SUNSHINE LAW

The Black, the White and the Gray of Open Meetings

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By

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I. Introduction to the Colorado Sunshine Law

The Colorado Sunshine Law was adopted in 1972 and may be referenced by its official name: the "Colorado Sunshine Act of 1972" which is located in Article 6 of Title 24, Parts 1 through 4 of the Colorado Revised Statutes ("C.R.S.").

Most of the United States have adopted similar laws *"[i]n order to continue the public confidence in the integrity of government officials and to promote trust of the people in the objectivity of their public servants"* and for other reasons stated throughout the Act. *See, §24-6-201, C.R.S.*

The Colorado Sunshine Act of 1972 addresses:

1. Public Official Disclosure Requirements which do not include Library Trustees;

2. Regulation of Lobbyists; and

3. Open Meetings Laws.

II. Open Meetings Laws §24-6-401, C.R.S.

A. The Policy Goal. The Colorado Legislature has declared its policy with regard to open meetings.

> *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.*
>
> §24-6-401, C.R.S.

The Courts have declared that:

> *The public meeting laws are interpreted broadly to*

> *further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision making process may be achieved.*
>
> *Cole v. State, 673 P.2d 345 (Colo. 1983)*

The courts and the statutes recognize certain constitutional, statutory and practical principals that override these policy goals. They will be discussed further in this presentation.

B. The Basic Rule. Meetings of a public body are open to the public. The statutes state:

> *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.*

1. What is a Public Meeting?

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

Note: A "public meeting" is:

a. any kind of gathering of a quorum of directors at which public business is discussed whether,

i. in person,

ii. by telephone,

iii. electronically, or

iv. by other means of communication.

b. It is a violation of the Colorado Sunshine Law to have a "public meeting" that is not open to the public at all times.

2. What is required to make a public meeting "open to the public" in a meaningful way?

a. Prior Notice of the Public Meeting. A local public body must give the public notice of any meeting at which a majority or quorum of the body is expected to attend.

i. Notice must be "full and timely" but that term is not well defined.

Benson v. McCormick, 195 Colo. 381, 578 P.2d 651 (1978)

ii. Notice is deemed "full and timely" if posted in a location within the District at least 24 hours before any meeting; and,

(a) That location was designated as the posting place at the first annual meeting each year; and,

(b) Agenda information is included if possible.

§24-6-402(2)(c), C.R.S.

b. Maintenance of Minutes available for public review. Minutes provide another means of "full and timely" access to public meetings.

i. Minutes of any meeting at which a local public body could take formal action must be taken and promptly recorded and open to the public.

§24-6-402(d)(II), C.R.S.

ii. The Minutes must reflect the topic of any executive session held at the meeting.

§24-6-402(d)(II), C.R.S.

iii. There is no standard format for minutes. Some boards prefer minutes that only reflect official action while others prefer to have a full discussion of the details of the meeting.

c. Participation in the public meeting. Is it necessary to allow participation in order to provide "full and timely" access to a public meeting?

i. Participation is required when the statutes provide for a "public hearing." *See, §29-1-108, C.R.S. concerning the adoption of budgets.*

ii. In the absence of a public hearing requirement, it is not necessary to allow public participation in discussions at a Board meeting. However, it is wise to provide a time period specifically for public comment as it may alert you to issues that should be dealt with before they become a crisis.

a. If you allow public comment, you should adopt a policy to allow the Board to control the speakers and the time. *See, Sample Policy Provisions attached as Appendix A.*

b. Policies or bylaws should define situations in which a speaker may be removed from the meeting.

iii. Participation in a public hearing or comment period may be halted by the Board President or presiding officer. The trick is to stay within the boundaries of the First Amendment concerning freedom of speech.

As a good example, see, Steinburg v. Chesterfield County Planning Comm'n, 527 F.3d 377 (4th Cir. 2008)

a. A clear agenda or hearing topic will allow you to keep a speaker on topic or remove him from the meeting while avoiding the problem of viewpoint discrimination.

b. Governments need not tolerate disruptive speakers. However, there is no clear test to determine how much disruption is too much.

- *Giving a Nazi salute to the board is not enough to justify removal from a meeting. See, Norse v. City of Santa Cruz, No. 02-16446, 2004 WL 2757528 (9th Cir. Dec. 3, 2004 unpublished)*
- *Cursing by shouting "God Damn!" was not sufficient disruption for removal from the podium. Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007).*
- *Dumping Trash in the school cafeteria meeting place and refusing to yield the microphone was sufficient to allow removal of a speaker from the meeting. See, McMahon v. Riffer, 2002 WL 1067808 (Cal. Ct. App. May 29, 2002)*

c. All speakers should be treated similarly as disparate treatment will support a First Amendment Claim where none would otherwise exist.

d. A speaker should be given a warning, be reminded of the topic and rules, and be allowed a second chance to avoid expulsion.

C. Exceptions to the Basic Rule. Exceptions to the basic rule that meetings of a public body are open to the public are found in the rules for **executive session**.

1. An Executive Session is a "closed" session that may only be called at a regular or special meeting. Executive Session cannot be held at a study session.

2. Procedures for Convening an Executive Session.

a. The board must announce to the public the topic to be discussed in executive session ***"in as much detail as***

possible without compromising the purpose for which the executive session is authorized." *See, Appendix B, "Model Motion to Convene an Executive Session".*

b. The announcement must include a ***specific citation*** to the section of the Open Meetings Law authorizing the executive session. *See Appendix B, "Model Motion to Convene an Executive Session".*

c. Executive session is only allowed for specified purposes limited to:

- Purchase, acquisition, lease or transfer of property;
- Conference with the attorney to obtain legal advice;
- Confidential matters under state or federal statute;
- Security arrangements or investigations;
- Negotiations;
- Personnel matters;
- Items concerning mandatory nondisclosure; or
- Discussion of individual students where public disclosure would adversely affect the person.

d. The motion to convene the executive session must be approved by a vote by at least two-thirds of the quorum present.

3. Guidelines for Conducting an Executive Session.

a. Announce the purpose of the executive session for the separate record being maintained as discussed in Item 4. *See, Appendix C, "Model Executive Session Minute Language for insertion at the beginning of executive session."*

b. Stay on Privileged Topic. The executive session discussion must remain solely on the topic announced and specified in the motion to convene the executive session.

c. No Formal Action. The board may not "adopt any proposed policy, position, resolution, rule, regulation or formal action" during the executive session. *(Exception: review, approve and amend minutes of an executive session)*

i. Even if a board takes no formal action during an executive session and formally adopts a decision in a public meeting, a court may find it has violated the Open Meetings Law if there is any indication that the board arrived at the decision during the executive session and subsequently "rubber stamped" that decision in public. Indications of "rubber stamping" include:

- Discussion during an executive session of matters that are normally discussed and acted upon during public meetings.

- Failure during the public meeting to present the "underlying pros and cons" of a formal action, i.e, providing "only cursory treatment" of an issue before putting the matter to a final vote.

- Failure to give the public the benefit of the motivations and policy arguments which lead to the final decision.

d. Personnel Matters. Although discussion of personnel matters may generally be discussed in executive session, the discussions must be conducted in public when the subject is:

i. any board member, any elected official or the appointment of a person to fill a vacancy of a board member or elected official; or

ii. personnel policies that do not require the discussion of matters personal to particular employees.

e. Limitations on the Presence of Non-Board Members. The law is somewhat unclear on the extent to which a district's attorneys and staff may be present at and participate in executive session discussions. However, the following guidelines are recommended.

i. A board may hold an executive session conference with its attorneys to receive legal advice on specific legal questions. But the mere presence of an attorney is not sufficient to justify meeting in executive session.

ii. The role of attorneys and staff during an executive session should be limited to providing information and advice only. They should not participate in the board's deliberations.

iii. Questions concerning a district's authority should be discussed in public.

f. Upon leaving executive session announce, during public session that no formal action was taken and that the executive session remained on topic. *See, Appendix D, "Model Regular Session Minute Language for insertion after the close of executive session.*

4. Guidelines for Recording an Executive Session Discussion.

a. Executive Session Minutes. Executive sessions must be electronically recorded, and must reflect the specific citation to the section of the Open Meetings Law authorizing the Board to meet in executive session. *See Appendix B, "Model Executive Session Minute Language for insertion in regular session minutes" and Appendix C, "Model Executive Session Minute Language for insertion at the beginning of executive session."*

i. The electronically recorded record of the executive session must be retained for at least 90 days after the executive session.

ii. Attorney-Client Communication Exception. If the attorney representing the Board is present and is of the opinion that all or a portion of the discussion during the executive session is privileged attorney-client communication, then no record or electronic recording is required to be kept for that part of the discussion. However, the electronic recording must reflect that based upon the opinion of the attorney present, the discussions are privileged communications. *See, Appendix B, Language to be inserted by attorney.*

III. Consequences of Violating the Open Meetings Law

A. Any action taken in violation of the Open Meetings Law is null and void.

B. The courts may issue an injunction to enforce the Open Meetings Law upon application by a citizen.

1. Any person seeking a court order to inspect a district's records must submit to a custodian of such records a written statement of intent at least three (30) days before filing an application with the court.

2. Award of costs and attorney fees.

a. If an applicant seeking enforcement of the right to inspect documents prevails, the district must pay costs and attorney fees to the applicant.

(1) Note: The courts may no longer require the custodian of records to "personally" pay such costs.

b. If the court finds denial of access to records was proper and the applicant's action was "frivolous, vexatious or groundless," the applicant must pay costs and attorney fees to the district.

3. The records custodian may apply to the court to prohibit disclosure of an otherwise public record when the custodian is "unable in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if disclosure of the public record is prohibited."

- If the court finds that the custodian acted in good faith, the district will not be required to pay attorney fees, even if the court finds the records must be disclosed.

4. Personnel-Related Documents. An applicant or candidate for an executive position who is not a "finalist," no longer must submit a written request to prevent public inspection of records submitted by or on behalf of such applicant or candidate.

- "Finalist" means an applicant for or candidate for the chief executive officer of a state agency, institution or political subdivision (which includes special districts) and:

  (1) who is a member of the final group of candidates that by law must be made public before an appointment is made; or

  (2) if three or fewer applicants or candidates possess the minimum qualifications for the chief executive officer position, then all such applicants or candidates are finalists.

B. Public Requests to Inspect Executive Session Meeting Records.

1. A citizen seeking access to an executive session meeting record must submit an application to the district court in which the records are located. The application must show grounds sufficient to support a reasonable belief that the district:

a. engaged in substantial discussion of any matter not authorized by law for discussion in executive session; or

b. adopted a proposed policy, position, resolution, rule, regulation or formal action in executive session.

2. If the court finds the applicant failed to show sufficient grounds to support such reasonable belief, it must deny the application.

- If the court finds the application was "frivolous, vexatious or groundless," the applicant must pay costs and attorney fees to the district.

3. If the court finds the applicant showed sufficient grounds to support such reasonable belief, the court must conduct a review of the executive session record.

- If the court, based on its review of the record, finds that Open Meetings Law violations occurred, it must order the district to open for public inspection the relevant portions of the record.

APPENDIX A

SAMPLE PUBLIC COMMENT POLICY PROVISIONS

In order to insure a fair opportunity for public comment and to allow the Board to maintain control of its meetings:

1. A Public Comment period will be provided at all public meetings of the Board of Trustees of the Library District.

2. Any citizen of the District may address the Board only during the time specified for Public Comment, unless otherwise allowed by motion and approval of a majority of the Trustees.

3. Each speaker will be limited to three minutes unless otherwise authorized by the Board in advance of the designated Public Comment period.

4. The official body authorized by law to act on behalf of the District is the Board of Trustees and not individual trustees, administrative staff or employees. Accordingly,

a. Speakers will address comments to the Board and not to individual trustees, administrators or staff;

b. Trustees will listen to Public Comment and consider them during their deliberations as a Board;

c. Trustees will not answer questions or engage in debate during the Public Comment period;

d. Speakers may be directed to staff or other sources for responses to questions raised during the Public Comment period.

5. Public Comment or concerns that requires more deliberation, research or study may be considered for addition as an agenda item at meetings subsequent to the meeting in which they arise.

APPENDIX B

Model Motion to Convene an Executive Session
To be entered into the minutes of the public meeting

Pursuant to section 24-6-402(4) of the Colorado Revised Statutes, I move that this [regular or special] public meeting of Board of [name of public entity] adjourn and that, upon an affirmative vote of at least two-thirds of the members present for this motion, the Board reconvene in executive session for the sole purpose of discussing [topic to be discussed with as much detail as possible] as authorized by [statutory citation from table below].

Authorized Topics for Executive Session Discussion	Citation
Purchase, acquisition, lease, transfer or sale of real, personal or other property interest. Exception: The purpose of an executive session cannot be to conceal the fact that a member of the Board has a personal interest in the purchase, acquisition, lease or transfer.	§ 24-6-402(4)(a)
Receiving from the Board's attorney legal advice on a specific legal question. The mere presence or participation of the District's attorney is not sufficient.	§ 24-6-402(4)(b)
Matters that federal or state law or rules and regulations require be kept confidential. Additional requirement: The specific law, rule or regulation must be cited.	§ 24-6-402(4)(c)
Specialized details of security arrangements or investigations.	§ 24-6-402(4)(d)
Determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators.	§ 24-6-402(4)(e)
Personnel matters. Exceptions: The following matters must be discussed in public. • Discussions concerning personnel policies that do not require the discussion of matters personal to a particular employee. • Discussions concerning any member of the Board, any elected official or the appointment to fill the office of a Board member or an elected official. • Discussions concerning a particular employee, if the subject employee requests an open meeting. • Discussions concerning more than one employee, if all the subject employees request an open meeting.	§ 24-6-402(4)(f)
Consideration of any documents protected by the mandatory non-disclosure provisions of the Open Records Act (§ 24-72-201, *et seq*), except consideration of documents or records that are defined as "work product" under § 24-72-202(6.5) or that are subject to the governmental or deliberative process.	§ 24-6-402(4)(g)
Discussion of individual students where public disclosure would adversely affect the person or persons involved.	§ 24-6-402(4)(h)

For Privileged Attorney-Client Communication during the Executive Session the attorney should state on the Record:

I am _____, acting as counsel giving advice to the board of Trustees of _____ in executive session. Pursuant to section 24-6-402(d.5)(ii)(B), no record will be kept of the portions of the executive session following this statement because, in my opinion the discussions constitute privileged attorney-client communication pursuant to section 24-6-402(4)(b).

APPENDIX C

Model Executive Session Minute Language for insertion at the beginning of executive session

An executive session meeting of the Board of [name of entity] is being convened at [time] on [date] for the sole purpose of discussing [topic described in the Motion] as authorized by [statutory citation]. Attending are [names and titles of all persons present during the executive session].

If Privileged Attorney-Client Communications occur during the Executive Session the attorney should state on the Record:

I am _____, acting as counsel giving advice to the board of Trustees of _____ in this executive session. Pursuant to section 24-6-402(d.5)(ii)(B), no record will be kept of the portions of the executive session following this statement because, in my opinion the discussions constitute privileged attorney-client communications pursuant to section 24-6-402(4)(b).

APPENDIX D

Model Regular Session Minute Language for insertion after the close of executive session

An executive session of the Board of [name of entity] convened at [time] on [date] for the sole purpose of discussing [topic discussed with as much detail as possible] as authorized by [statutory citation]. Attending were [names and titles of all persons present during the executive session]. During the executive session the board discussed or received advice regarding [description of actual contents of the executive session discussion as stated in the motion to convene into executive session].* The Board did not engage in substantive discussion of any matter not enumerated in section 24-6-402(4), C.R.S. The Board did not adopt any policy, position, resolution, rule, regulation or take any formal action. The executive session meeting was adjourned at [time] and we have reconvened in regular session.

* If any person other than Board members were present during the executive session, the minutes should also include: At no time during the executive session did [name(s) of non-board member(s)] participate in or influence the Board's deliberations.

APPENDIX E

RECENT CASES ON EXECUTIVE SESSION

There have been three recent rulings affecting open meetings:

- Denver District Court – Independent Ethics Commission. This case held the recordings of executive sessions that are not properly convened are subject to the Open Meetings Law.
- *The Steamboat Springs Pilot & Today v. Steamboat Springs School District RE-2*, 2009 Colo. App. LEXIS 475. This case held the posted meeting notices identifying an executive session must have specific information regarding the purpose of the executive session.
- *Marble v. Darien, et al.*, 181 P.3d 1148 (Colo. 2008). This case held the Open Meetings Law does not require a public body to adjourn and re-notify the public when the action already falls under a topic listed on the notice.

What Constitutes A Meeting?

A meeting is convened when a quorum of three or more members of a district's board of directors discusses public business or takes formal action. § 24-6-4.2(2)(b), C.R.S. Such a meeting can only be held after "full and timely notice to the public." § 24-6-402(2)(c), C.R.S. This requirement may be met by posting a notice of the meeting in "a designated public palace within the boundaries" of the district "no less than twenty-four hours prior" to the meeting. *Id*. In addition, the "posting must include specific agenda information where possible." *Id*. All such meetings must be open to the public.

It is important to note that the definition of meeting includes, "in person, by telephone, electronically, or by other means of communications." § 24-6-402(1)(b), C.R.S. A conversation held by electronic mail can be considered a meeting and a violation of the Open Meetings Law.

How has the Recent Case Law Affected Meeting Notice Requirements?

One of the first cases to address the legitimacy of a public notice was *Benson v. McCormick*, 578 P.2d 651 (Colo. 1978). In this case, the Colorado Supreme Court held that when determining if notice is "full" an objective standard should be applied. The notice should be interpreted in light of the knowledge of an ordinary member of the community to whom it is directed. The stated purpose of the Open Meetings Law, which is to provide fair notice of public meetings to members of the community, warrants this objective standard. Satisfaction of the full and timely notice requirement is flexible and depends upon the type of meeting involved.

The Court declined to impose a precise agenda requirement because it would unduly interfere with the legislative process. The Court held that the full notice requirement should not be interpreted to interfere with the ability of public officials to perform their duties in a reasonable manner. The standard takes into account the interest in providing access to a broad range of meetings at which public business is considered as well as the public body's need to conduct its business in a reasonable manner

The Colorado Supreme Court relied heavily on *Benson* when deciding *Marble v. Darien, et al.*, 181 P.3d 1148 (Colo. 2008). In this case, the Colorado Supreme Court held that the full notice requirement had been satisfied because an ordinary member of the community would understand the meaning of the specific agenda item. The Court held that the Open Meetings Law does not require a public body to adjourn and re-notify the public when the action already falls under a topic listed on the notice.

The particular notice contained the agenda information available at the time of the notice and, thus, satisfied the requirement that "specific agenda information" be included "where possible". The Open Meetings Law establishes a flexible standard to be applied based upon the particular circumstances and type of meeting involved. In the case of *Marble*, the agenda item was consistent with previous agenda titles discussing the same topic. As such, an ordinary member of the Town of Marble's community would understand the discussion item.

A notice does not need to specifically identify every single item to be considered at a meeting. Such an interpretation would violation the holding in *Benson* that public bodies must be permitted to conduct business in a reasonable manner. Otherwise, the Board would be prohibited from discussing any item not specifically listed on the notice even though the item is reasonably related to a listed item. A notice is sufficient as long as the items actually considered at the meeting are reasonably related to the subject matter indicated by the notice.

The Court also held that the Open Meetings Law does not impose a requirement that specific advance notice be given of formal actions that might be taken. The Open Meetings Law only requires that the notice be "full." It would be unreasonable to require a public body to adjourn, set a new date, provide new notice, etc. Again, a public body must be permitted to conduct its business in reasonable manner.

The Open Meetings Law states that specific agenda information must be provided where possible. The Court noted that this requirement was added after *Benson*. In Mable, the Court of Appeals held that a public body would be required to adjourn and re-set a meeting when there was the slightest diversion from the agenda, but the Supreme Court disagreed. The Court held that the requirement is that a public body must post the agenda information when possible at the time of posting. However, the Court noted that the Open Meetings Law would not allow the purposeful and bad-faith circumvention of the law by withholding and/or amending agenda information following posting.

What are the Notice Requirements for Executive Sessions?

A case came before the Denver District Court alleging that the Independent Ethics Commission (IEC) violated the Open Meetings Law by holding executive sessions that were not properly convened. The Court held that the IEC had, in fact, violated the Open Meetings Law, and that if an executive session is not properly convened, then the recording of the executive session is treated as an ordinary public record that is subject to inspection and copying.

The Court found that the commission did not "strictly comply" with the law when it failed to describe topics the commissioners planned to discuss in private. The IEC failed to adequately identify the particular matter to be discussed in executive session. Further, the IEC discussed matters, such as non-frivolous complaints, advisory opinions, letter ruling, and position statements, that were not matters that could properly be discussed in executive session. The Court held that the Legislature has made it clear through the Open Meetings Law that executive sessions should be very rare and that there must be strict compliance with the rules. The Court concluded that all of the recordings of the executive sessions must be made available for inspection and copying as public records. Additionally, the Court reviewed all notes from the executive sessions that were not recorded to determine if they were protected.

Because of the strict nature of the ruling, some have said that the ruling stands to state that compliance with the Open Meetings law is more important than attorney-client privilege.

In a similar case, the Colorado Court of Appeals ruled in an unpublished opinion, in *The Steamboat Springs Pilot & Today v. Steamboat Springs School District RE-2*, 2009 Colo. App. LEXIS 475, that the notice of the executive session failed because it was not specific enough. It was deficient because it did not state that the executive session would concern the release of the survey results and it did not identify that the 'personnel matter' to be discussed was specifically the performance of the superintendent.

The Court of Appeals ruled that the minutes of the executive session must be released to the public because the executive session was not properly convened. Moreover, the Court held that the School Board failed to announce its specific purpose, conferring with its attorney, before entering executive session.

In a special concurrence, Judge Carparelli disagreed with the finding of a notice violation, but concurred with the ultimate ruling because the School Board violated the Open Meetings Law by making a policy decision behind closed doors without public discussion and vote. Additionally, the School Board was ordered to pay legal fees incurred by the plaintiff.