

Public Meetings: Legal Requirements and Effective Practices

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DOJ ROLE

Legal counsel at Board meetings

- Legal considerations for particular cases
- Reminders on executive session v. public session topics
- Legal advice on questions from Board Chair or Executive Director

On-going legal counsel to OCDD

- Legal questions for policy matters (Board authority, etc.)

Attorney-Client Privilege

General Counsel Introduction

INTRODUCTION

The Department of Justice Counsel has no enforcement role regarding Public Meetings' Laws.

General Counsel Health and Human Services, where I work, represents the OCDD as a whole

The goal of today's meeting is to clarify the types of meetings, what can be discussed in each meeting type, and common missteps.

Outline of Today's Training

TOPICS	
1. Public Meeting Law Big Picture	5. Notice requirements
2. Who does this apply to?	6. Enforcement of Meetings Law
3. What does the law require?	7. Record Retention
4. Executive Sessions	8. Questions / Wrap-up

Why do we have public meeting laws?

WHY DO WE HAVE PUBLIC MEETING LAWS?

Policy

- To ensure an open governmental decision-making process and to facilitate the public's awareness "of the deliberations and decisions of governing bodies and the information upon which such decisions were made." ORS 192.620

Laws

- Oregon Revised Statutes 192.610 to 192.695

Enforcement

- The law is enforced by private right of action, but the Oregon Government Ethics Commission also has a role.

When do these laws apply?

REQUIRES US TO
EVALUATE

- Who is meeting?
- What are they meeting about?

When Does The Law Apply?

Step 1: Who is Meeting?

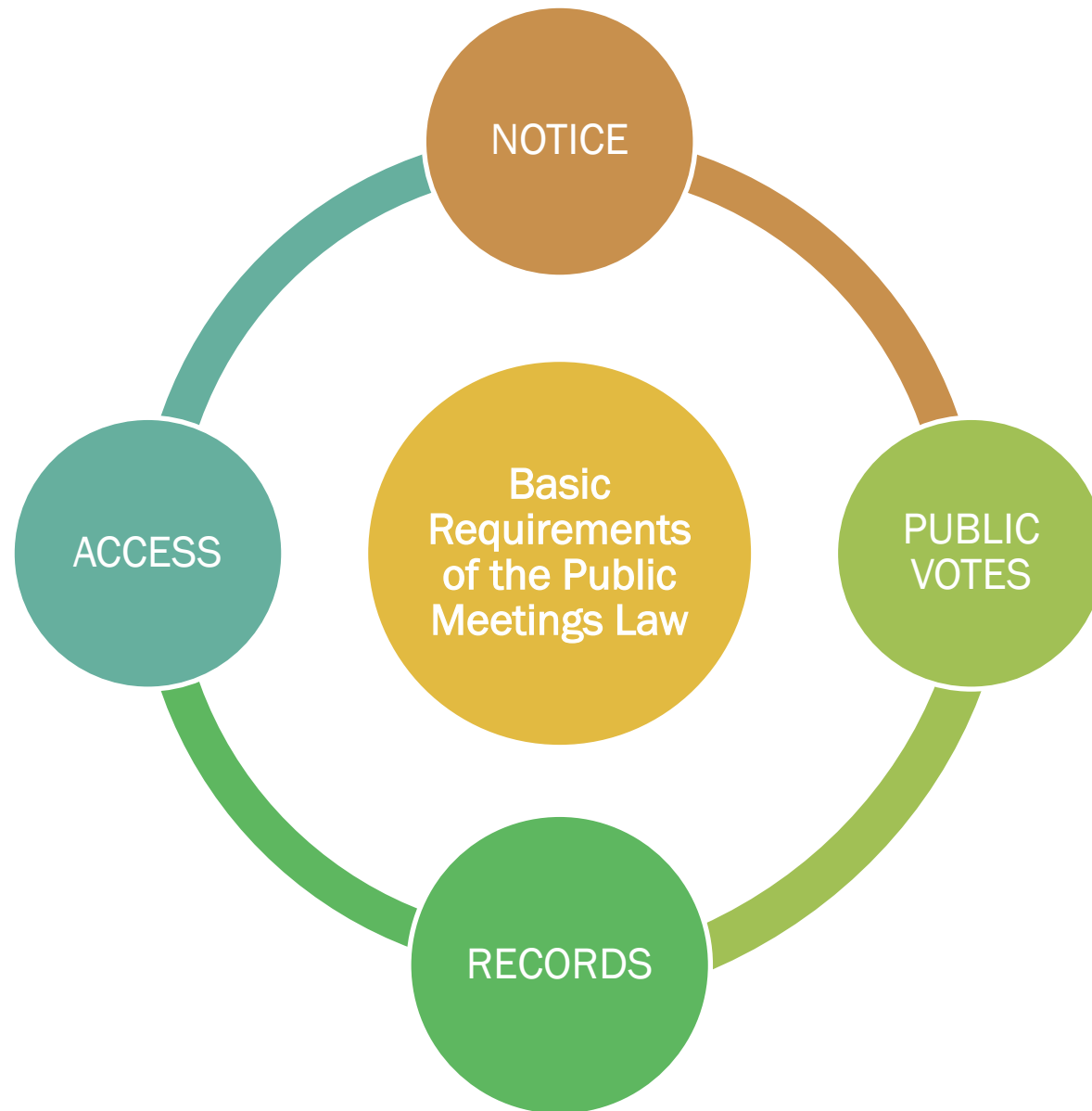
The Public Meetings Law applies to the "governing bodies" of state and local "public bodies."

Step 2: What are they meeting about?

The law does not apply to everything we call a “meeting”

The default is that the meeting is open to the public and only if an exception applies can the public or certain individuals be excluded.

Basic Requirements of the Law



Basic Requirements of the Law / Notice

Notice is Required

"Reasonably calculated to give actual notice to interested persons including news media which have requested notice." ORS 192.640(1).

Notice must include:

- Date; Time; Location
- A list of principal subjects that the governing body anticipates it will address.
- Notice of an electronic meeting must either identify a location where the public can access the meeting, or provide other means by which the public can attend the meeting, such as a call-in number.

If all or part of the meeting will be conducted in executive session, notice also must include reference to the provision authorizing the executive session. Still subject to Public Meeting Law.

Special Meetings require at least 24 hours' notice.

Emergency Meetings require notice "appropriate to the circumstances." An "actual emergency" must exist, and the minutes must describe the emergency justifying less than 24 hours' notice. ORS 192.640(3).

Paid advertising to provide notice of the meeting is not required.

Basic Requirements of the Law / Access

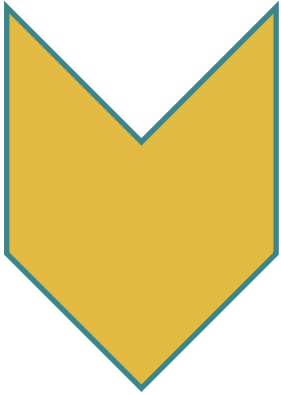
Provide Access to the Public

Who may attend a public meeting?

Meetings must be held in locations accessible to people with disabilities.

Where may public meetings be held?

Electronic meetings.



Public Access and Participation:

If the public meeting is not a contested case hearing and not an executive session, then a Governing Body must provide opportunity “to the extent reasonably possible” for people to:

- Access and attend the meeting by telephone, video or other electronic or virtual means.
- Submit oral testimony by electronic or virtual means during the meeting (if in-person oral testimony is allowed).
- Submit written testimony, by physical or electronic means, enabling consideration by Governing Body of the material in a timely manner (if in-person written testimony is allowed).

Serial Communications

A public meeting may occur via serial communications among a quorum of the Board, even if conducted through an intermediary

- *Handy v. Lane County*, 274 Or App 644 (2015), *affirmed in part, reversed in part*, 360 Or 605 (2016).
- Problem: there's no notice or public access

Watch out for group emails or serial emails

- Best practices: no group emails, or, have staff distribute information to the Board with bcc to prevent accidental “reply all” emails among board members

Basic Requirements of the Law / Public Votes

Votes must be held in public

All official actions by a governing body must be taken by public vote. ORS 192.660(6)

Secret ballots are prohibited.

No voting in executive session.

The vote of each member must be recorded if the public body has 25 or fewer members. If the public body consists of more than 25 members, recording the vote of each member is mandatory only if a member of that body requests it.

Basic Requirements of the Law / Records

Create a Record by Minutes and/or Recordings

"Sound, video or digital recording" of meeting must be made or written minutes kept of all meetings. ORS 192.650(1).

Minutes and recordings must include at least the following information:

- Members present.
- All motions, proposals, resolutions, orders, ordinances and measures proposed, and their disposition.
- Results of all votes and vote of each member by name (vote by name not required if over 25 members, unless member requests).
- Substance of all discussions.
- Reference to all documents discussed (confidentiality of records exempt from disclosure may be protected).
- For emergency meetings, a description of the emergency justifying the meeting.

Same rules apply to executive session (closed session) minutes, *except*:

- Audio tape recording generally need not be transcribed.
- Material the disclosure of which is inconsistent with purpose of the meeting need not be disclosed.

TERMS

- Special meeting
- Executive session
- Emergency meeting

SPECIAL MEETINGS

- The Council's bylaws specify that there will be 6 meetings per year.
- Special meetings are those called outside of this schedule.
- They are called by the chair and require at least 24 Hours' Notice.



EMERGENCY MEETING

- Called with less than 24 Hours' Notice.
- Meeting Minutes must identify the emergency and why 24 hours' notice could not be provided.
- Only the emergency matter may be discussed.

Emergency Meetings
Must involve an actual
emergency.

EXECUTIVE SESSION

- Closed to the public or to certain persons.
- Called by the chair who must identify the statute that allows the meeting.
- Public meeting laws still apply to the meeting.
- Only the matter for which an executive session can be called may be discussed.

Executive Sessions

The Oregon Public Meetings Law permits executive sessions for certain specified purposes, set out in ORS 192.660.

Conduct of Executive Session

Notice of the meeting must cite specific legal provision authorizing the executive session under ORS 192.660(2).

Before going into executive session, the presiding officer must announce the specific statutory authority for the executive session.

Take minutes or record executive session, but keep separate from public session minutes.

Members of the media may attend executive session, with limited exceptions. News media must be instructed not to report about what happened at the beginning of executive session or they may do so.

Discussions in executive session must stay within the bounds of the specific purpose of the executive session.

No final action or final decision can be made in executive session. ORS 192.660(6).

192.660 Executive sessions permitted on certain matters; procedures; news media representatives' attendance; limits; advisory opinions.

[199-040-0027](#)

Employment of a Public Officer, Employee, Staff Member or Individual Agent under ORS 192.660(2)(a) and Compliance with ORS 192.660(7)(d)

(1) The purpose of this rule is to provide guidance to a governing body when the governing body holds an executive session permitted by ORS 192.660(2)(a): “To consider the employment of a public officer, employee, staff member or individual agent.” **Only consideration of an initial employment is permissible under this section.** ORS 192.660(2)(a) does not authorize discussion of other employment actions such as performance evaluation, complaints, discipline, termination, or extension of an employment contract.

(2) Before a governing body convenes an executive session to consider initial employment of a chief executive officer, public officer, employee or staff member under ORS 192.660(2)(a), the governing body must fulfill the prerequisites listed in ORS 192.660(7)(d). ORS 192.660(7)(d) requires that the public body:

- (a) Advertise the vacancy;
- (b) Adopt regular hiring procedures;
- (c) In the case of an officer, offer the public an opportunity to comment on the employment of the officer; and
- (d) In the case of a chief executive officer, the governing body must have adopted hiring standards, criteria and policy directives in meetings open to the public in which the public has had the opportunity to comment on the standards, criteria and policy directives.

(3) When a governing body convenes an executive session to consider the employment of an agent under ORS 192.660(2)(a), the agent must be an individual person. Some examples may include an attorney, an accountant, or another individual who would perform services on behalf of the public body in the capacity of an agent, even if the prospective individual agent works for a larger firm or company. A firm or business entity that consists of more than one person is not an individual agent, and a governing body shall not consider the employment of a firm or entity in executive session under this section. It is not required that the governing body fulfill the prerequisites listed in ORS 192.660(7)(d) when considering the employment of an individual agent in executive session under ORS 192.660(2)(a).

Statutory/Other Authority: ORS 244.290

Statutes/Other Implemented: ORS 192.660(2)(a) & 192.660(7)(d)

199-040-0030

Notice to Public Official under ORS 192.660(2)(b) or (i)

(1) In order to afford to the chief executive officer of any public body, a public officer, employee, staff member or individual agent the opportunity to request an open hearing under ORS 192.660(2)(b) or (i), the public official must receive written notice of the meeting no less than one business day or 24 hours, whichever is greater, in advance of the meeting.

(2) At a minimum, the written notice shall include:

(a) Identification of the governing body before which the matter will be considered;

(b) The time, date and location of the meeting;

(c) The purpose for which the governing body proposes to convene the executive session, including the citation to the applicable section of ORS 192.660 and the fact that the governing body will be considering the dismissal or disciplining of, hearing complaints or charges against, or reviewing and evaluating the performance of the public official receiving the notice;

(d) Information on how the public official may make a request for an open hearing.

Statutory/Other Authority: ORS 244.290

Statutes/Other Implemented: ORS 192.660(2)(b) & 192.660(2)(i)

History:

GEC 2-2016, f. & cert. ef. 6-1-16

Basic Requirements of the Law / Enforcing the law

Enforcement of Public Meeting Laws

Any person "affected by" a governing body's decision can sue to enforce the meetings law; must sue within 60 days of when decision became a public record. ORS 192.680(2), 192.680(5).

A decision made in violation of the meetings law is voidable. A decision made in violation of public meeting law can sometimes get a "do over" by following the law.

The court may order the relief it believes appropriate, but may not void a decision of the governing body unless no other relief is available. ORS 192.680(3).

The court may order the public body to pay a successful plaintiff's court costs and attorney fees. ORS 192.680(3).

If the court finds a violation resulted from "willful misconduct" by a member of the governing body, that member is personally liable for court costs and attorney fees paid to plaintiff by the governing body. ORS 192.680(4).

Civil Penalties

- Complaints that public officials have violated the executive session provisions of the law may be made to the Oregon Government Ethics Commission. ORS 192.685(1).
- Commission may impose civil penalties not to exceed \$1,000 for violating any provision of ORS 192.660. ORS 244.350(2).

Final Dispositions by the Oregon Government Ethics Commission:

<https://apps.oregon.gov/OGEC/CMS/FinalDispositions>

Common violations discussed:

- Was a decision made in Executive Session?*
- Was Executive Session held on Authorized Subject?*
- Was Executive Session held with Proper Notice?*

What Records Must be retained

What are the duties of each council member regarding retention of records?

Public records / retention

- ▶ What is a public record that must be retained?
- ▶ It is any information that:
 - ▶ Is prepared, owned, used or retained by a state agency;
 - ▶ Relates to an activity, transaction or function of a council; and
 - ▶ Is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the council. (ORS 192.005(5)(a))
- ▶ It is not:
 - ▶ “extra copies of document, preserved only for convenience of reference” and stocks of publications. (ORS 192.005(5)(b)(D) & (E))
- ▶ Note: “information”—not “document”—all media formats.
 - ▶ Except voicemail. ORS 192.005(5)(b)(F).



Public records/retention

- ▶ **Public records retention obligations apply to**
 - ▶ Council business...
 - ▶ Done anywhere...
 - ▶ On any device...
 - ▶ In any account...

- ▶ **No distinction between**
 - ▶ Private email account and board email account...
 - ▶ Personal computer can be seized...

- ▶ **Content controls, not format**



Public records/inspection

- ▶ “Every person has a right to inspect any public record of a public body in this state, except as expressly provided by ORS 192.338, 192.345 and 192.355.” (ORS 192.314(1))
- ▶ “Public record”: any writing that contains information relating to the conduct of the public’s business... regardless of physical form or characteristics. (ORS 192.311(5)(a))
- ▶ “Public body”: every state officer, agency, department, division, bureau, board and commission. (ORS 192.311(4))



Personal Emails

Personal email, on a personal device, is a public record if it “relates to the conduct of the public’s business.” ORS 192.311(5)(b)

Best practices:

- Consider everything you put in writing relating to the conduct of Council business a potential public record that might have to be disclosed.
- Copy a council staff person on your Council-related emails to ensure they are saved to the agency’s server.

Consider your audience

- ▶ Who could potentially see your records?

1.

2.

3.

4.

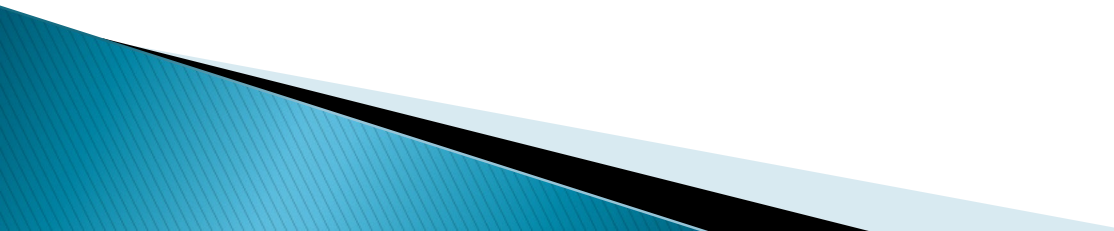
5.

CASE STUDY: Which of these are public records:

- ▶ 1. Notes taken at a council meeting
- ▶ 2. Emails among members marked “confidential”
- ▶ 3. Draft emails to council members regarding council business
- ▶ 4. Text messages sent from personal cell phone regarding council business
- ▶ 5. Printout of an email sent by another council member



Closing Thoughts

- ▶ You cannot throw records away and *everything* may be subject to production.
 - ▶ So, do not write anything you would be embarrassed to say in public.
- 

Conclusion

- ▶ Questions
- ▶ Discussion
- ▶ Future topics?

