HOT TOPICS IN THE LAW OF TRANSPARENCY

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Presentation Overview

- Transparency in local government remains a continual expectation of citizens, constituents…and the law!

- In this presentation we will touch on some recent developments / hot topics to have on your radar:
  - Emails and the openness requirement of the Open Meetings Law
  - Public process for calling an executive session
  - Legislation around transparency and public employment
    - Equal Pay for Equal Work Act requirements
    - Recent legislation regarding “CEO” finalists
  - Website accessibility

Email and the Open Meetings Law

- We're all familiar with the basic openness requirement of the Colorado Open Meeting Law (OML):
  - All meeting of three or more members of a local public body (or a quorum, if less) at which any public business is discussed or at which any formal action may be taken are public meetings open to the public
  - OML also requires posting of notice / agenda when majority or quorum will be present and / or formal action will occur
- And we've known since 1996 that emails and other electronic meetings can trigger the openness requirements of OML:
  - H.B. 96-1314: Revising definition of "meeting" to "[Any] kind of gathering, convened to discuss public business, in person, by telephone, **electronically,** or by other means of communication."

Emails and the Open Meetings Law

- 25 years on: How's It Going?
- While that provision of the OML has remained unchanged all this time, how the openness requirement applies to email communications remains a continual topic of inquiry and discussion. Why:
  - It's always a "new" issue for newly elected or appointed officials
  - For those who don't spend time in this space, the concepts just seem "odd":
    - "Email is ubiquitous and I use it all the time"—how can "mail" be a meeting?
  - So-called simple solutions, such as "Just don't use email to communicate with fellow council/board members" or "Just make the email discussion open" are unrealistic or impractical. Need to "figure this out."
  - There's simply no private sector counterpart to this unique feature of public entity law

Emails and the Open Meetings Law – H.B. 21-1025

- H.B. 21-1025 – signed by Governor April 7, 2021 – Effective September 7, 2021
- The OML still does not define what is "public business" is for purposes of the openness requirement, but H.B. 21-1025 brings some clarity by amending the OML to more precisely state what types of emails *do not* trigger the OML's openness requirement.
  - Email communication among elected officials "that does not relate to the merits or substance of pending legislation or other public business" shall not be considered a meeting. This includes:
    - Email "regarding scheduling and availability"
    - Email sent by an elected official for the purpose of:
      - forwarding information;
      - responding to an inquiry from an individual who is not a member of the public body;
      - posing a question for later discussion by the public body.

Emails and the Open Meetings Law – H.B. 21-1025

- What is “merits or substance” you ask? Good question!
  - “‘Merits or substance’” means any discussion, debate, or exchange of ideas, either generally or specifically, related to the essence of any public body policy proposition, specific proposal, or other matter being considered by the governing entity.”
- What is “essence” you ask? Hmmm….
  - While the H.B. 21-1025 clarifications are helpful—and provide some “safe harbors” from OML liability risks in the use of email, framing one’s approach to email use that way will still be perilous go forward
  - The larger point—and best practice around OML risk management—is still found at “page one” of the OML: “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.” (C.R.S. 24-6-401)

Emails and the Open Meetings Law – H.B. 21-1025

- Some related caveats / issues:
  - While H.B. 21-1025 identifies some safe harbors for “FYI” emails, officials should take care to ensure, for example, that an “FYI” email does not morph into a thread of substantive discussions
  - Technically, the H.B. 21-1025 amendments address email communications of elected officials. What about appointed officials?
  - And other electronic platforms aren’t addressed. What about texts or other forms of electronic communications?
- Our “best practice” suggestion will remain: Be sure to save all “merits or substance” discussions for your duly noticed, open public meeting!
- For more reading see this CIRSA article.

Executive Sessions

- While transparency is a basic expectation and requirement, there are times when confidentiality is not only entirely defensible under the law, but also in furtherance of the interests of your municipality and its citizens.

- But the discretionary right under the OML to conduct certain discussions confidentially, in executive session, must be used carefully.

- And proper procedures *must* be followed.

- Apart from legal risks—including liability for attorney fees—toeing too close to the line on executive session issues can also take a toll in terms of political capital and trust.

Executive Sessions

- How governing bodies call executive sessions has been receiving heightened attention lately—at CIRSA, it's been via our Liability Hotline and claims!
  - While pre-session prep tends to focus on "Can we discuss this in executive session?" equal focus needs to be placed on what to say *before* the session starts.
  - There are local government watchdogs—be it citizens, advocates or attorneys near or far from your council/board chambers—who keep a keen eye on your compliance with executive session procedures.

- What does the OML require "on the record" before the executive session:
  - 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."

Executive Sessions

- Recent Colorado Court of Appeals decision, *Guy v. Whitsett*, 469 P.3d 546 (Colo. App. 2020) is good reminder of difficultly and risks in striking the right balance.

- Executive sessions for “legal advice” and “personnel matters.” The motions for those sessions referenced these topics and the statutory citations but no further detail of the subject matter to be discussed.

- Town asserted that attorney-client privilege (ACP) and privacy interests in personnel matters prevented the Town from further identifying the topics to be discussed.

- Court of Appeals disagreed, holding ACP is not waived by disclosing the subject matter, and OML outweighed employee’s privacy interests (in this case, the town manager).

Executive Sessions

- The takeaway for reducing risks in this area? The courts—and others—expect you will attend to both the letter of the law and its spirit of transparency. So:
- Be sure the executive session is for an authorized topic. Don't pound a square peg….
- Make a complete and proper announcement and motion prior to the executive session. Don't wing it! Use a script to think through / write down what will said for "identification of the particular matter to be discussed."
- The virtual meeting world can increase the risk of missteps—be sure all is in order. And whether in-person or virtual, if there is uncertainty as to whether you did it right, it's better to do a do-over before going into executive session.
- For more reading and links to sample executive session scripts, see this CIRSA Liability Alert.

Transparency Around Public Entity Hiring

- It may have been some time since you thought about the job posting and other transparency requirements of the Colorado Equal Pay for Equal Work Act—the Act passed in 2019 but had a delayed effective date (any maybe you're an entity that wasn't doing much hiring during the pandemic)
- But the Act's posting requirements are now in effect—as of 1/1/2021—and your entity may be doing more hiring of late
- It's high time to be sure your entity is complying with the transparency requirements of the Act and related Rules. Those include:
  - Notice and disclosure requirements surrounding job postings and opportunities for promotion
  - And prohibitions on employer actions that thwart pay transparency within your organization

Transparency Around Public Entity Hiring

- **Job Announcements**: An employer shall disclose in each posting for each job opening the hourly or salary compensation—or a range—and "a general description of all of the benefits and other compensation to be offered to the hired applicant."
- Some emerging issues / practicalities:
  - The description of benefits likely needs to be more than what you've done in the past. The description need not include minor "perks;" but, the "benefits that must be generally described include health care, retirement benefits, paid days off, and any tax-reportable benefits."
  - If posting a range, you may ultimately pay more or less than the posted range, as long as your posting was genuine.
  - If you use a third-party recruiter, you remain responsible for compliance with the posting requirements.

Transparency Around Public Entity Hiring

- **Opportunities for Promotion**: An employer shall make reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making promotion decision.
- Some emerging issues / practicalities:
  - Does “all current employees” mean just that, whether or not qualified for the job? (In general, yes).
  - “In-line” advancement can constitute a promotional opportunity, so notice may be required even though the person/purpose is evident (e.g., promotion of Jim Smith from Peace Officer I to Peace Officer II).
  - While nothing in the Act requires employers to “post” jobs, a vacancy can create a promotional opportunity requiring distribution of same notice as a job posting.

Transparency Around Public Entity Hiring

- **Prohibited activities.** While we've known for a long time that compensation, expenses and benefits paid to public employees is not considered confidential under the open records laws, the Equal Pay for Equal Work Act enacts some new rules surrounding transparency of wage information:
  - Employers may not seek the wage rate history of a prospective employee. Not okay to ask "What were you making at your last job?" (How about: "What are your salary expectations?")
  - Prohibits discrimination/retaliation in relation to handling of wage information, running both directions:
    - Prohibits adverse action against a prospective employee for failing to disclose wage history.
    - Prohibits adverse action against an employee for discussing or disclosing their wage (Sources: Colo. DOL Info. #9 & EPT Rules).

Transparency and CEO Finalists

- **Identifying "Finalists" for CEO.** The hiring of a City Manager / Town Administrator or other "CEO" is a significant and "high-profile" undertaking and the citizens and press take great interest in learning about the hiring process and who your governing body might hire.
- To further transparency in this process, the OML has long had a provision requiring that a local public body "make public the list of all finalists under consideration" no later than 14 days prior to appointing or employing one of them.
- Related provisions of the Colorado Open Records Act (CORA) define "finalist" as "a member of the final group of applicants or candidates made public pursuant to [the OML]…". And, "[i]f only three or fewer applicants or candidates…possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists."

Transparency and CEO Finalists

- But the OML and CORA provisions left this lingering question: Does a governing body satisfy its OML requirements if it publicly identifies a single (or sole) finalist?

- This question has been the topic of recent legislation as well as current litigation.

- *Prairie Mountain Publishing Co. LLP d/b/a Daily Camera v. Regents of the University of Colorado* (Colo. App. 2021):
  - Court of Appeals held CU Board of Regents was within its rights to make public only one finalist – "By [CORA's] plain language, a "finalist" is a person who is disclosed by the appointing entity as a finalist — who is "made public."
  - Petition for review now pending before Colorado Supreme Court

Transparency and CEO Finalists

- House Bill 21-1051 – will become law without Governor's signature – effective May 25, 2021:
  - Repeals the "three or fewer" provision of CORA
  - Amends OML to allow a council, board or other governing body to "name one or more candidates as finalists."
  - Adds provision requiring custodian to allow public inspection of demographic data of a candidate who was interviewed but not named as a finalist.
    - Defines "demographic data" to be "a candidate's race and gender that has been legally requested and voluntarily provided on the candidate's application and does not include the candidate's name or other information."
- House Bill 21-1051 will settle confusion/legal risk around the number of finalists, but not the practical question of "What's the right number?"

Website Accessibility

- We reported recently about an uptick in ADA lawsuits challenging entities for their alleged lack of compliance with the website accessibility requirements of the ADA. *See* this recent CIRSA Liability Alert.
- While the recently reported rash of lawsuits mostly involved private entities, it serves as a reminder the public entities are also subject to accessibility requirements for on-line programs and services.
- Federal requirements and guidelines are already in place. The recently adopted House Bill 21-1110 will provide for enhanced enforcement at the state level, authorizing a direct right action via the provisions of the Colorado Anti-Discrimination Act.
  - Liability for failure to develop an accessibility plan and fully comply by 2024.
- Larger point within the details: House Bill 21-1110 authorizes state level CADA claims re: public entity "services, programs or activities," effective now.

Concluding Thoughts

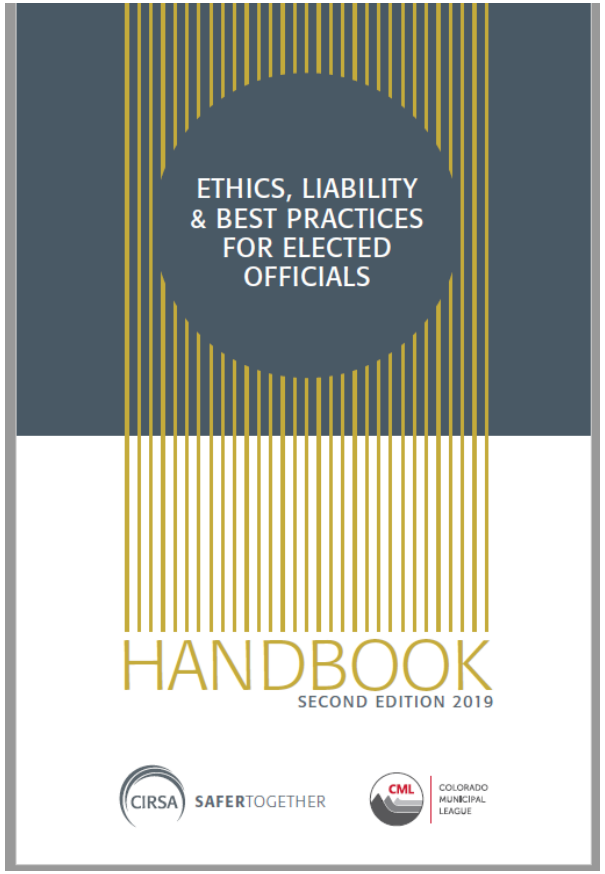
- This year's round of OML legislation helps answer some longstanding questions—transparency around emails and CEO hiring.
- While clarity around "safe harbors" is helpful, these new laws shouldn't cause us to lose sight of the larger principle: a "letter and spirit" approach to transparency laws builds trust and reduces risk. (So, perhaps the recent OML bills aren't points to lead with, but rather tools for the toolbox.)
- In the employment area, pay equity and transparency is more important now than ever. Be sure your entity is staying ahead of its obligations under the Equal Pay for Equal Work Act.
- Whatever the area, lead with transparency! While it can be at times expensive and time-consuming, it is an effort that will keep you out of harm's way and pay huge dividends in public trust and civic pride.

Concluding Thoughts

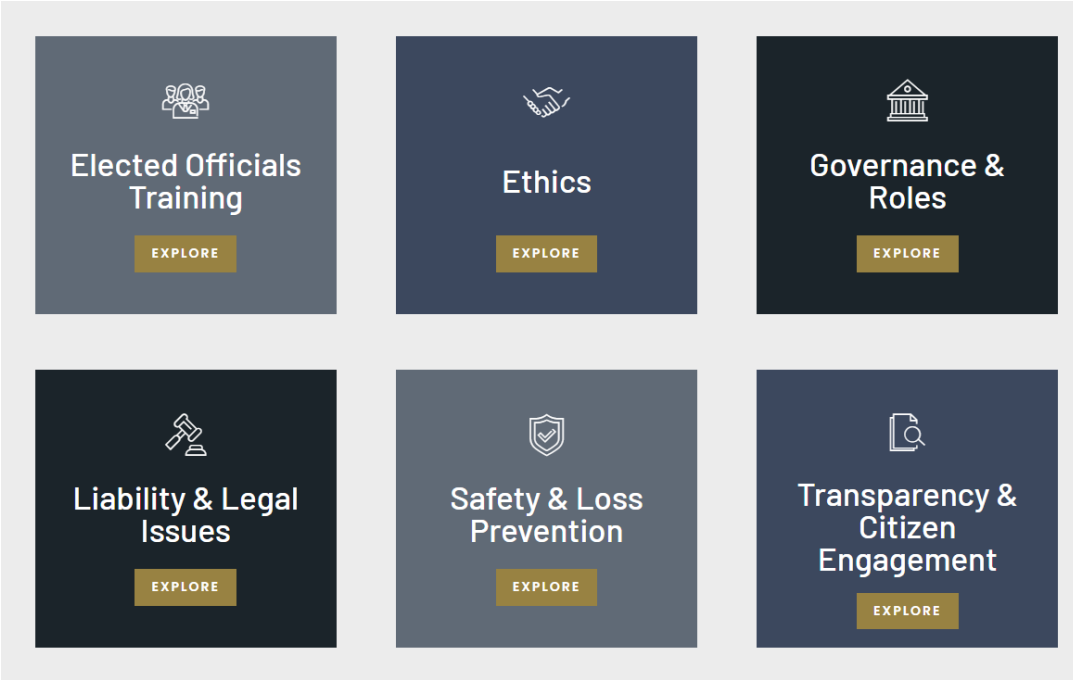
Thank you for your public service!

And for the opportunity to present.

Resources



Elected Officials Page CIRSA Website



About CIRSA

Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
- Not an insurance company, but an entity created by intergovernmental agreement of our members
- Total membership today stands at over 280 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities

Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.

Note: This presentation is a training resources only and the suggestions herein are those of the author, who takes full responsibility for them. This presentation is not intended as legal advice and members should consult with their entity's own attorney for legal advice and regarding specific legal questions. In the event of any conflict between the training tips herein and the advice of your entity's attorney, the advice of your attorney prevails!