

## COLORADO OPEN MEETINGS AND OPEN RECORDS LAWS AFFECTING CHARTER SCHOOLS

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### The Colorado Open Meetings Law.

**1. General Purpose of the Law.** The general policy underlying the Colorado Open Meetings Law<sup>1</sup> is stated in section 401 of the law, which states that the formation of public policy in Colorado is public business and may not be done in secret.

**2. Charter Schools are Local Public Bodies.** 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.”

**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 way in the act. “Meeting” is defined as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” However, the law does not apply to “any chance meeting or social gathering at which discussion of public business is not the central purpose.”

**4. E-Mail Discussions.** Increasingly charter school boards are discussing school business among themselves by means of e-mail. There is nothing wrong with this practice. However, it is unclear whether such e-mail communications are subject to the Open Meetings Law. The law states that e-mail communications among “elected officials” discussing “pending legislation or other public business” are subject to the law. This language seems to apply only to persons elected by the voters who have the power to enact legislation. It does not appear to apply to members of charter school boards. However, even if the Open Meetings Law does not apply to these e-mail communications, the e-mails themselves are subject to disclosure under the Open Records Act discussed later.

**5. General Rule of the Open Meetings Law.** The general rule of the Open Meetings Law is very simple. The rule is this: “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.”

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<sup>1</sup> C.R.S. § 24-6-401 et seq.

The rule simply means that any time three or more<sup>2</sup> 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.

Very importantly, 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 Law.

**6. Difference Between “Open” Meeting and “Noticed” Meeting.** There is a tremendous amount of confusion in the charter school community about whether meetings of board members must be noticed. 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?” The answer to this question involves the distinction between an “open” meeting and a “noticed” meeting.

As we saw in the previous section, an “open” meeting is any 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, the meeting of three<sup>3</sup> board members in the lunchroom is 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. If, however, the charter school has seven board members and four members meet to discuss school business, that meeting must be noticed.

**7. Notice.** The Open Meetings Law specifies the type of notice that is sufficient for those meetings where notice is required. The law states that a local public body shall be deemed to have given full and timely notice if the meeting is posted in a designated public place no less than 24 hours prior to the meeting. The designated place must be adopted annually by the school’s board in its first meeting in January. The posting must include the agenda for the meeting where possible. Therefore, if the school has an agenda prepared in advance it should be posted as part of the notice. However, the “where possible” language of the statute probably means that the charter school board will not be strictly bound to the posted agenda at its meeting.

**8. Minutes.** The Open Meetings Law requires charter school boards to keep minutes of their meetings and make those minutes available for public inspection. The

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<sup>2</sup> In the unlikely event that two members constitutes a quorum of the board, then the number would be two instead of three.

<sup>3</sup> Assuming a quorum of the charter school’s board is more than three.

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.

**9. 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. The announcement of the general topic must include a specific citation to the part of the law authorizing the executive session and must be as detailed as possible without compromising the purpose of the executive session.

**10. No Formal Action in Executive Session.** It is very important to understand that 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. Proper Subjects for Executive Sessions.** It is also important to note that 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 academic records);
- d. Security arrangements or investigations;
- e. Determining contract negotiation strategies;
- f. Personnel matters (Note that “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.);
- g. Consideration of documents protected from disclosure under the Open Records Act (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.

**12. Minutes of Executive Sessions.** The statute has special provisions for the minutes of executive sessions. First, 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.

Beginning in August 2001, the discussions that occur in executive sessions must be recorded in the same manner as the discussions that occur in open session. For example, if open sessions are recorded on tape, the executive session must be recorded on tape. If open sessions are recorded through a note taking procedure, executive sessions must be recorded through the same note taking procedure. Review and approval of the minutes of an executive session may, obviously, occur in an executive session as well. The minutes of an executive session must contain the following:

- a. A citation to the specific provision of the statute that authorizes the charter school board to meet in executive session;
- b. The contents of the discussions (this need not be verbatim; the minutes need only reflect the substance of the discussions);
- c. A signed statement from the person chairing the executive session attesting that the minutes of the executive session accurately reflect the substance of the discussions during the executive session.

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 minutes of the session need be taken.

The statute also provides an exception to the executive session minute taking procedure for consultations with attorneys. However, if the charter school board takes advantage of this exception and does not record discussions with an attorney, the attorney must sign a statement attached to the minutes of the regular meeting that the portion of the executive session for which minutes were not kept constituted a privileged attorney-client communication. In addition, the chair of the meeting must sign a statement in the minutes affirming that the portion of the meeting that was not recorded was confined to a subject for which it is proper to hold an executive session under the statute.

The minutes of an executive session of the charter school board are not open to the public unless the school agrees to open the minutes or is ordered to produce the minutes by a court. The charter school is required to keep the minutes of an executive session for at least 90 days, after which it may discard the minutes.

**13. Sunshine List.** A little known and little used part of the Open Meetings Law 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.

### The Colorado Open Records Law.

**1. General Purpose of the Law.** Like the Open Records Law, the Open Records Act<sup>4</sup> declares as its general purpose that all public records shall be open for inspection by the public.

**2. General Rule.** The general rule of the Open Records Act is also quite simple: All public records shall be open for inspection by any person at reasonable times.

**3. What is a “Record.”** The Open Records Act 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 will be subject to production to any member of the public who wishes to see them.

**4. Procedures for Production of Open Records.** The Open Records Act 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. In no even can extenuating circumstances apply to a request for a single, specifically identified document.

**5. Exceptions.** While the general policy of the State of Colorado 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., individual student academic records);
- b. Test questions, scoring keys, and other examination data;
- c. Real estate appraisals relating to property acquisitions until title has passed;

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<sup>4</sup> C.R.S. § 24-72-201 et seq.

- d. Medical, mental health, sociological and scholastic achievement data on individual persons;
- e. Personnel files (Note that notwithstanding this exception, any employment contract or other information regarding amounts paid to individual employees and amounts paid under settlement agreements must be produced);
- 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 the Open Records Act, if there is any doubt about whether production of a particular document is permissible, legal counsel should be consulted.**

**6. Charges for Copies.** The charter school may charge a reasonable fee for providing requested copies of open records.