. The open meetings law, the justices wrote, "strikes the proper balance between the public's right of access to information and a legislator's right to freedom of speech." The Court in ***Cole v. State*** included in its ruling a statement about the importance of freedom of information that would be quoted in many future court cases, even **outside of Colorado**: "A free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions."

The Colorado Supreme Court in 1974 **affirmed** that the voter-initiated Sunshine Law did not apply to school boards and other political subdivisions of the state. Those were subject to the terse 1963 law, which said that "all meetings of any board, commission, committee, or authority of this state or a political subdivision of the state … are declared to be public meetings and open to the public at all times." The 1963 law permitted executive sessions "for consideration of documents or testimony given in confidence," but final policy decisions were not allowed during closed meetings.

A lawsuit challenged the Denver school board's contention that the 1963 law permitted regular meetings with the superintendent that excluded the public. The Supreme Court justices disagreed with the Denver board in its 1974 ruling, holding that "regardless of whether formal action is taken," the superintendent conferences were meetings within the meaning of the law and "must be publicly scheduled and opened to the public and news media."

While that ruling was helpful, open-government proponents wanted a more robust and clearly defined Sunshine Law that would apply to both state and local public bodies. The 1963 law had "no definition of meeting, utter vagueness on when and how local public bodies may go into executive session, no requirement of notice or minutes," said Tom Kelley, a longtime CFOIC board member and past president.

In 1991, as attorney for the Colorado Press Association, Kelley drafted the comprehensive, two-tiered **legislation** that became today's **Colorado Open Meetings Law**. And over the past two decades, **amendments and court rulings** have generally made the law stronger and ensured compliance by governmental bodies.

The revised provisions mandating access to meetings of all "public bodies" still appear in the Colorado Revised Statutes alongside the public official-disclosure and lobbyist-regulation provisions, in an **article** titled "The Colorado Sunshine Act of 1972." (Home)

03/05/2024 - Amended CORA bill requires a government entity to prove a records requester is 'vexatious'

Colorado Freedom of Information Coalition (CFOIC) - Jeffery Roberts

https://coloradofoic.org/fifty-years-ago-voter-approval-of-the-sunshine-law-ushered-in-a-new-era-of-government-transparency-in-colorado-it-also-meant-no-more-beer-for-the-state-capitol-press-corps/

"A reworked Colorado Open Records Act bill endorsed by a House committee Monday shifts the legal burden of proving that a requester of records is "vexatious" to a government entity's records custodian.

The **introduced version** of House Bill 24-1296 had given records custodians the power to consider anyone — except a journalist — as vexatious if that person demonstrated "an intent to annoy or harass a custodian," limiting their access to public records under CORA for 30 working days and making them go to court to challenge that designation.

But with amendments approved by the House State, Civic, Military and Veterans Affairs Committee, the **bill** now requires a records custodian to ask a district court to determine that an individual or entity is vexatious. If a judge decides a requester is vexatious, after weighing 11 factors that include the number of requests made and "a pattern of conduct that amounts to an abuse of requests or an interference with the public entity's operation," the records custodian could delay providing records to that person for 30 working days. And that person would be considered vexatious for three years.

Rep. Cathy Kipp, the Fort Collins Democrat who introduced HB 24-1296 to curb the "abuse of CORA," said she changed the vexatious provision because "there was discomfort that it could be abused by custodians. But really our intent is that this vexatious-requester language would be used fairly infrequently. I don't think there would be very many people who would come under the term 'vexatious requester.'"

"The individual has to get to a really high level of annoyance," added the bill's co-sponsor, Rep. Matt Soper, R-Delta. "… And all of these determining factors have to be weighed against a public-interest factor. It's a very, very, very high bar to be able to clear."

Rep. Elisabeth Epps expressed concerns, however, that some people who are labeled vexatious might have to fight the government in court without an attorney. "I don't think it's likely to be an even adversarial process," the Denver Democrat said.

Approved 7-4 by the committee, the CORA bill as rewritten gives records custodians five working days, rather than the law's current deadline of three working days, to comply with records requests, and an additional 10 working days if "**extenuating circumstances**" apply. The current deadlines would remain in place for requests made by the news media, as defined in Colorado's **reporter's shield law**.

The measure establishes a new extenuating circumstance, extending the response period an extra 10 working days when "the custodian, or a person who is essential to the process of responding to requests, is not scheduled to work within all or part of the five-day period." It also allows a records custodian to treat multiple CORA requests made by the same person within 14 days as one request — ensuring the requester gets only one free hour before "research and retrieval" charges kick in.

Kipp said the bill "is a good balance between governmental transparency and our (government) organizations that are stretched thin." Representatives of several government associations testified in favor of the measure, but the committee also heard plenty of opposition from individual Coloradans who regularly use CORA.

HB 24-1296 "send a real clear message to the people of Colorado as to how the legislature views ordinary citizens in this state and our ability to see what our government is up to," said Cory Gaines, who lives in Sterling.

The Colorado Freedom of Information Coalition opposes the additional obstacles created by HB 24-1296, especially when **exorbitant fees** already can be a significant barrier to obtaining public records. Because of an **inflation factor** built into CORA since 2014, state and local government entities starting July 1 will be allowed to charge an hourly rate to process requests that likely exceeds $40 after providing the first hour at no charge, up from the current maximum rate of $33.58.

At Kipp's urging, the committee also removed a controversial provision from her bill that would have added a broad new CORA exemption allowing the withholding of "any record containing information that, if disclosed, would invade another individual's personal privacy." CFOIC argued that the proposed provision was open to interpretation and could overturn decades of judicial precedent in Colorado regarding the availability of public employees' personnel files, including disciplinary records that could show misconduct.

HB 24-1296 also let a records custodian take 30 working days to provide records to someone who plans to use the documents "for the direct solicitation of business or pecuniary gain" and recover "the full cost of associated with responding" to such a request. A requester could appeal the custodian's determination in district court.

The bill also makes a government employee's calendar "that is kept and maintained primarily pursuant to the employee's employment" off limits to public inspection, except for the calendars of elected officials or "employees in leadership positions." Such records, however, would be available to journalists.

Another amendment added Monday requires government entities to post information on their websites about how members of the public can request public records.

HB 24-1296 now heads to the House Appropriations Committee. The bill requires appropriations totaling $236,815 to several state agencies in FY 2024-25, according to its fiscal note." (Home)

06/09/2023 - With first-of-its-kind law, Colorado officials can now block you on social media

Denver Post – Seth Klamann

https://www.denverpost.com/2023/06/09/colorado-social-media-polis-block-supreme-court/

Elected officials in Colorado can now ban people from their private social media pages for any reason under a bipartisan bill signed into law Monday, a first-of-its-kind statute that's prompted criticism from First Amendment advocates.

But with a potentially decisive U.S. Supreme Court decision looming, will the new law stand?

HB23-1306, enacted into law with Gov. Jared Polis' signature, seeks to draw a line between officials' public and private social media pages. Under the law, a public page — like one linked directly to an office or run using public resources — couldn't ban anyone from interacting with it. But a private one — an account that predates an official's election or one that's kept distinct from official action — now can.

It's the first law of its kind in the United States, First Amendment experts and the bill's proponents say. It follows standards set by a federal appellate court, which ruled in 2022 that a Michigan city manager could ban a frequent critic from his personal Facebook page.

The bill's sponsors — Republicans Rep. Matt Soper and Sen. Bob Gardner and Democrats Rep. Leslie Herod and Sen. James Coleman — argued that the proposal was akin to removing an unruly audience member from a town hall or booting an unwelcome visitor from a public official's front lawn. While officials assume added scrutiny when they run for office, Herod said in late April that social media was the "wild, wild West" and that the bill was an attempt to bring some rules into place.

"It wasn't contemplated by the Founding Fathers," she said of social media. "If someone comes into the (House) gallery and yells obscenities, we can ask them to leave. If they come to our town halls, we can do the same. So social media — we have to figure out how to manage that."

Amid a contentious legislative session, the bill enjoyed bipartisan support: Over the objections of the ACLU, it unanimously cleared the most ideologically diverse House committee in April (though subsequent votes were more partisan).

Polis — a frequent tweeter — didn't respond to requests for comment about the bill before its passage. In a letter accompanying his signature Monday, he said he understood lawmakers' intent and thought the law "posits a reasonable division" between public and private accounts.

"However, I also want to make sure that elected officials don't view the presence of this statute as a safe harbor for the activity allowed under this law due to ongoing litigation," he wrote.

Polis was referring to a case set to be heard before the U.S. Supreme Court determining whether public officials can block people on social media. There are dueling, lower court decisions on that front: One, which underpins Colorado's new law, says bans are OK on private accounts. Another, from California, sided with parents who'd been blocked from school board members' accounts.

The high court is set to consider the question in the coming months, which could render Colorado's law moot. The state has its own history here, too: Two state lawmakers have lost lawsuits for blocking people on social media;

the taxpayer footed the bill in both cases. U.S. Rep. Lauren Boebert won a lawsuit against someone whom she had blocked on a private page.

As they await a definitive answer from the Supreme Court, First Amendment advocates are leery of the latitude Colorado lawmakers have granted themselves. The line between a public and private account is blurry, they argued, if elected officials are discussing public action or policy.

"Under Colorado's new law, a public official can opt to use a personal social media account to carry out the duties of their office and claim to be free to block critics from that account as long as they do not use government resources to operate the account," said Katie Fallow, senior counsel at Columbia University's Knight First Amendment Institute. "The likely result is that more and more elected officials will claim that their social media accounts are private, even when they are functionally indistinguishable from official accounts. This fundamentally undermines core democratic principles."

Though the law has been described as a way to address online abuse, it can also be wielded against anyone with whom an elected official disagrees, argues Jeffrey Roberts, the executive director of the Colorado Freedom of Information Coalition. It's true that the average private citizen can block people on social media with abandon. But officials' accounts often act as a "public forum," Roberts said, and Polis wrote that those officials "have a higher standard to be open to the public."

"You can do things to regulate really outrageous behavior, but it's different when someone disagrees with you and you shut them down," Roberts said. "That's the thing to be really looking out for."

It's unclear if anyone will challenge Colorado's law before the Supreme Court settles the question, or if that challenge would matter in the face of the higher litigation. Roberts said his organization typically doesn't directly intervene via litigation but that they would be monitoring for lawsuits. The ACLU, which testified against the bill during the session, referred to that testimony when asked for comment this week." (Home)

09/05/2024 - Settlement reached in lawsuit alleging "pervasive" violations of open meetings laws in Colorado House

Colorado Sun – Jesse Paul and Elliot Wenzler

https://coloradosun.com/2023/09/05/colorado-house-open-meetings-lawsuit/

"State Reps. Elisabeth Epps of Denver and Bob Marshall of Highlands Ranch entered into a consent decree Tuesday with the Colorado House of Representatives, the chamber's Democratic and Republican caucuses and partisan leadership in the chamber.

A settlement has been reached in the unusual lawsuit filed this summer by two Democratic state representatives alleging "pervasive" violations of the state's open meetings laws by members of the Colorado House.

State Reps. Elisabeth Epps of Denver and Bob Marshall of Highlands Ranch offered Tuesday to enter into a court-enforced deal, known as a consent decree, with the Colorado

House of Representatives, the chamber's Democratic and Republican caucuses and partisan leadership in the chamber.

As part of the settlement, which must be approved by a judge, the defendants agreed to not discuss public business or take a "formal action" during a meeting where a quorum of a state body is expected to be in attendance without first providing public notice of the gathering and promptly making minutes of the meeting publicly available.

Also, two or more members of the House "shall not discuss public business through any electronic means (including, without limitation, any instant messaging platform or application) unless written minutes of such meetings are made publicly available upon request." Those minutes would have to be released under the Colorado Open Records Act.

Finally, the defendants agreed to pay the lawyer representing Epps and Marshall $13,000 within 45 days to cover his fees. Taxpayers would be on the hook for the sum.

"The settlement of this dispute does not establish wrongdoing by any party," the agreement says.

Epps and Marshall filed their lawsuit in July, alleging that Colorado House Democrats' near-weekly caucus meetings, during which pending legislation is discussed, should be publicly noticed and that meeting minutes be recorded and offered to the public. The lawsuit claimed members of the House Democratic caucus "directed legislative aides to omit or disguise these mandatory meetings from representatives' calendars."

The lawsuit also argued that House Democrats' use of Signal, an encrypted smartphone messaging system in which messages can be automatically deleted, also violates the state's open meeting and public records laws. According to the legal action, representatives used Signal to discuss witness testimony and how each lawmaker would vote on bills.

The legal action argued that House Republicans have violated open meetings laws, too, through their regular caucus meetings and communications on Signal, an app through which users can send and automatically delete encrypted messages.

Lawmakers' use of Signal, which was first released in 2014, has become more widespread over the past two or three years.

As part of the consent decree, state representatives would be instructed to no longer be able to use Signal's automatic deletion function.

The lawsuit was highly unusual since Epps and Marshall sued their own caucus and its top leaders, House Speaker Julie McCluskie and House Majority Leader Monica Duran. It heightened tensions in the House Democratic caucus that built through the 2023 legislative session.

During the final day of the term, during a meeting of the House Democratic caucus, Epps directly criticized McCluskie's leadership, saying she had been too lenient with Republicans and had allowed last-minute bills to be forced through by Democrats.

"You asked to do this," Epps said. "I'm asking you to do much, much more."

McCluskie, of Dillon, and Duran, of Wheat Ridge, said in a joint statement Tuesday that Colorado House Democrats "believe deeply in the values of transparency and open government."

"Through this agreement, we continue our commitment to ensuring full public access, transparency and fairness in the legislative process," the statement said.

The consent decree, if approved by a judge, would also apply to House Minority Leader Mike Lynch, R-Wellington, and the chamber's GOP caucus.

Marshall, in an interview with The Colorado Sun, celebrated the agreement.

"It's going to get us where we need to go, I hope," he said.

Marshall said the next step is pursuing a bill aimed at modernizing Colorado's open meetings and public records laws. The consent decree says the agreement would be in effect until the laws are amended, hinting that changes are coming.

If a judge signs off on the consent decree, the agreement would be enforceable by the courts.

The legislature isn't in session. The 2024 lawmaking term begins in January and runs 120 days." (Home)

12/05/2023 - Legislators removed from Judiciary Committee months after suing Colorado House leaders

Westword – Hannah Metzger

https://www.westword.com/news/legislators-axed-from-judiciary-committee-after-suing-colorado-house-18544883

Just five months after a pair of lawmakers sued the Colorado House of Representatives over alleged illegal meetings, they both have been axed from their positions on the prestigious House Judiciary Committee.

"Serving on a member's top choice of committee is a privilege — not a right," House Speaker Julie McCluskie said in a statement Wednesday after releasing the committee assignments for next year's legislative session.

Rather than the lawsuit, McCluskie said she removed Democratic representatives Elisabeth Epps and Bob Marshall to address the "level of acrimony in the personal relationships on the committee." She alluded to conflicts that broke out between Epps and other legislators during last month's special session after Epps said "Free Palestine!" during her remarks on a bill.

The comment prompted yells and insults from Republicans. GOP Representative Ron Weinberg later responded in a speech on the floor, with Epps repeatedly yelling over Weinberg that he was "out of order." The disruption halted floor work for around an hour. At one point during talks with leadership, Epps shouted at Judiciary Committee Chair Mike Weissman, saying he had "failed and shamed us on Judiciary Committee this session."

"My decisions on where to appoint members depend on their respect of their colleagues, ability to collaborate, and adherence to decorum, which was clearly violated during our special session last month," McCluskie said in her Wednesday statement.

Regarding Marshall, she said his removal was intended "to help deliver the progressive outcomes our caucus is looking for." The District 43 rep is one of the most conservative Democrats in the legislature, representing a district that has never before elected a Democrat. Last session, he was often the only House Democrat to vote against progressive legislation, including bills to expand **insurance coverage for abortion**, provide **mental health screenings in schools** and cap **interest rates on medical debt**.

But with the Judiciary Committee holding a nine-to-four Democrat-Republican majority, Marshall's opposition could never single-handedly bring down progressive policies.

Marshall tells *Westword* he feels like he is being publicly "disciplined" by leadership.

"I've had colleagues express that it does seem like retaliation for the open-meetings lawsuit," Marshall says. "The speaker's comments [in a ***Colorado Sun* article**] made it sound like I was also being punished for personal issues or collaborative issues rather than what she had expressed to me."

Marshall says McCluskie told him he was being removed to move the committee in a more progressive direction and to have a more collaborative process. "I actually read all the bills and ask questions and don't just rubber-stamp things," Marshall says. "If that is considered not collaborative, then we've got a big problem."

McCluskie also removed Marshall as her designee on the State Board of Equalization a few weeks ago, he points out — though he says he's not certain the two dismissals are related.

Marshall and Epps **filed the lawsuit** in July, claiming legislators from both parties — with support from House leadership — regularly participated in gatherings that violated the Colorado open-meetings law. They alleged that the Democratic and Republican caucuses each held mandatory secret meetings at least weekly during the 2023 session, directing legislative aides to omit or disguise the meetings on legislators' calendars and using encrypted, automatically deleting messaging systems to discuss public business outside of public view.

The lawsuit was **settled** in September, with House leadership not admitting wrongdoing but agreeing not to violate the open-meetings law going forward. However, Epps claims the Judiciary Committee has continued to violate the law since that time.

"There are 65 members of the House, and as far as I know, only two of us objected to consistent, blatant, egregious violations of open meetings," Epps says. "There won't be anyone on the committee who will object to Representative Weissman continuing to violate open-meetings law."

Judiciary Chair Weissman disputes this, telling *Westword*: "I have not attempted to convene any quorum of members of the committee since [the regular session ended] for any reason, and I am not aware of any other such convening by anyone else for any reason. As the 2024 legislative session approaches, work of the committee will be in compliance with the law and the settlement reached earlier this year."

Epps says the policies that come out of the Judiciary Committee will probably be similar even without her and Marshall, but the "integrity" of the committee will be "wildly different" moving forward.

"Bob and I often cancel each other's vote out," Epps says. "But no one on the committee has shared my perspective as a survivor of someone who's currently in court. And Representative Marshall is consistently the most well-prepared, thoughtful, fair person on the committee. It's a real loss. ... There's not a lot of people in the legislature, much less that committee, who don't follow marching orders."

Epps declined to comment any further on the matter, saying, "I want folks to focus on Palestine; anything else is a distraction."

Without the Judiciary Committee, she and Marshall are two of only nine House Democrats who were assigned to just one committee this session: the Finance Committee for Marshall and the State, Civic, Military and Veterans Affairs Committee for Epps. Of the other seven single-committee representatives, five hold leadership positions in the party or in a committee, meaning they were likely assigned just one to accommodate for their

larger workloads. The remaining two are Representative Tim Hernández — a brand-new legislator entering his first session — and Representative David Ortiz, who is also known to **clash with his legislative colleagues**.

Though McCluskie did not attribute her decision to remove Epps and Marshall to their lawsuit, other legislators have been making the connection themselves.

House Minority Leader Mike Lynch applauded McCluskie's move in a **statement** Thursday, saying, "I am pleased that their blatant disregard for leadership and inability to work toward a solution to disagreements without litigation was not overlooked."

Republican Representative Ryan Armagost similarly called back to the lawsuit while celebrating Epps and Marshall's removal on **social media**, asking for McCluskie to go further. "The litigious lackeys and Hamas howlers need to be shut down with a little more intent than that or it won't stop," he said. "Let's be real... The gallery circus and podium theater need to be given some real circumstances."

Others criticized the move as retaliatory: Former Denver mayoral candidate Lisa Calderón **wrote**, "Retaliation against vocal Black women is such a frequent occurrence that bell hooks had a quote for it: 'Sometimes people try to destroy you, precisely because they recognize your power — not because they don't see it, but because they see it and they don't want it to exist.'" (Home)

01/09/2024 - Rep. Marshall calls his inclusion in Colorado Open Meetings Law case 'hit job'

CCM Highlands Ranch Herald - Haley Lena and McKenna Harford

https://coloradocommunitymedia.com/2024/01/09/rep-marshall-calls-his-inclusion-in-colorado-open-meetings-law-case-hit-job/

"State Rep. Bob Marshall says he was singled out politically in a lawsuit in which a judge recently ruled that lawmakers' reliance on anonymous surveys to determine budget priorities is illegal. The judge found last week that the practice runs counter to the Colorado Open Meetings Law.

But Marshall, a Democrat who represents Highlands Ranch, said he should not have been named in the suit. He called his inclusion in it a political "hit job" because of his involvement in fighting for more transparency at the state Capitol.

The suit was brought by the nonprofit Public Trust Initiative and Highlands Ranch resident David Fornof and centered around what's called "quadratic voting," which lawmakers used to determine which budget bills should go forward.

Suzanne Taheri, an attorney for West Group Law and Policy, who represented the plaintiffs, said the judge's decision was clear that the practice subverted the intentions of Colorado Open Meetings Law.

The "hit job," Taheri said, was by legislators, such as Marshall, against their own constituents.

"As a frequent litigator, including on open meetings issues, Rep. Marshall should have known that this secret voting system violates the letter and spirit of state law," said Taheri.

Taheri added that the Public Trust Institute had been fighting for records pertaining to the system for two years, including before Marshall was elected.

"We only filed the lawsuit when it became clear it was the only way to stop the practice," said Taheri.

The suit also named the Colorado House of Representatives, Colorado House Speaker Julie McCluskie, the Colorado Senate, Colorado Senate President Steve Fenberg, Sens. Jeff Bridges and Chris Hansen and legislative policy analyst Andrew Lindinger.

According to court documents, the plaintiffs argued that the system, called "quadratic voting," violated the "intent and spirit" of open meeting law and the Colorado Constitution's mandate for an open legislative process. They stressed that the open meetings laws are to be in favor of the public rather than exclusion.

The defendants claimed quadratic voting fails to qualify as a "meeting" for the purposes of the open meetings law because "it is wholly unrelated to the 'merits or substance' of any matter being considered" in court documents.

The defendants further argued that the voting system has been covered by the media and, therefore, cannot be considered a secret meeting.

Marshall said he was not able to concede the suit as he was sued for documents under CORA, which he claims he did not have. Marshall told Colorado Community Media that he turned over everything he had to the plaintiff, but that they insisted that he had custody and control over the data entered into the quadratic voting system.

He also said that he was opposed to the voting system and had even considered abolishing it in his other transparency efforts at the Capitol. He also said he didn't include the voting system in his effort because

Democratic leadership said in July that they would stop using the voting system in future sessions, as reported by Colorado Public Radio.

"I don't think (quadratic voting) is appropriate, but I had a commitment that they weren't going to use it anymore," he said.

Marshall also said that the anonymous votes were "non-binding."

Marshall added that he understands the view of the court.

"I am agnostic on the court's ruling," said Marshall. "But I am glad to see these issues continue to come to light and are addressed."

Colorado Community Media reached out to Bridges, whose Arapahoe County district includes Englewood and most of Littleton, but did not hear back by deadline." (Home)

06/16/2023 - Judge Jeffrey Holmes rules against members of Douglas County School Board for a second time

Douglas County News – McKenna Harford

https://coloradocommunitymedia.com/2023/06/16/judge-jeffrey-holmes-rules-against-members-of-douglas-county-school-board-for-a-second-time/

"A Douglas County judge ruled four school board members violated Colorado Open Meetings Law when they had a series of one-on-one conversations about terminating former Superintendent Corey Wise.

While Douglas County District Court Judge Jeffrey Holmes ruled against the majority of school board members for a second time, he still declined to issue a permanent injunction.

In a ruling issued June 16, Holmes reaffirmed that Douglas County Board President Mike Peterson and board members Christy Williams, Becky Myers, and Kaylee Winegar broke open meetings law by discussing firing Wise in non-public conversations last year.

Rep. Bob Marshall, D-Highlands Ranch, filed a lawsuit against the district in February 2022, with his attorney, Steve Zansberg, arguing that firing a superintendent is a public business subject to open meetings law.

In a statement, Marshall said he is glad Holmes reconfirmed his prior ruling; however, he still issued an ultimatum.

"I call upon the board, and the individual directors to announce, publicly, that they will comply, or I will be forced to ask the court to reconsider that portion of its ruling," Marshall said in an email statement to Colorado Community Media and the four majority board members.

In a statement, Peterson said emphasized a comment from Holmes where he said he didn't think the board had intentionally broken the law.

"As one director and an individual defendant, I am glad to move forward and put the termination of the former superintendent in the past," Peterson said. "I believe the court was right to dismiss the claim to declare the termination of the former superintendent null and void and in the decision to not impose an injunction against the Board, as we will simply rely on existing COML going forward."

To date, the majority of board members have refused to admit they broke open meeting laws, pushing to appeal the initial ruling.

Friday's ruling reiterates what Holmes said in his preliminary injunction in March 2022.

Holmes found that all meetings where public business was discussed must be open to the public, regardless of whether a decision is made, dismissing one of the arguments school board members had made.

"Circumventing the statute by a series of private one-on-one meetings at which public business is discussed and/or decisions reached is a violation of the purpose of the statute, not just its spirit," he said.

Holmes agreed with attorney Zansberg that at the Jan. 28, 2022, meeting between Peterson, Williams and Wise, the two board members gave Wise an ultimatum to resign or be fired.

"Though disguised as a choice, Wise was not given an opportunity to continue his employment," Holmes said. "The only options presented were options about how his job would end."

Holmes also found that the Feb. 4, 2022, meeting where the board members fired Wise without cause in a 4-3 vote did not fix the board's violation of the law because it "rubber-stamped" the decision Peterson, Williams, Myers and Winegar had already made.

As evidence of this, Holmes cited the lack of public comment and conversation about Wise's performance during the meeting, as well as the quick timing.

"In a review of what actually transpired at that meeting, based on a recording that was made, it is difficult to identify any portions of it that address 'concerns' that Peterson and Williams had other than concerns about how quickly Wise's superintendency could be brought to an end," Holmes said in his ruling.

Though Marshall had asked Holmes to find that Wise's termination was invalid since it occurred outside of a public meeting, the judge did not rule on the matter because Wise had already settled with the district.

Holmes declined to issue a permanent injunction, which would have explicitly prevented the board from serial conversations in the future, because he said there's no evidence the board needed an injunction to comply with the law.

"There is no indication that once a court has determined their behavior did not comply with (Colorado Open Meetings Law), they will continue to engage in the prohibited practice," he said.

The ongoing legal battle has cost the district more than $152,000 so far." (Home)