CHAPTER 5

OPEN MEETINGS AND EXECUTIVE SESSIONS

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At CIRSA, we've seen a steady stream of claims against our members for alleged violations of the open meetings law in the conduct of meetings and executive sessions. These types of claims are usually excluded from most commercial insurance coverages. However, CIRSA provides some defense cost coverage for claims alleging executive session violations by governing bodies. In this chapter, we'll go over the basics of the open meetings law and summarize CIRSA's coverage for allegations of open meetings violations.

The Open Meetings Law

Under the Colorado open meetings law, C.R.S. Section 24-6-401 *et seq.* (COML), it is "the policy of this state that *the formation of public policy* is public business and may not be conducted in secret." Note this statement's focus on the formation of public policy. Thus, the law intends openness in the policymaking process, and councils and boards are well-served by honoring not only the letter of the COML but the spirit of this purpose statement.

The core requirement of this law is that all meetings of a local public body (a term which includes the governing body and other formally constituted bodies of a public entity), at which 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. "Full and timely notice" must be given of all meetings. The COML deems this requirement to have been met if notice of the meeting is posted at least 24 hours prior to the holding of the meeting; however, your charter or local ordinances may require posting further in advance. The notice shall include specific agenda information where possible. No action taken at a meeting is valid unless it meets the requirements of the open meetings law. A "meeting" under the open meetings law includes "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication."

There are a few exceptions to this core requirement of public openness, and a properly convened executive session may be held to discuss matters that fall into those exceptions.

Some of the more commonly arising subjects that are proper matters for an executive session include:

- The purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest;
- Conferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions;
- Certain personnel matters; and
- Determining positions on matters that may be subject to negotiations, developing strategy for negotiations, and instructing negotiators.

The open meetings law should be reviewed in its entirety for all of the applicable legal requirements, and legal advice should be obtained on its meaning. Home rule municipalities may have their own meeting and executive session procedures established pursuant to their home rule powers; this discussion is not intended to cover the variances in local practice in home rule municipalities.

The "courts of record" of the state have jurisdiction to issue injunctions to enforce the purposes of the open meetings law. Any citizen of the state may apply for such an injunction. The open meetings law states that, in any case in which the court finds a violation of the law, the court shall award the citizen prevailing in such action his or her costs and reasonable attorney fees. In addition, a citizen may apply to the court for access to the record of an executive session; if the court determines, after listening to the record, that the local public body engaged in substantial discussion of any matters that were not proper subjects for an executive session, or took formal action while in executive session, then the record may be made accessible to the public.

Executive Session Coverage Through CIRSA

Defense costs coverage for executive session claims is provided to CIRSA property/casualty members by way of an amendment to the "non-monetary damages, fines or penalties" exclusion in the public officials liability section of the coverage document. This coverage is subject to the following terms:

- It applies only to reasonable attorney's fees and reasonable and necessary costs included in the defense of an action brought solely under C.R.S. Section 24-6-402(9) of the open meetings law.
- It applies only to such an action brought against the member's governing body; subordinate boards and commissions holding executive sessions do not have this coverage.
- It does not apply to any plaintiff's attorney fees or costs that are assessed against the member as a result of losing such an action. Such fees and costs must be borne by the member.
- There is a sublimit for this coverage that is shared with certain other non-monetary defense coverages. The sublimit is $10,000 any one action, subject to a $30,000 annual aggregate per member. The member deductible does not apply to this coverage.

- Submitting an executive session claim to CIRSA is optional with the member; the member may choose to defend such a claim itself. If a member wants to avail itself of this coverage, the claim must be submitted to CIRSA, for handling by CIRSA-assigned defense counsel, at the time of commencement of the action.

A Few Suggestions

The risks of open meetings violations can be greatly reduced by favoring transparency and using caution in cases of uncertainty. After all, the courts interpret the rules and will resolve doubts in favor of openness. Toward that end, elected and appointed officials should be cognizant of when their discussions will trigger open meetings requirements, so that violations can be avoided. To avoid claims of improper notice, a full meeting agenda should be timely posted, and the body and staff alike should avoid adding substantive items to the agenda at the meeting (as claims and distrust can result from such surprises).

Of course, claims of executive session violations could be avoided entirely by never having an executive session! However, this may be an unrealistic goal because, as discussed above, there is a legitimate need for confidentiality in some matters. But consider the following:

- Hold executive sessions to the absolute minimum necessary to protect legitimately confidential matters.
- Confirm with your city or town attorney that the proposed subject of the executive session is authorized under the law. The statutory bases for having an executive session are specific and narrowly construed, and bodies should resist efforts to pound a square peg in a round hole in searching for authority where it does not exist.
- Utilize an executive session "script" to help guide you in the proper procedures for convening an executive session. CIRSA members may obtain a CIRSA sample by contacting saml@cirsa.org.
- When participating in an executive session, be vigilant of yourself and others to make sure that the discussion doesn't stray from the specific subject that was announced in the motion to go into executive session. Participants in the executive session must commit to "stay on topic" and not stray from the specific subject.
- Make sure you keep an electronic record of each executive session as required by the open meetings law. The only exception to the recording rule is an executive session for an attorney-client conference; these sessions should not be recorded.
- Stay out of the loop on personnel matters when feasible. One of the more common reasons for holding an executive session is the discussion of a personnel matter. However, if the employee who is the subject of the executive session so demands, the discussion must be done in public. Moreover, personnel matters that are not personal to a particular employee are not proper subjects for an executive session (unless some other lawful basis for holding an executive session applies). These and other complexities of the "personnel matters" basis for holding an executive session can be avoided if your personnel policies have been set up in a manner that delegates most personnel matters to your staff.

- If you have to take one of your own governing body members to the "woodshed," don't do it in an executive session. Some years ago, the "personnel matters" basis for holding an executive session was amended to state that executive sessions are not permitted for discussions concerning any member of the local public body or appointment of a person to fill a vacancy on the local public body. Thus, the idea that the governing body can convene in executive session to discuss one of its own members as a governing body "personnel matter," is no longer viable.
- If the confidentiality of a matter is such that it warrants an executive session, then be sure to honor that confidentiality once the executive session is over, until and unless public discussion of the matter becomes legally permissible. Don't act outside the scope of your legal authority as an individual member of the governing body to waive confidentiality on your own. If the executive session concerns negotiations or other matters where some information will be shared with third parties in follow up to the session, ask "Who are our spokespersons?" and "What information will we share at this time?" and honor the answers arrived at in the session.

Conclusion

Open meetings missteps are hard to overcome in terms of maintaining your constituents' trust in you. Further, each and every executive session your entity holds exacts a price in terms of expectations of open government and, if done improperly, can subject your entity to claims. By complying with the strict requirements of the open meetings law, keeping executive sessions to the minimum necessary, and observing all of the formalities for holding meetings and executive sessions, you can keep that price low and public confidence high.