

Colorado Court of Appeals Weighs in on Executive Sessions - Again

If your city council or town board is like most, you'll probably call executive sessions on occasion—or perhaps regularly—to discuss specific legal questions or another topic for which executive sessions are authorized under Colorado's Open Meetings Law (OML). If so, you'll want to be aware of a recent Colorado Court of Appeals decision addressing the OML's notice requirements and its prohibition on taking action in executive session.

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 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. The announcement must also include 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." Further, the OML prohibits taking any action in executive session; specifically, it states "no adoption of any proposed policy, position, resolution, rule, regulation, or formal action...shall occur at any executive session that is not open to the public."

The recent Court of Appeals [decision](#), issued December 7, 2023, stems from efforts by a local newspaper, The Sentinel Colorado (The Sentinel) to obtain release of the recording of an Aurora City Council executive session held in March 2022. Among other purposes, the executive session was called for legal advice concerning censure proceedings brought against a Councilmember. While the meeting agenda announced the topic of the executive session (legal advice) and the statutory citation authorizing the session (C.R.S. 24-6-402(4)(b)), the Court concluded the announcement violated the OML public notice requirement because it did not identify any "detail" of the topic to be discussed. Citing a 2020 Court of Appeals decision (discussed in this [CIRSA Liability Alert](#)), the Court ruled that privilege does not encompass information about the subject matter of an attorney-client communication, and therefore the failure to announce further "detail" of the session violated the OML.

Additionally, the Court of Appeals ruled the City Council violated the OML by taking action in executive session, which action the trial court characterized as "a roll call" taken "as to the direction to be given to legal counsel" concerning the investigation related to the censure. More specifically, the Court concluded the Council improperly adopted "a position... or formal action" when special counsel was "directed and instructed" at the executive session to "end the investigation" and "enter into a stipulation" to dismiss the censure charges. In short, the Court essentially concluded that giving direction to counsel in executive session was formal action in violation of the OML. Finally, while the City Council attempted to "cure" the alleged OML violations at a subsequent public meeting, the Court held that the narrow, court-created concept of allowing a public body to "cure" an OML violation did not apply in this case because The Sentinel's lawsuit was brought only to gain access to the executive session recording and not to challenge the Council's decision to end the censure proceedings.

While the Court of Appeals decision remains subject to potential review by the Colorado Supreme Court, it serves as a reminder of some key provisions of the OML that will continue to require close attention irrespective of whether the Supreme Court hears an appeal. First, although determining what to say in an executive session announcement can be a delicate task, The Sentinel decision emphasizes that the transparency standard is high: The matter to be discussed in executive session must be identified "in as much detail as possible without compromising the purpose" for the executive session. Thus, you'll need to be specific in your announcements calling for an executive session and need to include more

than the citations and topic(s) as stated in the OML. We suggest working with staff and legal counsel to help ensure the announcement includes sufficient details to meet OML requirements, and that the additional detail be scripted as part of the agenda and/or public statement made when calling the executive session.

Second, recognize the OML's prohibition on taking formal action in executive session is similarly a high standard. As noted above, the OML prohibits the adoption of "any proposed policy, position, resolution, rule, regulation, or formal action" in executive session. The Court of Appeals' decision highlights the breadth of this prohibition: Under the Court's analysis, a "roll call"—and perhaps only the giving of direction and instructions to counsel—in executive session can constitute prohibited formal action. Thus, you'll want to work closely with your legal counsel and staff to determine the appropriate limits on executive session discussions and identify any needed actions that may only be taken in open session.

At CIRSA, we've seen a steady stream of claims against our members for alleged violations of the OML in the conduct of executive sessions. And the consequences of a violation can be significant. Among other remedies, a court can order the release of an executive session recording that pertains to a violation, invalidate any action improperly taken in an executive session, and award attorney fees¹ to a prevailing citizen². As important, when an OML violation occurs, it can be hard to recover citizen faith and trust in your entity's commitment to transparency.

Therefore, as a matter of practice, you'll want to ensure your entity's procedures are set up to comply with the substantive and procedural requirements of the OML that govern executive sessions. CIRSA suggests that your entity have and follow a script for calling an executive session, and that elected and appointed officials work closely with legal counsel and staff to ensure any executive session is properly called and conducted.

A CIRSA set of sample executive session 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.

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 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. This coverage is solely for actions against the governing body. For claims brought on or after January 1, 2024, this coverage has an increased sub-limited of \$15,000 in defense costs per action (subject to a \$45,000 annual each member aggregate). This coverage does not apply to any award of plaintiff's attorney fees or costs; thus, the member would be responsible for payment of any attorney fee award entered against it.

² In its December 7 opinion, the Court of Appeals ruled *The Sentinel* was not entitled to an award of attorney fees because the OML mandates such an award to "the citizen prevailing in such action." The Court held *The Sentinel* is not a "naturalized person" and thus not a "citizen" under the plain meaning of that term. This holding is also subject to potential review by the Colorado Supreme Court.