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COLORADO OPEN MEETINGS AND OPEN RECORDS LAWS AFFECTING CHARTER SCHOOLS

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OPEN MEETINGS LAW

1. General Purpose of the Law. The Colorado Open Meetings Act (also known as the "Sunshine Law") is codified at C.R.S. § 24-6-401 *et seq.* The general purpose of the statute is to require the formation of public policy in Colorado to be done in public.

2. Local Public Body/State Public Body. The law applies in different ways depending on whether the public body in question is a "state public body" or a "local public body." A charter school is a "local public body." For many years, an institute-authorized charter school was considered a state public body, but in 2016 the General Assembly added a special provision to the statute designating Institute schools as local public bodies.

3. "Meeting" is Defined Very Broadly. In considering whether the law is applicable to any particular meeting, charter school board members should keep in mind that the term "meeting" is defined in an extremely broad manner. "Meeting" is defined as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication."

4. General Rule of the Open Meetings Law. The general rule of the Open Meetings Act is very simple: "All meetings of a quorum or three or more members of any local public body, whichever is fewer, 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."

The rule means that any time three or more members of a charter school board have a meeting at which they discuss charter school business, they may not exclude from that meeting any member of the public who wishes to sit in on it.

The statute states that no formal action of any local public body shall be valid unless the action is taken in an open meeting that complies with the Open Meetings Act. If a school believes it has inadvertently taken an action in violation of the law, there is a remedy. In *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*, 292 P.3d 1132 (Colo. App. 2012), the court held that a violation of the law may be cured if the policy is readopted in a meeting that complies with the statute. The court cautioned, however, that the meeting curing the violation cannot merely "rubberstamp" the prior action. The cure meeting must completely reopen the matter and include a full discussion of the issues attendant to the policy. *Id.*, 292 P.3d at 1137.

5. E-Mail Discussions. Email discussions among board members are not illegal *per se*. They are, however, "gatherings" for purposes of the law, and it is unclear how one would invite the public to attend such meetings. Accordingly, email discussions involving more than two board members should be avoided.

It is not illegal to send out information to directors via email in a one-way communication. For example, the board president may send materials that will be considered at an upcoming board meeting to all of the other directors by attaching them

to an email. As a general rule, however, a director who receives such an email should never press the "reply all" button when he or she sends a reply email.

This issue was discussed by the Court of Appeals in *Intermountain Rural Elec. Ass'n v. Colo. Public Utilities Commission*, 298 P.3d 1027 (Colo.App. 2012). In that case officials of the PUC discussed pending legislation in an email string. The court held that the emails constituted a "gathering" (and therefore a "meeting") for the purposes of the law, but that the particular discussions in the email string did not implicate the PUC's "policy making" function, and therefore the discussion did not violate the law. The negative implication of the court's opinion is that where an email discussion does implicate a board's policy making function, the discussion is subject to the law.

In another case the Colorado Court of Appeals specifically held that email discussions of policy issues among board members violated the Open Meetings Act. *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*, 292 P.3d 1132, 1134 (Colo. App. 2012).

6. Virtual Meetings. The statute defines "meeting" as "any kind of gathering, convened to discuss public business, in person**, by telephone, electronically**, or by other means of communication." C.R.S. § 24-6-402(1)(b). The statute seems to assume that a meeting can be electronic or telephonic so long as it is open to the public.

For many years it has been a fairly common practice for individual board members to appear at a meeting by telephone. This complies with the statute so long as the board member appearing by telephone can hear everything that is said and everyone can hear the board member.

In 2020, the COVID-19 crisis brought the issue of virtual meetings into focus. During that crisis almost all boards began meeting in virtual settings such as conference call bridges, Zoom or Google Meets. While the statute has probably always contemplated in person meetings and that remains a best practice, such virtual meetings do comply with the law so long as all board members and all members of the public attending the meeting can hear all speakers at all times. Special care should be taken in resolving into an executive session in a virtual meeting to ensure that no unidentified and improper participants have "hung on" from the open meeting.

7. Difference Between "Open" Meeting and "Noticed" Meeting. There is sometimes confusion about the difference between an "open" meeting and a "noticed" meeting. This confusion leads to questions such as: "If two other members of the board and I meet in the school lunchroom to discuss school business, do we have to post a notice the day before?" As we saw in section 4, an "open" meeting is <u>any</u> meeting of three or more board members. A "noticed" meeting, on the other hand, is any meeting where either of the following occurs:

a. A formal action of the board is taken (e.g., adoption of a policy or other motion); or

b. A majority (or quorum if less than a majority) of the board is present or is expected to be present.

Thus, for a seven-member board, a meeting of three board members in the lunchroom in which they discuss school business may be an open meeting (i.e., any member of the public can sit in on the discussion), but it is not a meeting for which notice must be posted in advance.

Is the annual school Christmas party attended by all of the directors an open meeting that must be noticed? If a majority of the board members plan to attend the party, it certainly appears to fall within the provisions of the statute and thus must be noticed. On the other hand, posting notice of a party does not appear to serve the purposes of the statute.

The Colorado Supreme Court resolved this issue in *Board of County Commissioners of Costilla County v. Costilla County Conservancy District*, 88 P.3d 1188 (Colo. 2004). In that case a majority of the county commissioners went to a dinner sponsored by a company with business before the board. The commissioners did not participate in the discussion or act in their official capacity in any way. Nevertheless, the county conservancy district sued, claiming that because a majority of the commissioners were at the dinner it was an open meeting that had to be noticed.

The Colorado Supreme Court disagreed. It held that a local public body must give notice of a meeting that is expected to be attended by a quorum of the body only if the meeting is "part of the policy-making process." A meeting is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance or other formal action.

In summary, even though a majority of the board plans to attend the Christmas party (or picnic or basketball game or any other event), if the board does not expect to discuss or undertake any formal board action, the meeting is not subject to the Open Meetings Act and there is no need to post advance notice. Obviously, the members of the board should not discuss board business at the event.

8. Votes Must be Public/No Secret Ballots. All board votes must be in public. Secret ballots are prohibited. There are two narrow exceptions to this rule. A charter board may vote by secret ballot to (1) elect board leadership (officers) and (2) appoint a search committee to search for a new chief executive officer. The Arvada City Council violated this provision when they used secret ballots to fill a vacancy on the city council. *Weisfield v. City of Arvada*, 361 P.3d 1069 (Colo.App. 2015).

9. Meeting Notice Requirements. The Open Meetings Act specifies the type of notice that is sufficient for those meetings where notice is required. For decades the notice requirement was fulfilled by posting a piece of paper at a designated place at the office of the charter school. In 2019 the General Assembly made a significant change to the law. The law now specifies that notice should be accomplished online instead of physically. The statute states:

> On and after July 1, 2019, a local public body shall be deemed to have given full and timely notice of a public meeting if the local public body posts the notice, with specific agenda information if available, no less than twenty-four hours prior to the holding of the meeting on a public website of the local public body. The notice must be accessible at no charge to the public. The local public body shall, to the extent feasible, make the notices searchable by type of meeting, date of meeting, time of meeting, agenda contents, and any other category deemed appropriate by the local public body . . .

Important Requirement: Charter schools providing notice online are required to provide the address of the website where notice is provided to the Department of Local Affairs for inclusion in the inventory of websites maintained by that department. To enter a charter school website, go to this webpage: https://cdola.colorado.gov/local-government. See the following text on that page:

> **If your local government is seeking to meet the electronic public notice requirements of HB 19-1087, an official website must be provided: ENTER WEBSITE HERE**

Finally, the charter school must designate a public place within the boundaries of the local public body at which it may post a notice no less than twenty-four hours prior to a meeting if it is unable to post a notice online in exigent or emergency circumstances such as a power outage or an interruption in internet service that prevents the public from accessing the notice online. For a school, the "public place" would be the school's office.

10. Minutes. The Open Meetings Act requires charter school boards to keep minutes of their meetings and make those minutes available for public inspection. The statute states that the minutes shall be recorded "promptly." Thus, there is no specific time limit for making minutes available, but the usual practice is to adopt the minutes for a meeting at the next regularly scheduled meeting. If a local public body ever records its meetings electronically it must continue to do so from that time forward. This means that charter schools should be very careful about recording their meetings, because if they do so even once they must continue to do so from that point on.

In 2009 the General Assembly enacted a law requiring boards of education of school districts to record all of their meetings. This law did **not** amend the Open Meetings Act. The new law applies only to boards of education of school districts. It does not apply to charter school boards.

11. Executive Sessions

11(a) How to Call an Executive Session. The statute provides that a charter school board may call an executive session to discuss certain matters. In order to call the executive session the board must (a) announce the general topic that will be discussed in the executive session; and (b) vote by a 2/3 majority to resolve into executive session.

One of the most common mistakes in this area is approving a motion to resolve into executive session by voice vote. The minutes of the meeting must show the necessary 2/3 majority approved going into executive session, and this is impossible if the motion was approved by voice vote. To resolve into executive session the board should vote by roll call. Alternatively, the chair of the meeting may call for objections, and if there are none announce a unanimous vote.

The statute requires the board to announce the "particular matter" that is going to be discussed with "as much detail as possible without undermining the purpose for which the executive session is held." The board may not announce merely the statutory description of the topic of an authorized executive session discussion (e.g. "personnel matters" or "discussions with an attorney"). If the board fails to comply with the announcement requirement, the meeting may be declared to be an illegal closed meeting, in which case the recording of that closed meeting would be a public record open for inspection and attorney fees would be assessed against the school. *Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004).

In a 2016 case, the Jefferson County District Court held that a charter school board had failed to comply with the requirements of the statute regarding the description of the discussion to be held in two executive sessions. The first involved investigation of possible teacher misconduct. The board described the session as follows: "Executive Session: Investigation CRS 24-6-402 4(d)." The court held this description violated the statute, because it simply cited the statute and included a single word from the statute and this was not adequate to describe the "particular matter to be discussed." The court held that the board was not required to name the specific teacher involved, but any number of descriptions, e.g. "investigation of teacher misconduct," may have been appropriate and would not have compromised the purpose for which the executive session was authorized.

The second executive session involved discussion of a particular student. The board described the session as follows: "Executive Session CRS 24-6-402(4) - 'discussion of individual students where public disclosure would adversely affect the person or persons involved.'" The court held this violated the statute because it again simply cited the statute and quoted the statutory language without describing the particular matter to be discussed. Again, identification of the specific student involved was not required, but any number of descriptions, e.g. "investigation of student misconduct," may have been appropriate and would not have compromised the purpose for which the executive session was authorized.

11(b) No Formal Action in Executive Session. Executive sessions are for discussion only. No formal actions can be taken in executive session. Thus, for example, a charter school board may never vote on a motion while it is in executive session. If the board wants to adopt a motion after discussing it in executive session, it must first resolve itself out of executive session into an open meeting and then hold the vote.

11(c) Proper Subjects for Executive Sessions. A charter school board may not resolve itself into executive session just because it wants to discuss a matter in

private. All discussions of the charter school board must occur in open session unless there is specific statutory authority for holding an executive session on a topic. The specific grounds for which a charter school board may meet in executive session are listed in C.R.S. § 24-6-402(4) as follows:

a. Discussions regarding buying or selling property;

b. Conferences with an attorney to receive legal advice;

c. Matters required to be kept confidential by state or federal law (e.g., student records under FERPA);

d. Security arrangements or investigations;

e. Determining contract negotiation strategies;

f. Personnel matters. "Personnel matters" does not include discussions concerning a member of the charter school board or the appointment of a person to fill a vacancy on the board. Nor does the topic include discussion of general personnel policies like salary schedules. The exception occurs only when an individual employee or group of employees are discussed. An individual employee has a right to require discussions about him or her to be held in an open meeting, which means that the employee must receive notice in advance that he or she will be the subject of the executive session discussion. *Gumina v. City of Sterling*, 119 P.3d 527 (Colo.App. 2004).

   There is confusion about whether an employee has a right to attend an executive session in which they are discussed. They do not. They have the right to require the discussion to be held in an open session, but they do not have the right to be present in the executive session if they waive this right. The board of directors may invite the employee into the executive session if it chooses, but is not required to do so.

g. Consideration of documents protected from disclosure under CORA (for more on this see the discussion of that act below); or

h. Discussion of individual students where public discussion would adversely affect the student involved.

11(d) Recordings of Executive Sessions. If the charter school board resolves itself into executive session, the minutes of the regular open meeting must state the general topic of discussion (e.g., "consultations with legal counsel;" "determining contract negotiation strategy;" etc.). The minutes of the regular open meeting should not reflect the actual discussions that occurred in the executive session.

Discussions that occur in executive sessions must be recorded by electronic means. At the beginning of the executive session a statement of the citation to the

specific provision of the statute that authorizes the charter school board to meet in executive session must be made on the record.

Importantly for charter schools, the statute specifically excepts from its provisions discussions of individual students at the school. Therefore, if the purpose of the executive session is to discuss an individual student (for e.g., discipline, etc.) no recording of the session need be made.

The statute also provides an exception to the executive session recording requirement for consultations with attorneys. However, the recording of the executive session must have a statement from the attorney that the portion of the session that was not recorded, in the opinion of the attorney, constituted a privileged communication. In the alternative, the attorney may provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged communication.

The recording of an executive session of the charter school board is <u>not</u> open to the public unless the school agrees or is ordered to produce the recording by a court. A school is required to keep the recording of an executive session for 90 days. If there is no notice of a challenge to the executive session within that 90 day period, it is advisable to purge the recording from the school's records, although it is not required to do so.

In 2014 the General Assembly amended the Education Code to impose additional requirements regarding executive sessions on local boards of education. C.R.S. § 22-32-108(5)(d). The statute specifically states that it is applicable only to boards of education of school districts. It is not part of the Open Meetings Act and therefore it does not apply to charter schools.

12. Sunshine List. A little known and little used part of the Open Meetings Act requires the secretary of each local public body to keep a record of each person who has requested specific notice of meetings and to provide individual notice to such persons in advance of any meeting.

13. CEO Appointment. The Open Meetings Act contains a provision that has more to do with appointing the school's chief executive officer than with meetings as such. The provision states that a search committee shall establish job search goals, draft a job description, and establish deadlines for applications, requirements for applicants, selection procedures, and the time frame for employing the CEO. The school must make public the list of all finalists under consideration for the position no later than fourteen days prior to employing one of the finalists to fill the position. No offer of appointment or employment shall be made prior to this public notice.

COLORADO OPEN RECORDS ACT ("CORA")

1. Purpose of the Law. The Colorado Open Records Act is codified at C.R.S. § 24-72-201 *et seq.* The law is usually referred to as "CORA." The statute declares as its general purpose that all public records shall be open for inspection by the public.

2. General Rule. CORA's general rule creates a "strong presumption" that public records shall be disclosed unless an exception to disclosure is clearly applicable. *Int'l Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist*., 880 P.2d 160, 165, 167 (Colo.App.1994). This strong presumption requires any exceptions to CORA's disclosure requirements to be construed narrowly. *City of Westminster v. Dogan Constr. Co*., 930 P.2d 585, 592 (Colo.1997).

3. "Record" is Defined Very Broadly. CORA defines the term "record" extremely broadly to include practically any kind of written, electronic or recorded communication or document imaginable. Note that the term specifically includes e-mail. Thus, charter school board members should assume that any e-mails among board members that are in the custody of the school (usually as a result of having gone through the school's email server) will be subject to production to any member of the public who wishes to see them.

4. Procedures for Production of Open Records. CORA contains very specific and detailed instructions for the production of public records to a requesting member of the public. Generally speaking, the procedures require the charter school to make the records available to the requesting party within three working days of the request unless there are extenuating circumstances justifying a greater time. However, the maximum period of time between the request and the production is seven working days unless the production cannot be accomplished in that time. In no event can extenuating circumstances apply to a request for a single, specifically identified document.

5. Exceptions. While CORA's general policy is that all records are open records subject to inspection, there are a number of exceptions. Unless a record falls within a specific exception it must be produced. The exceptions are too numerous to summarize here (and many of them would not generally be applicable to charter schools). However, some of the more important exceptions are the following:

a. Producing the record would violate state or federal law (i.e., student records under FERPA);

b. Test questions, scoring keys, and other examination data;

c. Real estate appraisals relating to property acquisitions until title has passed;

d. Medical, mental health, sociological and scholastic achievement data on individual persons;

e. Personnel files;

f. Letters of reference;

g. Privileged information (e.g. attorney-client communications);

h. Addresses and telephone numbers of students (such information may not be provided in, for example, a school directory unless specific authorization is obtained); and

i. Records of sexual harassment complaints.

Since there are so many exceptions to CORA, if there is any doubt about whether production of a particular document is permissible, legal counsel should be consulted.

6. Expanded Discussion of Personnel File Exception

Particular attention should be paid to the whether records within a "personnel file" are subject to production, because what constitutes a record under this exception (and what does not) is often counterintuitive. The courts have held that a public body may not restrict access to a document merely by placing it in a file labeled "personnel file." *Denver Publishing Co. v. Univ. of Colo*., 812 P.2d 682 (Colo.App. 1990). The document must implicate a legitimate expectation of privacy on the part of the employee, and information such as employment contracts regarding amounts paid to the employee do not implicate such a privacy interest. In other words, public employees have no right to privacy regarding the terms of their employment.

Some documents that some might consider "personnel" documents must be produced on request. Others must not. The statute states the following regarding employment records:

> (3)(a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest pursuant to this subsection (3):
>
> (II)(A) Personnel files; but such files shall be available to the person in interest and to the duly elected and appointed public officials who supervise such person's work.
>
> (B) The provisions of this subparagraph (II) shall not be interpreted to prevent the public inspection or copying of any employment contract or any information regarding amounts paid or benefits provided under any settlement agreement pursuant to the provisions of article 19 of this title.

The term "personnel files" is defined as follows:

> (4.5) "Personnel files" means and includes home addresses, telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure under this part 2 or any other provision of law. "Personnel files" does not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required under section 23-5-123, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.

In summary, personnel files generally may not be disclosed except to the employee to whom they pertain. However, applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports, or any compensation, including expense allowances and benefits, paid to employees are not protected by the "personnel file" exemption. However, even if a document must be produced (an application for example) private information such as a social security number must be redacted.

Finally, there is C.R.S. § 22-9-109(1), which provides:

> Notwithstanding the provisions of section 24-72-204(3), C.R.S., the evaluation report and all public records as defined in section 24-72-202(6), C.R.S., used in preparing the evaluation report shall be confidential and shall be available only to the licensed person being evaluated, to the duly elected and appointed public officials who supervise his or her work, and to a hearing officer conducting a hearing pursuant to the provisions of section 22-63-302 or the court of appeals reviewing a decision of the board of education pursuant to the provisions of section 22-63-302 . . .

So with respect to "evaluation reports," there is the general rule, an exception to the rule, an exception to the exception, and an exception to the exception to the exception. After all of the dust settles evaluation reports are confidential.

Many of these rules were analyzied by the Colorado Court of Appeals in *Jefferson Cty. Educ. Ass'n v. Jefferson Cty. Sch. Dist. R-1*, 378 P.3d 835 (Colo.App. 2016). This case involved a 2014 "sick out" called by a group of teachers in Jefferson County. Certain parents requested the district to disclose the names of the teachers who participated in the sick out, and the teachers filed suit to prevent that, claiming that the information was protected under the "personnel" provision of the CORA. The court rejected the teacher's claim and held that the personnel exception was generally limited to "personal demographic information" such as that listed in the statute. The court stated:

> Turning to the records in this case, we must therefore decide whether they are of the "same general nature" – personal demographic information – as

> the teacher's home address, telephone number, or financial information. We conclude that the records in this case are not of the same general nature because a teacher's absence is directly related to the teacher's job as a public employee. The fact of a teacher's absence from the workplace is neither personal nor demographic; it is conspicuous to coworkers, to students, and to parents. The basic reason given for the absence – the teacher is sick – is often equally conspicuous.

7. The Interplay Between CORA and FERPA

Sometimes schools must address the interplay between CORA and the federal Family Education Rights and Privacy Act of 1974, 20 U.S.C. sec. 1232 g ("FERPA"). The distinction is important with regard to whether a school may charge a fee for a document production. The main distinction to keep in mind is that CORA defines "records" that must be produced very broadly, but it allows the school to charge a fee for voluminous productions (see discussion below). Conversely, the definition of "education record" under FERPA is substantially narrower, and no fee may be charged in connection with producing documents under the statute.

As discussed above, CORA defines the term "record" extremely broadly to include practically any kind of written, electronic or recorded communication or document imaginable. A detailed discussion of what constitutes an "education record" under FERPA is beyond the scope of this discussion. However, it is sufficient to note that United States Supreme Court has suggested a very narrow reading of the term. *Owasso Ind. School Dist. v. Falvo,* 534 U.S. 426, 435–36, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002).

Suppose a parent were to demand that a school produce all emails associated with a student for the last eight years, which would entail tasking a staff member to spend two weeks retrieving and reviewing over 10,000 emails. If all of these emails were "education records" under FERPA, the school would be obliged to perform all of this work and produce the records for no charge. But if the emails are not FERPA education records, the school can charge a fee for this work as discussed in the next section. Thus, depending on the circumstances, the interplay between CORA and FERPA can be important.

8. Charges for Copies. A charter school may charge up to twenty-five cents per standard page for copies. It may charge actual costs for non-standard pages. It may also charge an hourly fee (after the first hour, which is free) designed to recover its staff-time research and retrieval costs for responding to the request. The original fee was $30.00 per hour. The statute provides that this fee escalates every five years beginning in 2019. The adjusted fee is on the General Assembly's website.

The statute requires the copy and research and retrieval fees to be published on the custodian's website prior to the request. In other words, if the fee schedule is not published prior to the request, no fee may be charged. Most districts have CORA fee schedules, which operate as district policies. Therefore, if a school does not have a fee schedule when a CORA request comes in, it should consider relying on the district

schedule. However, it is a best practice for each school to publish its own schedule on its website. Institute schools must publish their own schedules. The statute allows the school to require a deposit against such fees to be paid prior to producing the records.