



## OPEN MEETING REQUIREMENTS FOR SCHOOL BOARDS

School boards are subject to the requirements set forth in Colorado’s Open Meetings Law, C.R.S. 24-6-401 and 24-6-402 (OML), which is part of the general Colorado Sunshine Law that outlines how public meetings are conducted. Additional provisions specific to school boards, including C.R.S. 22-32-108, also apply. This memo is intended to provide an overview of the OML requirements for school boards. *This memo is for informational purposes only and does not constitute legal advice. Specific questions should be referred to the school district’s legal counsel.*

### ALL "MEETINGS" ARE PUBLIC

The purpose of the OML is to provide public access to a broad range of meetings at which public business is considered so that the public has a greater opportunity to become fully informed on issues of public importance or policy.<sup>1</sup>

All meetings of three or more members of any "local public body" 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.<sup>2</sup> A "local public body" includes boards of education as well as any committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body, including private entities that have been delegated a governmental decision-making function.<sup>3</sup> While the term generally does not include persons on the school district’s administrative staff, it does cover school administration personnel or a combination of board members and school administration personnel “who are involved in a meeting with a representative of employees at which a collective bargaining agreement is discussed.”<sup>4</sup>

A "meeting" is as any kind of gathering—including work sessions, retreats, and other board gatherings—convened to discuss public business, in person, by telephone, electronically, or by other means of communication.<sup>5</sup> A meeting also may occur via email if it involves a discussion between three or more board members.<sup>6</sup> Chance meetings or social gatherings at which discussion of public business is not the central purpose are not considered meetings.<sup>7</sup>

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<sup>1</sup> See C.R.S. § 24-6-401.

<sup>2</sup> C.R.S. § 24-6-402(2)(b).

<sup>3</sup> C.R.S. § 24-6-402(1)(a)(I).

<sup>4</sup> C.R.S. § 24-6-402(1)(a)(II).

<sup>5</sup> C.R.S. § 24-6-402(1)(b).

<sup>6</sup> C.R.S. § 24-6-402(2)(d)(III). See also CASB’s memo regarding use of electronic mail by school boards (providing more information on board use of email).

<sup>7</sup> C.R.S. § 24-6-402(2)(e).

## FULL AND TIMELY NOTICE

"Full and timely notice" must be given of all meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a quorum of the body is, or is expected to be, in attendance.<sup>8</sup>

"Full and timely notice" is not specifically defined in the OML. However, in 2019 the Colorado legislature passed HB19-1087 to provide that, as of July 1, 2019, a board is deemed to have given full and timely notice if either:

- Notice of a meeting, with specific agenda information if available, is posted on the district's website at least 24 hours before the meeting.<sup>9</sup> If notice is posted online, the board must provide the website address to the Colorado Department of Local Affairs for inclusion in the inventory maintained pursuant to section 24-32-116.
- Notice of a meeting, with specific agenda information if available, is posted in a designated public place within the boundaries of the district at least 24 hours before the meeting.<sup>10</sup> If notice is posted physically, the board must designate the public place or places where meeting notices will be posted at its first regular meeting each year.<sup>11</sup>

Previously, notices had to be posted in a designated public place within the boundaries of the district to constitute full and timely notice, but the legislature amended this notice requirement, in part, to relieve local public bodies from having to post notices in physical locations instead of online.<sup>12</sup> If notice is posted online, the board is not required to also post the notice in a physical location, but the board must still designate a physical location to post notices as a back-up option in case it is not possible to post online—such as during a power outage or interruption in internet service.<sup>13</sup>

Online notices must be accessible at no charge to the public and, to the extent feasible, the board must make the notices searchable by type of meeting, date of meeting, time of meeting, agenda contents, and any other category deemed appropriate by the board.<sup>14</sup> The board must also consider linking the notices to any appropriate district social media accounts.<sup>15</sup> Posting meeting notices, either online or in physical locations, at least 24 hours before the meeting are minimum requirements that should not prevent the board from using other means of notifying the press and the public of the meeting as appropriate.

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<sup>8</sup> C.R.S. § 24-6-402(2)(c)(I).

<sup>9</sup> C.R.S. § 24-6-402(2)(c)(III).

<sup>10</sup> C.R.S. § 24-6-402(2)(c)(I).

<sup>11</sup> *Id.*

<sup>12</sup> C.R.S. § 24-6-402(2)(c)(II)(B).

<sup>13</sup> C.R.S. § 24-6-402(2)(c)(III).

<sup>14</sup> C.R.S. § 24-6-402(2)(III).

<sup>15</sup> *Id.*

Boards also must maintain a list of persons who, within the previous two years, have requested notification of all meetings or consideration of certain policies and provide reasonable advance notice of these meetings.<sup>16</sup>

## **NOTICE OF SPECIAL MEETINGS**

It is important to remember that there are requirements in law for notice of special meetings to board members, which must be delivered 72 hours in advance if mailed and 24 hours in advance if delivered.<sup>17</sup> A board member may “waive notice of the time, place and purpose of a special meeting at any time before, during, or after such meeting, and attendance thereat shall be deemed to be a waiver.”<sup>18</sup>

Rural districts that enroll 6,500 or fewer students in kindergarten through twelfth grade may meet the special meeting notice requirement by delivering the written notice of a special meeting to each board member by electronic mail at least 24 hours before the special board meeting.<sup>19</sup> Arguably, however, school districts that are not considered “rural” also may provide notification of special board meetings by email at least 24 hours in advance of the meeting, so long as the board member agrees to receive such email notification or waives the required notification.<sup>20</sup>

## **MINUTES MUST BE TAKEN**

Minutes must be taken and promptly recorded of any meeting of a local public body at which adoption of any proposed policy, resolution, or formal action occurs or could occur.<sup>21</sup> Minutes of any meeting at which the board convened in executive session must indicate the amount of time spent on each topic discussed during executive session.<sup>22</sup>

If the board uses a secret ballot vote to elect its president or vice president or to select the members of a superintendent search committee, the outcome of the vote must be contemporaneously recorded in the minutes.<sup>23</sup> Other school district committees subject to the OML, such as the district accountability committee, may also elect committee leadership by secret ballot, subject to the same requirement to contemporaneously record the outcome of the vote in the meeting minutes.

Each board is required to cause minutes of all board proceedings to be recorded in convenient form and to be open for public inspection at the district’s administrative office during reasonable business hours.<sup>24</sup> In addition, districts must publish the minutes of any board meeting at which the board convenes in executive session on the board’s website not later than 10 business days after the minutes are approved by the board.<sup>25</sup> If the board does not maintain a website, the minutes must

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<sup>16</sup> C.R.S. § 24-6-402(7).

<sup>17</sup> C.R.S. § 22-32-108(2)(a).

<sup>18</sup> C.R.S. § 22-32-108(3).

<sup>19</sup> C.R.S. § 22-32-108(2)(b).

<sup>20</sup> C.R.S. § 22-32-108(3).

<sup>21</sup> C.R.S. § 24-6-402(2)(d)(II).

<sup>22</sup> C.R.S. § 22-32-108(5)(d).

<sup>23</sup> C.R.S. § 24-6-402(2)(d)(IV).

<sup>24</sup> C.R.S. § 22-32-109(1)(e).

<sup>25</sup> C.R.S. § 22-32-108(5)(d).

be published in the same manner as the board regularly provides public notice.<sup>26</sup> While the law does not specify the length of time such minutes must remain published, CASB suggests a publication window of at least 90 days following the meeting at which the executive session occurred, aligning this practice with the statutory timeline for retaining electronic recordings of executive sessions, as discussed below.

Minutes of meetings where no executive session occurred are not required to be published in this manner and within this timeline. However, all official minutes must be permanently retained by the district and must remain available for public inspection.

## **RECORDING OF REGULAR AND SPECIAL MEETINGS**

State law requires boards of education to make a recording of each regular and special meeting at which votes are taken and recorded.<sup>27</sup> The recording must be made by using “appropriate technology” available within the school district at the time the recording is made but, at a minimum, an audio recording must be made.<sup>28</sup> These recordings must be available to the public and maintained by the school district for at least 90 days.<sup>29</sup> Any individual or entity requesting a copy of the recording shall pay the district’s costs incurred in providing a copy.<sup>30</sup> The district may only charge those costs permitted by Colorado’s Open Records Act.<sup>31</sup>

## **ELECTRONIC PARTICIPATION**

A board may adopt a policy permitting board members to attend and participate electronically in the board’s meetings.<sup>32</sup> Any board member participating electronically pursuant to a lawful board policy is present for purposes of voting.<sup>33</sup>

A policy permitting electronic participation must include the following provisions<sup>34</sup>:

- A requirement that a quorum of the board, including members physically present and attending electronically, to convene a meeting;
- A description of the extenuating circumstances the board deems sufficient to permit electronic attendance;
- Discretion for the board to decide the maximum number of meetings a board member may attend electronically before the board member’s position is declared vacant;

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<sup>26</sup> C.R.S. § 22-32-108(5)(d).

<sup>27</sup> C.R.S. § 22-32-108(5)(b).

<sup>28</sup> *Id.*

<sup>29</sup> C.R.S. § 22-32-108(5)(c).

<sup>30</sup> C.R.S. § 22-32-108(5)(b).

<sup>31</sup> *See* C.R.S. § 24-72-205.

<sup>32</sup> C.R.S. § 22-32-108(7).

<sup>33</sup> *Id.*

<sup>34</sup> C.R.S. § 22-32-108(7)(b).

- A requirement that the board have the technology in place that ensures that members of the public can hear the board member participating remotely and to ensure the board member can hear comments made by the public;
- A clear description of the methods by which a board member may attend electronically, including via telephone, video conferencing, or other electronic means; and
- A requirement that the board have a procedure in place to ensure that a board member who attends the meeting electronically has real-time access to any materials that are presented and available to members who are physically present at the meeting.

## EXECUTIVE SESSION

A board, upon the affirmative vote of two-thirds of the quorum present, may convene in executive session at any a regular or special meeting.<sup>35</sup> Only those persons invited by the board may be present during any executive session regardless of the topic of the session, including personnel matters, and the board may not make final decisions while in executive session.<sup>36</sup> As discussed above, the minutes of any board meeting at which the board convenes in executive session must indicate the amount of time spent on each topic discussed during the board’s executive session and must be published within 10 business days of the board’s approval of the minutes.<sup>37</sup>

Discussions occurring during an executive session are confidential. To safeguard this confidentiality, the law requires each school board member to sign an affidavit stating that the board member is aware of and will comply with the confidentiality requirements and restrictions applicable to executive sessions of the board.<sup>38</sup> Board members sign these affidavits during the board’s biennial organizational meeting, and the school district then maintains such affidavits with the minutes of board meetings and other board documents.<sup>39</sup> CASB recommends that newly appointed board members that were not on the board at the time of the organizational meeting should sign the confidentiality affidavit upon appointment by the board.

Due to Colorado court decisions, it has become increasingly important for boards to strictly comply with the law’s requirements before convening in executive session. Otherwise, a court may invalidate the board’s actions and the school district could be liable for attorney fees and court costs resulting from a successful legal challenge of the board.<sup>40</sup>

If the board does not strictly comply with the requirements to convene in executive session, the executive session may be considered an open meeting subject to public disclosure requirements.<sup>41</sup> In addition, state law requires local public bodies—including school boards—to electronically record executive sessions, as discussed in more detail below.<sup>42</sup> Accordingly, violations of the law’s

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<sup>35</sup> C.R.S. §§ 22-32-108(5)(a) and 24-6-402(4).

<sup>36</sup> C.R.S. § 22-32-108(5).

<sup>37</sup> C.R.S. § 22-32-108(5)(d).

<sup>38</sup> C.R.S. § 22-32-108(5)(a).

<sup>39</sup> *Id.*

<sup>40</sup> C.R.S. §§ 24-6-402(8), (9).

<sup>41</sup> *Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004).

<sup>42</sup> C.R.S. § 24-6-402(2)(d.5)(II)(A).

requirements with regard to executive sessions could also result in the recording being made public.<sup>43</sup>

### **Steps to Convene in Executive Session**

The steps a board must take to convene in executive session are provided in C.R.S. 24-6-402(4) and outlined as follows:

1. The board president announces the topic of the executive session and the specific citation to the statute, C.R.S. 24-6-402(4), authorizing the board to meet in executive session.
2. The board president identifies the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized. In crafting this announcement, the board president may factor in how much the public already knows about the particular matter and provide additional detail when describing the topic to be discussed consistent with this public knowledge.
  - A 2020 Colorado Court of Appeals ruling held that when announcing an intent to enter executive session to receive legal advice, a local government must identify at least the subject matter of the legal matter(s) to be discussed<sup>44</sup> and, when announcing an intent to enter executive session to discuss a personnel matter, at least identify the subject employee.<sup>45</sup>
3. The board votes whether to convene in executive session. Upon the affirmative vote of two-thirds of the quorum present, the board then goes into executive session.
4. The discussion during executive session cannot stray from the matter(s) stated at the onset of the executive session.
5. The board is not allowed to adopt any proposed policy, resolution, regulation, or take any formal action in an executive session.

If the board wishes to confer with its attorney during an executive session and it did not specifically announce its intent to do so prior to convening the executive session, the board should return to public session, make an additional topic announcement citing the statutory authority for conferring with its attorney, and vote on whether to convene in executive session for this purpose.

### **Matters that may be Considered in Executive Session**

Executive sessions may be conducted for the sole purpose of considering any of the following matters:

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<sup>43</sup> C.R.S. § 24-6-402(2)(d.5)(C).

<sup>44</sup> *Guy v. Whitsitt*, 2020 COA 93, ¶ 27.

<sup>45</sup> *Id.* at ¶ 32.

- The purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest. However, no executive session shall be held to conceal the fact that a member of the local public body has a personal interest in such property transaction.<sup>46</sup>
- Conferences with an attorney for the purpose of receiving legal advice on specific legal questions. The mere presence or participation of an attorney at an executive session is not sufficient to satisfy this requirement.<sup>47</sup>
- Matters required to be kept confidential by federal or state law or rules and regulations. The board must announce the specific citation of the statute or rules that are the basis for such confidentiality before holding the executive session.<sup>48</sup>
- Specialized details of security arrangements or investigations.<sup>49</sup>
- Determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, including strategy for negotiations relating to collective bargaining or employment contracts, and instruction of negotiators. Discussion of negotiations relating to collective bargaining or employment contracts (other than negotiations for an individual employee’s contract) must occur in a public meeting, unless an executive session is otherwise allowed.<sup>50</sup>
- Personnel matters; except if the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting. If the employee(s) does not request an open meeting, the board will hold the discussion in executive session. The board may, at its discretion, invite the employee(s) into the session. Discussion of personnel policies that do not require discussion of matters specific to a particular employee are not considered “personnel matters.” Discussions concerning a member of the board, any elected official, or the appointment of a board member are not considered personnel matters.<sup>51</sup>
- Consideration of any documents protected under the mandatory nondisclosure provision of the Colorado Open Records Act, except that consideration of work product documents and documents subject to the governmental or deliberative process privilege must occur in a public meeting, unless an executive session is otherwise allowed.<sup>52</sup>

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<sup>46</sup> C.R.S. § 24-6-402(4)(a).

<sup>47</sup> C.R.S. § 24-6-402(4)(b).

<sup>48</sup> C.R.S. § 24-6-402(4)(c).

<sup>49</sup> C.R.S. § 24-6-402(4)(d).

<sup>50</sup> C.R.S. § 24-6-402(4)(e). Proposition 104, passed by voters in 2014, limits this statutory ground for convening in executive session. However, in 2019, HB19-1201 amended this limitation to permit school boards to “develop strategy” relating to collective bargaining or employment contracts in executive session. Proposition 104 continues to require a meeting between an employee representative and school district administrators, school board members, or a combination of administrators/board members during which a collective bargaining agreement, master agreement, or an employees’ contract are discussed to be noticed and open to the public.

<sup>51</sup> C.R.S. § 24-6-402(4)(f).

<sup>52</sup> C.R.S. § 24-6-402(4)(g).

- Discussion of individual students where public disclosure would adversely affect the person or persons involved.<sup>53</sup>
- Negotiations concerning the terms of an employment contract with one or more superintendent finalists if the board has named more than one finalist and holds a forum open to the public to conduct interviews with each of the finalists.<sup>54</sup> The board may also, in addition to interviewing finalists in a public forum, interview finalists in executive session.<sup>55</sup>

## **ELECTRONIC RECORD OF EXECUTIVE SESSION**

School boards must make an *electronic* record of the discussion that occurs in executive session unless the discussion falls within two limited exceptions, as discussed below.<sup>56</sup> The electronic record must include the specific statutory citation that allows the board to meet in executive session.<sup>57</sup>

The law does not specify the form of electronic recording that must be used. Thus, the board may use a simple tape recorder or more advanced equipment to electronically record the executive session.

The electronic record must be retained for at least 90 days following the executive session.<sup>58</sup> The board should put a procedure in place to ensure the electronic record of any executive session is destroyed once the 90-day deadline expires and ensure the procedure is implemented consistently.

### **Exceptions to the Electronic Recording Requirement**

If the executive session is held to discuss an individual student matter, the OML does not require the board to make *any* record of the executive session.<sup>59</sup>

If the executive session is held to receive legal advice from an attorney on a particular matter, an electronic record must be made of the statutory citation to the executive session law permitting the board to meet in executive session to receive legal advice, but the board is not required to make an electronic or written record of the discussion that occurs in executive session, on the basis that it constitutes privileged attorney-client communication.<sup>60</sup> If no electronic recording is made because the discussion constitutes privileged attorney-client communication, this must be stated on the electronic recording, or the attorney representing the board must provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged

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<sup>53</sup> C.R.S. § 24-6-402(4)(h).

<sup>54</sup> C.R.S. § 24-6-402(4)(i). This clarification that boards may conditionally interview superintendent finalists and discuss finalist negotiations in executive session was provided through HB22-1110.

<sup>55</sup> *Id.*

<sup>56</sup> C.R.S. § 24-6-402(2)(d.5)(II)(A).

<sup>57</sup> *Id.*

<sup>58</sup> C.R.S. § 24-6-402(2)(d.5)(II)(E) and C.R.S. § 22-32-108(5)(e).

<sup>59</sup> C.R.S. § 24-6-402(2)(d.5)(II)(A).

<sup>60</sup> C.R.S. § 24-6-402(2)(d.5)(II)(B).



attorney-client communication.<sup>61</sup> Following this procedure will protect the privileged portions of communications with an attorney from being released in any litigation challenging the board's compliance with the OML.

### **Access to the Electronic Record**

No portion of the record of an executive session is open for public inspection or subject to discovery in any administrative or judicial proceeding, unless the board consents or unless a district court judge makes a portion of the record public.<sup>62</sup> For this to happen, the person seeking access to the record of the executive session would have to convince the judge that the board engaged in substantial discussion of matters that were not permissible topics for executive session or that the board took action while in executive session.<sup>63</sup> If a judge determines that the board strayed from the stated topic in executive session or took formal action, the entire record or a portion of the record reflecting the discussion of "open" matters will be subject to public inspection.<sup>64</sup>

### **ENFORCEMENT MECHANISM**

Board action is invalid unless taken or made at a meeting that complies with the OML.<sup>65</sup> The courts have jurisdiction to issue injunctions to enforce the OML.<sup>66</sup> If the law is violated, the court is to award costs and reasonable attorneys' fees to the citizen prevailing in such action.<sup>67</sup> The board will receive costs and attorneys' fees if it prevails and the action is determined to be frivolous or groundless.<sup>68</sup>

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<sup>61</sup> C.R.S. § 24-6-402(2)(d.5)(II)(B).

<sup>62</sup> C.R.S. § 24-6-402(2)(d.5)(II)(D).

<sup>63</sup> C.R.S. § 24-6-402(2)(d.5)(II)(C).

<sup>64</sup> *Id.*

<sup>65</sup> C.R.S. § 24-6-402(8).

<sup>66</sup> C.R.S. § 24-6-402(9)(b).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*