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COLORADO OPEN MEETINGS AND OPEN RECORDS LAWS AFFECTING CHARTER SCHOOLS

The Colorado Open Meetings Law.

1. General Purpose of the Law. The general policy underlying the Colorado Open Meetings Law[1] is stated in section 401 of the law, which states that the formation of public policy in Colorado is public business and may not be done in secret.

2. Charter Schools are Local Public Bodies. The law applies in different ways depending on whether the public body in question is a "state public body" or a "local public body." A charter school is a "local public body."

3. "Meeting" is Defined Very Broadly. In considering whether the law is applicable to any particular meeting, charter school board members should keep in mind that the term "meeting" is defined in an extremely broad way in the act. "Meeting" is defined as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." However, the law does not apply to "any chance meeting or social gathering at which discussion of public business is not the central purpose."

4. E-Mail Discussions. The law states that e-mail communications among elected officials discussing public business are subject to the statute. Accordingly, charter school board members should assume that email discussions regarding the school's business are subject to the Open Meetings Law. Unfortunately, while email discussions among board members are not illegal per se, it is unclear how one would "invite" the public to attend such "meetings." Accordingly, email discussions involving more than two board members should be avoided.

5. General Rule of the Open Meetings Law. The general rule of the Open Meetings Law is very simple. The rule is this: "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."

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[1] C.R.S. § 24-6-401 et seq.

The rule simply means that any time three or more[2] members of a charter school board have a meeting at which they discuss charter school business, they may not exclude from that meeting any member of the public who wishes to sit in on it.

Very importantly, the statute states that no formal action of any local public body shall be valid unless the action is taken in an open meeting that complies with the Open Meetings Law.

6. Difference Between "Open" Meeting and "Noticed" Meeting. There is a tremendous amount of confusion in the charter school community about whether meetings of board members must be noticed. This confusion leads to questions such as: "If two other members of the board and I meet in the school lunchroom to discuss school business, do we have to post a notice the day before?" The answer to this question involves the distinction between an "open" meeting and a "noticed" meeting.

As we saw in the previous section, an "open" meeting is <u>any</u> meeting of three or more board members. A "noticed" meeting, on the other hand, is any meeting where either of the following occurs:

a. A formal action of the board is taken (e.g., adoption of a policy or other motion); or

b. A majority (or quorum if less than a majority) of the board is present or is expected to be present.

Thus, the meeting of three[3] board members in the lunchroom in which they discuss school business may be an open meeting (i.e., any member of the pubic can sit in on the discussion), but it is not a meeting for which notice must be posted in advance.

For many years the status of "informal meetings" under the Open Meetings Law was subject to doubt. For example, is the annual school Christmas party an open meeting? If a majority of the board members plan to attend the party, it certainly appears to fall within the provisions of the statute and thus must be noticed. On the other hand, posting notice of a party does not appear to serve the purposes of the statute.

The Colorado Supreme Court resolved this issue in its 2004 decision in *Board of County Commissioners of Costilla County v. Costilla County Conservancy District*, 88 P.3d 1188 (Colo. 2004). In that case a majority of the county commissioners went to a dinner sponsored by a company with business before the board. The commissioners did not participate in the discussion or act in their official capacity in any way. Nevertheless, the county conservancy district sued, claiming that because a majority of the commissioners were at the dinner it was an open meeting that had to be noticed.

[2] In the unlikely event that two members constitutes a quorum of the board, then the number would be two instead of three.

[3] Assuming a quorum of the charter school's board is more than three.

The Colorado Supreme Court disagreed. It held that a local public body must give notice of a meeting that is expected to be attended by a quorum of the body only if the meeting is "part of the policy-making process." A meeting is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance or other formal action.

So now we finally have an answer to the "Christmas Party Question." Even though a majority of the board plans to attend the Christmas party (or picnic or basketball game or any other event), if the board does not expect to discuss or undertake any formal board action, the meeting is not subject to the Open Meetings Law and there is no need to post advance notice.

7. Notice. The Open Meetings Law specifies the type of notice that is sufficient for those meetings where notice is required. The law states that a local public body shall be deemed to have given full and timely notice if the meeting is posted in a designated public place no less than 24 hours prior to the meeting. The designated place must be adopted annually by the school's board in its first meeting in January. The posting must include the agenda for the meeting where possible. Therefore, if the school has an agenda prepared in advance it should be posted as part of the notice. However, the "where possible" language of the statute probably means that the charter school board will not be strictly bound to the posted agenda at its meeting.

8. Minutes. The Open Meetings Law requires charter school boards to keep minutes of their meetings and make those minutes available for public inspection. The statute states that the minutes shall be recorded "promptly." Thus, there is no specific time limit for making minutes available, but the usual practice is to adopt the minutes for a meeting at the next regularly scheduled meeting. Important Note: In 2002 the legislature changed the statute to provide that if a local public body ever records its minutes electronically it must continue to do so. This means that charter schools should be very careful about recording their meetings, because if they do so even once they must continue to so from that point on.

In 2009 the General Assembly enacted a law requiring boards of education of school districts to record all of their meetings. This law did **not** amend the Open Meetings Law. The new law applies only to boards of education of school districts. It does not apply to charter school boards.

9. How to Call an Executive Session. The statute provides that a charter school board may call an executive session to discuss certain matters. In order to call the executive session the board must (a) announce the general topic that will be discussed in the executive session; and (b) vote by a 2/3 majority to resolve into executive session. The announcement of the general topic must include a specific citation to the part of the law authorizing the executive session and must be as detailed as possible without compromising the purpose of the executive session. **Note**: One of the most common mistakes in this area is approving a motion to resolve into executive session by voice vote. The minutes of the open meeting must show the necessary 2/3 majority. Therefore, unless the motion is approved by unanimous acclimation, the vote must be a roll call.

10. No Formal Action in Executive Session. It is very important to understand that executive sessions are for discussion only. No formal actions can be taken in executive session. Thus, for example, a charter school board may never vote on a motion while it is in executive session. If the board wants to adopt a motion after discussing it in executive session, it must first resolve itself out of executive session into an open meeting and then hold the vote.

11. Proper Subjects for Executive Sessions. It is also important to note that a charter school board may not resolve itself into executive session just because it wants to discuss a matter in private. All discussions of the charter school board must occur in open session unless there is specific statutory authority for holding an executive session on a topic. The specific grounds for which a charter school board may meet in executive session are listed in C.R.S. § 24-6-402(4) as follows:

a. Discussions regarding buying or selling property;

b. Conferences with an attorney to receive legal advice;

c. Matters required to be kept confidential by state or federal law (e.g., student academic records);

d. Security arrangements or investigations;

e. Determining contract negotiation strategies;

f. Personnel matters (Note that "personnel matters" does not include discussions concerning a member of the charter school board or the appointment of a person to fill a vacancy on the board. Nor does the topic include discussion of general personnel policies like salary schedules. The exception occurs only when an individual employee or group of employees are discussed. However, an individual employee has a right to require discussions about him or her to be held in an open meeting, which means that the employee must receive notice in advance that he or she will be the subject of the executive session discussion. *Gumina v. City of Sterling*, 119 P.3d 527 (Colo.App. 2004)). Note also that there is confusion about whether an employee has a right to attend an executive session in which they are discussed. They do not. They have the right to require the discussion to be held in an open session, but they do not have the right to be present in the executive session if they waive this right. The board of directors may invite the employee into the executive session if it chooses, but is not required to do so.

g. Consideration of documents protected from disclosure under the Open Records Act (for more on this see the discussion of that act below); or

h. Discussion of individual students where public discussion would adversely affect the student involved.

12. Minutes of Executive Sessions. The statute has special provisions for the minutes of executive sessions. First, if the charter school board resolves itself into executive session the minutes of the regular open meeting must state the general topic of discussion (e.g., "consultations with legal counsel;" "determining contract negotiation strategy;" etc.). The minutes of the regular open meeting should not reflect the actual discussions that occurred in the executive session.

Beginning in August 2006, the discussions that occur in executive sessions must be recorded by electronic means. At the beginning of the executive session a statement of the citation to the specific provision of the statute that authorizes the charter school board to meet in executive session must be made on the record.

Importantly for charter schools, the statute specifically excepts from its provisions discussions of individual students at the school. Therefore, if the purpose of the executive session is to discuss an individual student (for e.g., discipline, etc.) no recording of the session need be made.

The statute also provides an exception to the executive session recording requirement for consultations with attorneys. However, the recording of the executive session must have a recorded statement from the attorney that the portion of the session that was not recorded, in the opinion of the attorney, constituted a privileged communication. In the alternative, the attorney may provided a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged communication.

The minutes of an executive session of the charter school board are not open to the public unless the school agrees to open the minutes or is ordered to produce the minutes by a court. The charter school is required to keep the minutes of an executive session for at least 90 days, after which it may discard the minutes.

13. Sunshine List. A little known and little used part of the Open Meetings Law requires the secretary of each local public body to keep a record of each person who has requested specific notice of meetings and to provide individual notice to such persons in advance of any meeting.

The Colorado Open Records Law.

1. General Purpose of the Law. Like the Open Records Law, the Open Records Act[4] declares as its general purpose that all public records shall be open for inspection by the public.

2. General Rule. The general rule of the Open Records Act is also quite simple: All public records shall be open for inspection by any person at reasonable times.

3. What is a "Record." The Open Records Act defines the term "record" extremely broadly to include practically any kind of written, electronic or recorded

[4] C.R.S. § 24-72-201 et seq.

communication or document imaginable. Note that the term specifically includes e-mail. Thus, charter school board members should assume that any e-mails among board members will be subject to production to any member of the public who wishes to see them.

4**. Procedures for Production of Open Records.** The Open Records Act contains very specific and detailed instructions for the production of public records to a requesting member of the public. Generally speaking, the procedures require the charter school to make the records available to the requesting party within three working days of the request unless there are extenuating circumstances justifying a greater time. However, the maximum period of time between the request and the production is seven working days. In no even can extenuating circumstances apply to a request for a single, specifically identified document.

5. Exceptions. While the general policy of the State of Colorado is that all records are open records subject to inspection, there are a number of exceptions. Unless a record falls within a specific exception it must be produced. The exceptions are too numerous to summarize here (and many of them would not generally be applicable to charter schools). However, some of the more important exceptions are the following:

a. Producing the record would violate state or federal law (i.e., individual student academic records);

b. Test questions, scoring keys, and other examination data;

c. Real estate appraisals relating to property acquisitions until title has passed;

d. Medical, mental health, sociological and scholastic achievement data on individual persons;

e. Personnel files (Note that notwithstanding this exception, any employment contract or other information regarding amounts paid to individual employees and amounts paid under settlement agreements must be produced);

f. Letters of reference;

g. Privileged information (e.g. attorney-client communications);

h. Addresses and telephone numbers of students (such information may not be provided in, for example, a school directory unless specific authorization is obtained); and

i. Records of sexual harassment complaints.

Since there are so many exceptions to the Open Records Act, if there is any doubt about whether production of a particular document is permissible, legal counsel should be consulted.

6. Charges for Copies. The charter school may charge a reasonable fee for providing requested copies of open records.