



CIRSA PUBLIC OFFICIALS LIABILITY ALERT

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Colorado Court of Appeals Weighs in on the Calling of Executive Sessions – You'll Want to Read This!

If your city or town is like most, your governing body will at some point—perhaps very soon—call an executive session to discuss a legal or personnel matter. If so, you need to be aware of a recent Colorado Court of Appeals decision addressing the sufficiency of the announcement required to be made in open session, prior to going into executive session. In short, the Court of Appeals has held that merely mentioning the statutorily permitted executive session topics of “legal advice” and “personnel matters” is not enough to comply with the Colorado Open Meetings Law (OML). Rather, to comply with the OML, your body’s announcement needs to include more detail of the legal or personnel matter to be discussed.

As background, the OML generally requires that meetings of public officials to discuss or take formal action on public business be open to the public. The OML allows a local public body to convene in executive session for discussion of certain topics, including limited personnel matters and to confer with the entity’s attorney on specific legal questions. However, detailed procedures must be followed: The body must announce to the public the topic for discussion in executive session. This announcement must include both the specific statutory citation that authorizes the session and “identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized.”

The Court of Appeals’ [decision](#), issued June 11, stems from a citizen’s challenge to executive sessions called by the Basalt Town Council in 2016. The Council’s announcements for the executive sessions identified the statutory citations and the authorized topics of “legal advice” and “personnel matters,” paraphrasing the authorizing provisions of the OML. However, the announcements did not further identify the legal or personnel matters to be discussed. The plaintiff challenged the announcements as inadequate. While the trial court found that the Town Council’s announcements were adequate because of the nature of the attorney-client-privilege and the privacy interests at stake for personnel matters, the Court of Appeals disagreed and reversed the trial court decision.

Regarding the Town’s sessions for legal advice, the Court of Appeals noted the attorney-client privilege “ordinarily does not encompass information about the subject matter of an attorney-client communication,” and that the privilege is not waived by divulging the subject matter. ¹ Based on this reasoning, the Court concluding it was possible for the Town Council to describe in its public announcement “at least the ‘subject matter’ of what was to be discussed,” and, consequently, its failure to do so “did not comply with the statutory requirement of identifying ‘a particular matter in as much detail as possible without compromising the purpose for which an executive session was called.’”

Regarding the Town’s executive sessions for personnel matters, the Town’s dispute with the plaintiff over transparency involved related questions of employee privacy—in this case the privacy interests of the then Town Manager. In ruling in favor of the Town, the trial court cited the Town’s evidence supporting its concern that by revealing the Town Manager as the subject of the executive sessions, it ran the risk of litigation for claimed breaches of privacy and the Manager’s employment agreement. The Town Manager had in fact intervened in the case to protect these asserted interests.

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However, the Court of Appeals rejected these concerns, holding that the Town Manager, as a public employee, has a narrower expectation of privacy than other citizens and that even if his employment agreement proscribed discussing his employment or performance in public, “the Town may not, by contract, evade its statutory obligations.” The Court of Appeals stated the Town’s desire to limit its exposure to possible legal action by the Town Manager “did not...justify negating the public’s right to know the subject of what its officials would be discussing in secret.” The Court concluded the Town’s announcement should have notified the public that the personnel matters that would be discussed in executive session concerned the Town Manager.

The Court of Appeals’ reversal of the trial court also highlights the significant risks of an OML violation. Based on its finding of a violation of the OML, the Court also held the plaintiff is entitled to the recordings and minutes of the executive session involving the matters not properly noticed. Further, per the OML, the plaintiff is entitled an award of attorney’s fees.²

What are the takeaways from the Court’s ruling? First, recognize that while determining what to say in an executive session announcement can be a delicate task, the transparency standard is high: The matter to be discussed must be identified “in as much detail as possible without compromising the purpose” for the executive session. Thus, be specific in your announcements calling an executive session, and be sure to include more than the citations and topics listed in the OML.

Second, while the Court of Appeals’ decision sidesteps the “what is possible” question and is based on the failure to provide any information “beyond the mere mention of generic statutory categories,” the decision is still rooted in the notion that under the law of transparency, it’s possible to share information about an intended executive session while preserving other interests. Indeed, the Court of Appeals noted the attorney-client privilege is not lost by informing the public of the subject your body intends to discuss with the attorney. And, lastly, at least at the city manager/town administrator level, the decision confirms that the privacy interest in “personnel matters” is narrower, and the public generally has the right to know that the executive session is about your entity’s chief executive officer.

As a matter of practice, make sure your entity has and follows a script for calling any executive session. A CIRSA set of sample procedures can be found [here](#) for a Town Board of Trustees, and [here](#) for a City Council. Prior to any use of these samples, you’ll want to review them with your municipal attorney and make any revisions needed to reflect local rules or practices. To further minimize your risks in this area, you’ll also want to consult closely with your municipal attorney regarding any announcement to be made for executive session.

If you have any questions regarding this article, please call our Liability Hotline at 800.228.7136 to speak to CIRSA’s General Counsel, Sam Light.

¹ The Court stated that it could conceive of extraordinary situations in which a colorable claim of privilege could be made regarding the very fact of a person’s consultation with an attorney; but, this case was not one of them. If this is ever a concern for one of your entity’s executive sessions for legal advice, you’ll want to consult closely with your attorney.

² While alleged violations of the OML often are not covered by public entity insurance policies, your CIRSA liability coverage does include a sub-limited coverage for defense of claims of violation of the OML. However, this coverage is solely for actions against the municipal governing body, is sub-limited to \$10,000 in defense costs per action (subject to a \$30,000 annual each member aggregate) and does not cover an award of plaintiff’s attorney’s fees or costs.

Endnotes

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