

— Oregon Municipal Handbook —

CHAPTER 9: PUBLIC MEETINGS LAW



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Chapter 9: Public Meetings Law

The purpose of the Oregon Public Meetings Law (OPML) is to make decision-making of state and local governing bodies available to the public. This policy is stated expressly in the law: “The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of [this law] that decisions of governing bodies be arrived at openly.”¹

That policy is given effect through various substantive provisions contained under ORS 192.610 to ORS 162.690, discussed below.² Although compliance with these provisions might reduce the speed and efficiency of local decision-making, local residents benefit from a better understanding of the facts and policies underlying local actions. The required process and formality also can make it easier for cities to justify a decision if one is later challenged in an administrative or judicial proceeding.³

This chapter will touch on the basic requirements of the law, beginning with the criteria for what gatherings constitute “meetings” and what organizations constitute “governing bodies” under the OPML.⁴ Where applicable, the OPML generally requires that meetings be open to the public unless an executive session is permitted, that proper notice be given, and that meeting minutes and votes be recorded.⁵ The OPML also governs the location of meetings.⁶ Finally, the OPML includes enforcement provisions for when these provisions are violated.⁷

Please note that this chapter is meant to provide LOC members with an overview of the OPML. LOC members with specific questions are encouraged to contact their city’s attorney. Further, note that this chapter of the Handbook is based extensively on material in the Oregon Attorney General’s Public Records and Meetings Manual (2019). LOC strongly recommends that cities purchase the print version of this manual, which is updated every two years. A free online version is available at <https://www.doj.state.or.us/oregon-department-of-justice/public-records/attorney-generals-public-records-and-meetings-manual/>. Finally, note that the Oregon Department of Justice (ODOJ) reserves its legal advice for the state of Oregon and its agencies; as such, cities with specific questions on the OPML again should consult their legal counsel.

¹ ORS 192.620.

² *Id.*

³ *See, e.g.*, ORS 192.650. By recording the minutes of any meeting, including the “substance of any discussion on any matter,” cities build a record that shows the basis for their actions. This record can dispel claims that a city’s action is arbitrary, discriminatory, retaliatory, etc.

⁴ ORS 192.610.

⁵ ORS 192.630 to ORS 192.660.

⁶ *Id.*

⁷ ORS 192.680.

I. COVERED ENTITIES

Understanding the scope of the OPML is critical for ensuring compliance with the law. In short, the OPML applies to **(A)** governing bodies of a public body that **(B)** hold meetings for which a quorum is required to make a decision or deliberate toward a decision on any matter.⁸ The first of those elements addresses the *who* of the OPML — that is, which entities are subject to the law. The second of those elements addresses the *what* of the OPML — that is, what types of meetings are subject to the law. This section addresses the first of those elements.

A. Governing Bodies of Public Bodies

The OPML applies only to the “governing bodies” of a public body.”⁹ A public body includes state bodies, any regional council, a county, a city, a district, or any other municipal or public corporation.¹⁰ A “public body” also includes a board, department, commission, council, bureau, committee, subcommittee, or advisory group of any of the aforementioned entities.¹¹ A “governing body,” meanwhile, does not just mean city council; it means two or more members of any public body with “the authority to make decisions for or recommendations to a public body on policy or administration.”¹² The following subsections examine in more detail the authority to make decisions and recommendations, and what entities might in turn qualify as a “governing body.”

Examples:

A city is a public body under ORS 192.610(4), and a five-member city council is a governing body of the city. Further, a planning commission of a city is also a public body, and a three-member board of commissioners is a governing body of the planning commission. ORS 192.610(3).

i. A body that makes decisions for a public body

A body with the authority to make decisions for a public body on “policy or administration” is a governing body.¹³ For instance, cities are public bodies and their governing bodies are city councils. Sometimes, cities delegate decision-making authority to lower bodies, such as planning commissions; these too are governing bodies for the purposes of the OPML.

⁸ ORS 192.610(5); ORS 192.630(1).

⁹ ORS 192.630(1).

¹⁰ ORS 192.610(4).

¹¹ *Id.*

¹² ORS 192.610(3).

¹³ ORS 192.610(3).

ii. A body that makes recommendations to a public body

A body that has the authority to make recommendations to a public body on policy or administration is itself “a governing body” under the OPML.¹⁴ These recommending bodies are sometimes called “advisory bodies.”¹⁵ From time to time, a local government agency or official may appoint a group or committee to gather information about a subject. If this “advisory body” makes a recommendation to a governing body, then it shares the title of governing body and becomes subject to the OPML.¹⁶

For cities, common examples of bodies that make recommendations to a governing body include subcommittees of the city council and city boards and commissions. The OPML applies to local advisory bodies and all of their members, including private citizens. The language of the OPML is not limited to public officials; rather, it applies to all “members” of a body making decisions or recommendations to a public body, even if all of the members are private citizens.¹⁷

B. Governing Bodies of Certain Private Bodies

Technically, only “public bodies” are covered by the OPML.¹⁸ However, it is at least possible that some private bodies might fall under the gamut of the law if they assume clear public functions.

There is no test for determining whether or when a private entity should be considered a “public body” for purposes of the OPML. Therefore, cities should consult their attorney when in doubt about whether a private body is covered by the law. Note that the Oregon Supreme Court follows a six-part test for determining when a private entity is the “functional equivalent” of a “public body” under Oregon’s Public Records Law.¹⁹ Those factors include (1) the entity’s origin, (2) the nature of the functions, i.e., whether the function performed is traditionally private or public, (3) the scope of authority exercised by the entity, (4) whether the entity receives financial support from the government, (5) the degree of government control over the entity, and (6) the status of the entity’s offices and employees.²⁰ That said, the OPML has its own definition of “public body,” and so it is not clear whether these factors apply in the meetings context.²¹

¹⁴ ORS 192.610(3).

¹⁵ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 138 (2019).

¹⁶ ORS 192.610(3).

¹⁷ ORS 192.610(3).

¹⁸ ORS 192.610.

¹⁹ See *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 463-65 (1998) (interpreting ORS 192.311).

²⁰ *Id.*

²¹ ORS 192.610(4).

II. COVERED MEETINGS

The previous section explained that the OPML applies to the “governing bodies” of a public body.”²² Not every action that a governing body takes, of course, is subject to the OPML. Only a “meeting” of a governing body of a public body is subject to the law.

The OPML defines a meeting as **(1)** the “convening of a governing body” in order to **(2)** “make a decision or deliberate toward a decision” and for which **(3)** “a quorum is required.”²³ Taken together, a meeting only occurs where a governing body convenes, reaches a quorum, and discusses or deliberates on city matters.²⁴ This section examines each of these elements under the OPML and how courts have interpreted them.

Before reviewing the meeting elements, please note that at least two categories of gatherings that might otherwise qualify as “meetings” under the OPML have been exempted by statute.²⁵ As such, these gatherings are not “meetings” for the purposes of the OPML.

- The on-site inspection of any project or program; and
- A gathering of any national, regional, or state association to which the public body or its members belong. This includes any monthly, quarterly, or annual gatherings of the League of Oregon Cities or National League of Cities.

A. ‘Convening’ a Meeting

For governing bodies, the most natural method of convening is in person. Of course, modern technology provides many other ways for members of a governing body to convene with one another. Because convening might occur by accident, members of governing bodies need to be mindful about how they communicate with each other and staff to avoid holding a “meeting” under the OPML.

Outside in-person meetings, the OPML applies to teleconferences, web conferences, and more generally to “telephone or electronic communications.”²⁶ Moreover, the OPML applies in exactly the same way to these meetings as it does to in-person meetings.²⁷ Inherent in this are

²² ORS 192.630(1).

²³ ORS 192.610(5).

²⁴ *Id.* Under the OPML, a decision is any action that requires a “vote of the governing body.” ORS 192.610(1).

²⁵ ORS 192.610(5).

²⁶ ORS 192.670.

²⁷ *Id.*

logistical issues, such as guaranteeing public attendance to the meeting and ensuring that the medium of communication can accommodate everyone who wishes to attend. Local governing bodies must solve these issues and comply with all other OPML requirements if they hold a meeting that it is not in-person.²⁸

It may be possible for a governing body to convene through serial communications on a topic.²⁹ In 2015, the Oregon Court of Appeals found that three county commissioners — a quorum of the governing body — had violated the OPML by using a series of phone calls and emails to reach a county decision.³⁰ While the Oregon Supreme Court reversed the ruling, the court did not express an opinion one way or the other on serial communications.³¹ Therefore, that portion of the Court of Appeals ruling still holds at least some weight.

The Court of Appeals noted “not all private, serial communications among members” are OPML violations.³² Just as it is with meeting in person, members of a governing body may correspond through email or voicemail on topics unrelated to city business. These serial communications may become an issue only when they are “conducted for the purpose of deliberation or decision.”³³

B. Meeting ‘Quorum’

By law, a meeting cannot take place without a “quorum” of the governing body.³⁴ Oddly enough, the term “quorum” is not defined in the OPML. For cities, quorum requirements often are set by charter, bylaws, council rules, or ordinance. In the absence of a specific definition, the general definition of “quorum” under state law is a majority of the governing body.³⁵

If a quorum of members convenes, then the OPML will apply unless the subject matter discussed is completely unrelated to a city decision or recommendation. Conversely, if less than a quorum convenes, then a “meeting” has not taken place, as that term is defined in the law.

Quorum is a technical requirement. As a practice, cities should take care not to deliberate toward decisions or recommendations in small groups. Gatherings that are below quorum and

²⁸ *Id.*

²⁹ See *Handy v. Lane County*, 274 Or App 644, 664-65 (2015), *reversed on other grounds*, 360 Or 605 (2016).

³⁰ *Id.*

³¹ See *generally* *Handy v. Lane County*, 360 Or 605 (2016).

³² See *Handy*, 274 Or App at 664-66 (2015).

³³ *Id.* The Court of Appeals noted that a plaintiff likely needs “some evidence of coordination, orchestration, or other indicia of a purpose...to deliberate or decide out of the public eye.” *Id.*

³⁴ ORS 192.630.

³⁵ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 142 (2019).

clearly deliberations violate (if nothing more) the policy of OPML, which is to include the public in the decision-making process.³⁶

Significantly, meetings that do not require a quorum are not “public meetings” under the OPML. As such, meetings with staff generally do not constitute public meetings. A single city council member may meet with staff to discuss city business because staff are not members of the city council.

C. Meeting for a ‘Decision’

By law, members of a governing body only meet for purposes of the OPML if they are making or deliberating toward a “decision.”³⁷ The OPML defines a “decision” as the following:

Any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.³⁸

In other words, only topics that relate to the business of the governing body trigger the OPML. This subject matter requirement means that members of a governing body are free to gather to discuss a number of topics — sports, television, literature — as long as these do not concern the work of the governing body. Similarly, if a quorum of a governing body meets to discuss matters on which it has no authority to make a decision, it is not a “meeting” under the OPML either.³⁹

Social Gatherings? A quorum of a governing body is permitted to meet in a social setting without triggering the OPML. Care must be taken, however, to avoid any discussion of public policy or administration, lest the social gathering evolve into an illegal public meeting.

Yet where the topics do relate to matters concerning the governing body, any discussion by a quorum of the body will trigger the OPML. As noted by the ODOJ, even meetings “for the sole purpose of gathering information” fall under the OPML.⁴⁰ Accordingly, the LOC recommends that members of governing bodies avoid discussing with each other any of the facts or context of local matters unless they are participating in a proper public meeting.

³⁶ ORS 192.620.

³⁷ ORS 192.610(5).

³⁸ ORS 192.610(1)

³⁹ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 144 (2019) (citing 38 Op Atty Gen 1471, 1474, 1977 WL 31327 (1977)).

⁴⁰ *Id.*

III. REQUIREMENTS

The last two sections answered the *who* and the *what* of the OPML, namely what entities and what meetings of those entities are subject to the law. Now comes the meeting requirements, including rules on notice, meeting location, and the recording of minutes and votes. The OPML also requires public attendance, and many laws further require public participation. This section addresses these requirements and the challenges that accompany it.

A. Meeting Types and Notice

As a reminder, each city in Oregon is subject to its own individual charter, municipal code and rules of procedures. Public notice is a common topic of local procedure. As such, the LOC recommends that cities conduct a thorough review of applicable charter provisions, municipal code sections, and their respective city’s rules and procedures to ensure that those provisions do not provide additional requirements to be followed when creating and posting a public notice. This section will address the minimum notice requirements under state law.

i. When Notice is Required

The OPML requires public notice to be given any time a governing body of a public body holds a “meeting” as defined under the law.⁴¹ Therefore, all regular, special, and emergency meetings require notice, though the amount of notice depends on the meeting type. Generally, notice is required for any interested persons and any media outlet that has requested notice.⁴²

ii. Contents of the Notice

ORS 192.640(1) requires a notice for meetings which are open to all members of the public to contain, at a minimum, the following information:

- Time of the meeting;
- Place of the meeting; and
- A list of the principal subjects anticipated to be considered at the meeting.

While the first two items are self-explanatory, the list of principal subjects is less clear. While publishing the agenda along with the notice is generally sufficient for this requirement, the

⁴¹ ORS 192.640.

⁴² *Id.*

ODOJ recommends that the list of principal subjects “be specific enough to permit members of the public to recognize the matters in which they are interested.”⁴³ This means that notices should avoid repeating generic descriptions, such as “consideration of a public contract,” and should instead state qualities specific to the subject, such as “consideration of contract with X company to provide Y services.”⁴⁴

Occasionally, a governing body may wish to discuss a subject that was not on the list, perhaps because the issue arose too late to be included in the notice. As a matter of state law at least, the absence of a subject from a notice does not preclude the governing body from discussing it; under the OPML, the list of *anticipated* subjects does “not limit the ability of a governing body to consider additional subjects.”⁴⁵

Beyond these requirements, a common practice is to include information in the notice for persons with disabilities. The OPML mandates that public bodies make all meeting locations accessible to persons with disabilities.⁴⁶ The ODOJ suggests that notices include the name and telephone number of a city employee who can help a person in need of a reasonable accommodation.⁴⁷

iii. Amount of Notice

The number of days in advance a city must give notice of a public meeting depends on the type of meeting to be conducted. For regularly scheduled meetings, notice must be “reasonably calculated” to provide actual notice of the time and place of the meeting “to interested persons including news media which have requested notice.”⁴⁸

For special meetings, i.e. non-regular meetings, notice must be provided at least 24 hours in advance to “the general public” and again to “news media which have requested notice.”⁴⁹ The only exception to the 24-hour notice rule for special meetings is an emergency meeting.

For an emergency meeting, the governing body must show that “an actual emergency” exists and must describe the circumstances of the emergency in the meeting minutes.⁵⁰ Even these meetings require notice; the OPML requires that emergency meetings be noticed in a

⁴³ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).

⁴⁴ *Id.*

⁴⁵ ORS 192.640.

⁴⁶ ORS 192.630(5).

⁴⁷ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).

⁴⁸ ORS 192.640(1).

⁴⁹ ORS 192.640(3).

⁵⁰ *Id.*

manner that is “appropriate to the circumstances.”⁵¹ Furthermore, an emergency meeting may only be used to discuss matters pertaining to the emergency.⁵² In *Oregon Association of Classified Employees v. Salem-Keizer School District*, the Oregon Court of Appeals found that a school district had violated the OPML by using an emergency meeting held for budget reasons to discuss a “contract approval,” a non-emergency matter.⁵³ The LOC recommends that cities use emergency meetings only in clear emergencies and only as a way to respond to the emergency.

iv. Noticing Executive Sessions

If the type of meeting to be held is an executive session, the governing body holding the executive session is required to give notice in the manner described above.⁵⁴ In addition, the notice must be sent to each member of the governing body.⁵⁵ No member of the governing body can be excluded from receiving notice of the executive session, even if it is known that the member is unable to attend the meeting. In addition, when providing notice of an executive session, the notice is required to state the specific provision of the OPML that authorizes the executive session.⁵⁶ Finally, unless the executive session is necessary to respond to an emergency, the notice of the session must be provided with a minimum of 24 hours’ notice.⁵⁷

The LOC Guide to Executive Sessions explores these issues and offers sample notices.⁵⁸

B. Proper Meeting Space

The OPML requirements for a public meeting space fall roughly into four categories. First, the meeting space must have appropriate **capacity**.⁵⁹ Second, the meeting space must be within the right **geography**.⁶⁰ Third, the meeting space must satisfy criteria for **accessibility**.⁶¹ Fourth, the space must be a place of **equality**.⁶²

⁵¹ *Id.*

⁵² *See* Or. Ass’n of Classified Employees v. Salem-Keizer Sch. Dist. 24J, 95 Or App 28, 32 (1989).

⁵³ *Id.*

⁵⁴ ORS 192.640(2).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ORS 192.640(3).

⁵⁸ LEAGUE OF OREGON CITIES, GUIDE TO EXECUTIVE SESSIONS (2017), <https://www.orcities.org/application/files/7415/6772/9151/GuidetoExecutiveSessions-03-27-19.pdf> (last accessed June 29, 2020).

⁵⁹ ORS 192.630(1).

⁶⁰ ORS 192.630(4)

⁶¹ ORS 192.630(5).

⁶² ORS 192.630(3).

i. Capacity

The OPML provides that any and all public meetings must “be open to the public” and that anyone interested in attending “shall be permitted to attend.”⁶³ Based on this language, it should be inferred that governing bodies need to anticipate roughly how many citizens will be interested in a meeting and plan accordingly. A meeting space that is woefully inadequate for the expected turnout likely is a violation of the OPML.

ii. Geography

The OPML lays out certain criteria for the location of a governing body’s meeting. The provisions are presented in an “either/or” list, and so not all of the criteria need to be satisfied. The OPML requires that a meeting space *either* be **(1)** “within the geographic boundaries” of the public body, **(2)** at the public body’s “administrative headquarters,” *or* **(3)** the nearest practical location.⁶⁴ Generally speaking, the LOC recommends public meetings be held within the city unless exigent circumstances arise. In the event of “an actual emergency necessitating immediate action,” these criteria do not apply and the governing body may hold an emergency meeting at a different location than the ones described here.⁶⁵

iii. Accessibility

In two main ways, the OPML requires accessibility for persons with disabilities.⁶⁶ First, meetings subject to the OPML must be held in places accessible to individuals with mobility and other impairments.⁶⁷ Second, the public body must make a “good-faith effort” to provide an interpreter at the request of deaf or hard-of-hearing persons.⁶⁸

Cities can find guidance on the first requirement, and the potential penalties for failure to comply, under laws and regulations of the Americans with Disabilities Act (ADA). As for the “good faith” requirement, this can be enforced only through the OPML.⁶⁹ The law defines a “good-faith effort” as “including ... contacting the department or other state or local agency that maintains a list of qualified interpreters and arranging for the referral of one or more qualified interpreters to provide interpreter services.”⁷⁰

⁶³ ORS 192.630(1).

⁶⁴ ORS 192.630(4). A fourth option for most public bodies is to hold a public meeting within “Indian country.” *Id.*

⁶⁵ *Id.*

⁶⁶ See ORS 192.630(5)(a).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 154-55 (2019).

⁷⁰ ORS 192.630(5)(e).

iv. Equality

Public bodies are prohibited from holding meetings where discrimination is practiced on the basis of race, color, creed, sex, sexual orientation, national origin, age, or disability.⁷¹ Generally, a public body may not hold a meeting at a location that is used by a restricted-membership organization, but may if the location is not primarily used by such an organization.⁷²

C. Recording and Retaining Minutes

The OPML requires that the governing body of a public body provide for sound, video, or digital recording, or written minutes, of its public meetings.⁷³ Whatever the format, the record of the meeting must include the following categories of information:

- (a) All members of the governing body present;
- (b) All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;
- (c) The results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;⁷⁴
- (d) The substance of any discussion on any matter; and
- (e) Subject to ORS 192.311 to 192.478 relating to public records, a reference to any document discussed at the meeting.⁷⁵

When recording minutes, the objective is not to include every word said at the meeting, but rather to provide “a true reflection of the matters discussed at the meeting and the views of the participants.”⁷⁶ Upon conclusion of the meeting, the minutes must also be available to the public “within a reasonable time.”⁷⁷ The ODOJ notes that, with some exceptions, the minutes should also be “available to persons with disabilities in a form usable by them, such as large print, Braille, or audiotape.”⁷⁸

⁷¹ ORS 192.630(3).

⁷² *Id.*

⁷³ ORS 192.650(1).

⁷⁴ Note that the recording of minutes requires the “vote of each member by name” to either be recorded or made available on request. This means that members of a governing body cannot vote anonymously. The Court of Appeals has held, however, that the “absence of a recorded vote alone is not reversible error.” *See* ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 158-59 (2019) (citing *Gilmore v. Bd. of Psychologist Examiners*, 81 Or App 321, 324 (1986)).

⁷⁵ ORS 192.650(1).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 161 (2019).

Finally, the OPML requires that minutes or another record of a public meeting must be preserved for a reasonable time.⁷⁹ However, the Secretary of State’s Retention Schedule for cities requires minutes of non-executive session meetings to be retained permanently.⁸⁰ Executive session minutes must be retained for 10 years.⁸¹ The LOC recommends that cities consult with their attorney before setting a retention schedule for meeting minutes.

D. Public Attendance and Participation

The OPML is a public attendance law, not a public participation law. Generally, meetings of a governing body of a public body are open to the public unless otherwise provided by law.⁸² Yet while the law guarantees the right of public attendance, the law does *not* guarantee the right of public participation. In fact, the OPML only expressly mentions public participation in two specific contexts: the opportunity for “public comment” on the employment of a public officer and the opportunity for “public comment” on the standards to be used to hire a chief executive officer.⁸³

Importantly, public participation laws *do* exist elsewhere under state and local laws. In many cases, public participation might be required by another statute, a state regulation, or by a local charter or ordinance. For example, a city ordinance may require the city council to hear public comment when the council considers whether to condemn private property for public use. Similarly, state law requires cities to provide an opportunity for public testimony during the annual budgeting process.⁸⁴ State regulations, meanwhile, require that “[c]itizens and other interested persons [have] the opportunity to present comments orally at one or more hearings” during the periodic review of a local comprehensive plan.⁸⁵ For this reason, the LOC cautions cities to consult their attorney before choosing to withhold opportunities for public comment. Note that there is no rule *against* public participation if cities wish to allow it at meetings.

i. Maintaining Order

For cities, the charter ordinarily designates a specific person with authority to keep order in council meetings, often the mayor or the council president. For other governing bodies serving the city, the one with this authority likely is the leader of the body, such as the head, chair, or president of a particular committee, group, or commission. Generally speaking, a city may adopt

⁷⁹ *Id.* at 162 (citing *Harris v. Nordquist*, 96 Or App 19 (1989)).

⁸⁰ OAR 166-200-0235.

⁸¹ *Id.*

⁸² ORS 192.630(1).

⁸³ ORS 192.660(7)(d)(C); ORS 192.660(7)(d)(D).

⁸⁴ ORS 294.453

⁸⁵ OAR 660-025-0080(2).

meeting rules and a violation of these rules can be grounds for expulsion. For more information on maintaining order in council meetings, consult the LOC’s Model Rules of Procedure for Council Meetings.⁸⁶

Reasonable restrictions also may be placed on public participation. However, care must be taken to protect the freedom of speech under the First Amendment and Article 1, Section, of the Oregon Constitution. For example, the First Amendment protects the interest of citizens who are “directing speech about public issues to those who govern their city.”⁸⁷ Speech is a protected right that can be enjoyed not only through **actual speech** but also through **expressive conduct**, such as making a gesture, wearing certain clothing, or performing a symbolic act.⁸⁸ While the right to speech is “enormous,” it is subject to content-neutral limitations.⁸⁹ Further, no city is required to “grant access to all who wish to exercise their right to free speech on every type of government property, at any time, without regard to the disruption caused by the speaker’s activities.”⁹⁰

a. The Time, Place, and Manner of Speech

Under federal law, a city’s council meeting or similar meeting is considered a limited public forum.⁹¹ At a minimum, any expression of speech at a limited public forum in Oregon can be limited through time, place and manner restrictions.⁹² Time, place and manner restrictions are simply that — rules regulating the **time** in which a person may speak, the **place** in which a person can speak, and the **manner** in which the speech can be made. An important caveat is that all of these restrictions must be viewpoint neutral.⁹³ The restrictions also must serve a “legitimate interest” and provide “ample alternatives for the intended message.”⁹⁴

⁸⁶ LEAGUE OF OREGON CITIES, MODEL RULES OF PROCEDURE FOR COUNCIL MEETINGS (2017), <https://www.orcities.org/application/files/1115/7228/7626/ModelRulesofProcedure3-15-19.pdf> (last accessed July 9, 2020).

⁸⁷ See *White v City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir 1990).

⁸⁸ See *Virginia v. Black*, 538 U.S. 343, 358 (2003).

⁸⁹ See *White*, 900 F. 2d at 1425 (1990).

⁹⁰ See *Walsh v Enge*, 154 F. Supp. 3d 1113, 1119 (D. Or. 2015) (quoting *Cornelius v. NAACP*, 473 U.S. 788, 799 (1985)).

⁹¹ See *White*, 900 F. 2d at 1425 (1990).

⁹² See *State v. Babson*, 355 Or 383, 408 (2014). Under federal law, expressions of speech in a limited public forum can also be subject to “content-based” rules, provided those rules are both “viewpoint neutral” and “reasonable.” *Enge*, 154 F. Supp. 3d at 1128. Thus, under federal law, a city council could limit the *content* of a public comment to the subject-matter at hand as long as it did not apply this rule unevenly. *White*, 900 F. 2d at 1425 (1990). In Oregon, however, the free speech clause Oregon Constitution appears to prohibit any “content-based” regulation of speech. See *Outdoor Media Dimensions, Inc. v. Dept. of Transp.*, 340 Or 275, 288 (2006). Cities should err on the side of caution by permitting speech on any “subject” at meetings and limiting only its time, place, and manner.

⁹³ See *White*, 900 F. 2d at 1425 (1990).

⁹⁴ See *Babson*, 355 Or at 408 (2014).

Because these restrictions are constitutional, local governing bodies generally can establish a specific format for speech at a council meeting or other public meeting. For example, a city’s budget committee may choose to limit public comment to the start of a hearing and limit the amount of time a person may speak. Limiting public comment to the start of a public hearing is not legally contentious.

The challenge of time, place, and manner restrictions is ensuring that the restrictions are enforced consistently and equally to all speakers and that the restrictions cannot be construed as discriminating against a given viewpoint.⁹⁵ That said, cities generally will avoid triggering the First Amendment if their restrictions serve “purposes unrelated to the content of expression.”⁹⁶ This is true even if an otherwise valid restriction, under particular circumstances, “*incidentally* burdens some speakers, messages or viewpoints.”⁹⁷

b. Disruptive Conduct

A good example of an “incidental” restriction on speech is rules on disruptive conduct. As noted above, cities and other governments are not required to tolerate “actual disruptions” when carrying out government business. So, even if the disruptive activity is a voice or some form of expressive conduct, i.e., speech, it can be regulated.⁹⁸ The rule against actual disruptions means that governing bodies may override one’s freedom of speech in certain circumstances, such as when an audience member is shouting loudly at others or when an individual refuses to sit down long after their allotted speaking time has ended. The general rule of thumb is that the disruption has to be preventing the governing body from completing its work.

Conversely, cities must allow any actions that are not “**actual**” disruptions to the governing body’s ability to conduct business.⁹⁹ In *Norse v. City of Santa Cruz*, for example, the Ninth Circuit Court of Appeals found that an audience member giving the Nazi salute did not actually interfere with or interrupt the public meeting and that the city therefore had not been justified in removing the individual from the meeting.¹⁰⁰ In reaching its decision, the *Norse* Court found that “[a]ctual disruption means actual disruption. It does not mean constructive

⁹⁵ See *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir 2010) (noting that viewpoint neutrality is a key element under the First Amendment),

⁹⁶ *Alpha Delta Chi-Delta Chapter v Reed*, 648 F.3d 790, 800 (9th Cir 2011) (quoting, in part, *Ward v Rock Against Racism*, 491 US 781, 791, 109 S Ct 2746, 105 L Ed2d 661 (1989)).

⁹⁷ *Id.*

⁹⁸ *Norse*, 629 F.3d at 976.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption.”¹⁰¹

c. Barring Disruptive Individuals

It is not uncommon for a person desiring to make their point to cause several disruptions at the same meeting or over a series of meetings. The constant disruption of public meetings by the same person, despite repeated warnings and removals, often leads public officials to consider suspending the person from future public meetings. Unfortunately, any efforts to suspend or ban individuals from future hearings are highly suspect and likely unconstitutional.

On two separate occasions, federal courts have held that prohibiting a disruptive person from attending future meetings, and from entering the entirety of a government facility, is not permitted under the First Amendment. In *Reza v. Pearce*, the Ninth Circuit Court of Appeals ruled that “imposing a complete ban” on a person’s entry into a government building “clearly exceeds the bounds of reasonableness ... as a response to a single act of disruption.”¹⁰² Similarly, in *Walsh v. Enge*, a federal district court found that the city of Portland could not “prospectively exclude individuals from future public meetings merely because they have been disruptive in the past.”¹⁰³ Note, however, that a district court decision is not binding precedent. While neither of these cases conclusively answers the question of whether a frequently disruptive individual can be barred from future hearings, they cast serious doubt that a court would uphold such an action.

For a description of these cases and a more detailed overview of the options available to cities for handling disruptive members of the public at public meetings, see the LOC’s Legal Guide to Handling Disruptive People in Public Meetings (2017).¹⁰⁴

IV. EXECUTIVE SESSIONS

An executive session is a public meeting that is closed to members of the general public. Executive sessions may only be held for certain reasons and the other meeting requirements discussed above still apply, such as notice, location, and minute-keeping requirements.¹⁰⁵

¹⁰¹ *Id.*

¹⁰² *Reza v Pearce*, 806 F.3d 497, 505 (9th Cir 2015).

¹⁰³ *See Walsh v Enge*, 154 F. Supp. 3d 1113, 1119 (D. Or. 2015).

¹⁰⁴ LEAGUE OF OREGON CITIES, LEGAL GUIDE TO HANDLING DISRUPTIVE PEOPLE IN PUBLIC MEETINGS (2017), <https://www.oregocities.org/application/files/2715/6116/0383/LOCWhitePaperonDisruptiveCitizens-FINAL5-5-17.pdf> (last accessed June 29, 2020).

¹⁰⁵ *See* ORS 192.660; *see also* ORS 192.610(2) (defining an executive session as a “meeting.”).

For a thorough assessment of how executive sessions apply to cities, including sample notices and a model media policy, consult the LOC Guide to Executive Sessions.¹⁰⁶

A. Executive Sessions for Municipalities

The Oregon Legislative Assembly has identified 14 circumstances in which an executive session is authorized.¹⁰⁷ Of these, 10 circumstances are likely to be used by municipalities:

1. Employment of a public officer, employee, staff member or individual agent.

Members of governing bodies may generally deliberate whether to employ individuals that meet this description. That said, this exception does not apply to any public officer, employee, staff member, or chief executive officer unless **(1)** the position has been advertised **(2)** and there already exists an adopted regular hiring procedure. In addition, with respect to public officers, the public must have had an opportunity to comment on the officer's employment. With regard to chief executive officers, there must be adopted hiring criteria and policy directives. This type of executive session cannot be used for either of the following purposes:

- To fill a vacancy in any elected office, public committee or commission, or advisory group;¹⁰⁸ or
- To discuss an officer's salary.¹⁰⁹

2. Dismissal, disciplining, or hearing complaints or charges relating to a public officer, employee, staff member or individual agent who does not request an open hearing.

A governing body may hold an executive session on disciplinary matters; however, the subject of the deliberations must be provided with an opportunity to request an open hearing.¹¹⁰ Clearly, this means that the governing body must notify the individual well in advance and determine whether they wish to have an open hearing.

Generally, cities should be aware that public employees have a property interest in their employment. When in doubt, cities that are members of CIS are encouraged to consult the CIS

¹⁰⁶ LEAGUE OF OREGON CITIES, GUIDE TO EXECUTIVE SESSIONS (2017), <https://www.oregocities.org/application/files/7415/6772/9151/GuidetoExecutiveSessions-03-27-19.pdf> (last accessed June 29, 2020).

¹⁰⁷ ORS 192.660.

¹⁰⁸ See ORS 192.660; see also ORS 192.660(7)(a)-(d).

¹⁰⁹ See generally 42 Op Atty Gen 362, 1982 WL 183044 (1982).

¹¹⁰ ORS 192.660(2)(b).

Pre-Loss Legal Department before taking disciplinary action. Failing to do so can negatively impact a city's deductible if a lawsuit or wrongful termination complaint is subsequently filed.

3. Persons designated by the governing body to carry on labor negotiations.

This provision allows city officials to hold an executive session to conduct deliberations with the person they have designated to act on the city's behalf during labor negotiations.¹¹¹ Note that this is one of the few meetings where news organizations and the media can be excluded from an executive session.¹¹²

4. Persons designated by the governing body to negotiate real property transactions.

This provision allows city officials to hold an executive session to conduct deliberations with the person they have designated to act on the city's behalf regarding real property transactions.¹¹³ A real property transaction likely may include the purchase of real property, the sale of real property, and/or negotiations of lease agreements.¹¹⁴ The deliberations conducted during an executive session held under this provision must concern a specific piece of property or properties — the session may not be used to discuss a city's long-term property needs.¹¹⁵

5. Information or records that are exempt by law from public inspection.

In order to hold an executive session under this provision, the information and records to be reviewed must otherwise be exempt from public inspection under state or federal law.¹¹⁶ The most common source for public records exemptions is Oregon's Public Records Law and the attorney-client privilege under ORS 40.225.

6. Preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

A governing body may use this provision to meet in executive session when it has good reason to believe it is in competition with other governments on a "trade or commerce" issue.¹¹⁷

7. Rights and duties of a public body as to current litigation or litigation likely to be filed.

¹¹¹ ORS 192.660(2)(c).

¹¹² ORS 192.660(4).

¹¹³ ORS 192.660(2)(e).

¹¹⁴ ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 165 (2019).

¹¹⁵ *Id.* (citing Letter of Advice to Rep. Carl Hosticka, 1990 WL 519211 (OP-6376) (May 18, 1990)).

¹¹⁶ ORS 192.660(2)(f).

¹¹⁷ ORS 192.660(2)(g).

A governing body may use executive sessions as a way to consult with legal counsel about current or pending litigation.¹¹⁸ In the event the litigation is against a news organization, the governing body must exclude any journalist who is affiliated with the news organization.¹¹⁹

8. Employment-related performance of the chief executive officer of any public body, a public officer, employee, or staff member who does not request an open hearing.

A governing body may hold an executive session to evaluate an employee's performance; however, the subject of the deliberations must be provided with an opportunity to request an open hearing.¹²⁰ Clearly, this means that the governing body must notify the individual well in advance and determine whether they wish to have an open hearing.

Generally, cities should be aware that public employees have a property interest in their employment. When in doubt, cities that are members of CIS are encouraged to consult the CIS Pre-Loss Legal Department before taking disciplinary action. Failing to do so can negatively impact a city's deductible if a lawsuit or wrongful termination complaint is subsequently filed.

9. Negotiations under ORS Chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

This provision allows cities to conduct negotiations about certain public investments.¹²¹ The final decision on these investments must occur in an open public meeting (see below).¹²²

10. Information on the review or approval of certain security programs.

In order to hold an executive session under this provision, the security program must be related to one of the areas identified under ORS 192.660(2)(n). These include telecommunication systems and the "generation, storage or conveyance of" certain resources or waste.¹²³

B. Final Decision Prohibition

Under the OPML, executive sessions must not be used "for the purpose of taking any final action or making any final action."¹²⁴ While final decisions cannot be made, city councils and other public bodies may still reach a consensus during an executive session. This provision simply guarantees that the public is made aware of the deliberations. Thus, a formal vote in a

¹¹⁸ ORS 192.660(2)(h).

¹¹⁹ ORS 192.660(5).

¹²⁰ ORS 192.660(2)(i).

¹²¹ ORS 192.660(2)(j).

¹²² ORS 192.660(6).

¹²³ ORS 192.660(2)(n).

¹²⁴ ORS 192.660(6).

public session satisfies the requirement, even if the vote merely confirms the consensus reached in executive session.¹²⁵

C. Media Representation at an Executive Session

Representatives of the news media must be allowed to attend all but two types of executive sessions.¹²⁶ The news media may be excluded from an executive session held to conduct deliberations with a person designated by the governing body to carry on labor negotiations or an executive session held by a school board to discuss certain student records.¹²⁷ Also, remember that a city council or other public body must exclude any member of the press if the news organization the reporter represents is a party to the litigation being discussed during the executive session.¹²⁸

Even though news organizations are permitted to attend virtually every executive session, governing bodies may prohibit news organizations from disclosing certain specified information.¹²⁹ Unless a governing body specifies what information is prohibited from disclosure, news organizations are free to report on the entire executive session. It also is worth noting that there is no penalty or punishment under the OPML against a news organization that shares information from an executive session without the city’s permission.

The term “representatives of the media” is not defined by the OPML or in case law. However, the Oregon attorney general recently issued an advisory opinion wherein it concluded that under Oregon law “news-gathering representatives of institutional media” are permitted to attend executive sessions and the term is “broad and flexible enough to encompass changing technologies for delivering the news.”¹³⁰ The conclusion reached by the attorney general seems to imply that bloggers and other social media news entities are authorized to attend executive sessions. In reaching this conclusion, the attorney general relied heavily on what it believes are the stated reasons the Legislative Assembly allowed the media to attend executive sessions when the law was originally adopted.¹³¹

Due to the ambiguity around who is or isn’t a “representative of the media,” the LOC recommends that cities generally permit any person providing the public with news, including internet bloggers, to attend executive sessions. Some cities may seek to establish a stricter media

¹²⁵ See ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL 173-75 (2019).

¹²⁶ ORS 192.660(5).

¹²⁷ *Id.*

¹²⁸ ORS 192.660(5).

¹²⁹ ORS 192.660(4).

¹³⁰ See generally Op Atty Gen 8291 (2016).

¹³¹ *Id.*

attendance policy and, if so, those cities need to undertake a meaningful and in-depth discussion with their city attorney before drafting such a policy. Denying “representatives of the media” access to meetings can lead to costly litigation.

V. ENFORCEMENT

A. General Enforcement

Any person affected by a decision of a governing body of a public body may file a lawsuit to require compliance with, or prevent violations of, the OPML by members of the governing body.¹³² Lawsuits may be filed by “any person who might be affected by a decision that might be made.”¹³³

A plaintiff may also file suit to determine whether the OPML applies to meetings or decisions of the governing body.¹³⁴ Under ORS 192.680(5), any suit brought under the OPML must be commenced within 60 days following the date the decision becomes public record.¹³⁵

A successful plaintiff may be awarded reasonable attorney fees at trial or on appeal.¹³⁶ Whether to award these or not is in the court’s discretion.¹³⁷ If a court finds that a violation of the OPML was the result of willful misconduct by a member or members of the governing body, each is liable for the amount of attorney fees paid to the successful applicant.¹³⁸

If a governing body violates the OPML in a decision, the decision is not necessarily void. In the case of an unintentional or non-willful violation of the OPML, the court has discretion to void a decision, but such an action is not mandatory.¹³⁹ The law permits a governing body that violates the OPML to reinstate the decision while in compliance with the law.¹⁴⁰ If a governing body reinstates an earlier decision while in compliance with the law, the decision will not be voided and the decision is effective from the date of its initial adoption.¹⁴¹

Importantly, reinstatement of an earlier decision while in compliance with the law will not prevent a court from voiding the earlier decision “if the court finds that the violation was the result of intentional disregard of the law or willful misconduct by a quorum of the members of

¹³² ORS 192.680(2).

¹³³ *See Harris v. Nordquist*, 96 Or App 19, 23 (1989).

¹³⁴ ORS 192.680(2).

¹³⁵ ORS 192.680(5).

¹³⁶ ORS 192.680(3).

¹³⁷ *Id.*

¹³⁸ ORS 192.680(4).

¹³⁹ ORS 192.680(1).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

the governing body.”¹⁴² In that case, the court will void the decision “unless other equitable relief is available.”¹⁴³

B. Civil Penalties for Violations of ORS 192.660

Apart from the enforcement provisions described above, the Oregon Government Ethics Commission may review complaints that a public official has violated the executive session provisions of the OPML as provided in ORS 244.260.¹⁴⁴ The commission has the authority to interview witnesses, review minutes and other records, and obtain other information pertaining to executive sessions of the governing body for purposes of determining whether a violation occurred.¹⁴⁵ If the commission finds a violation of the executive sessions provisions, the commission may impose a civil penalty not to exceed \$1,000.¹⁴⁶ If, however, the violation occurred as a result of the governing body acting on the advice of its legal counsel, the civil penalty may not be imposed.¹⁴⁷

¹⁴² ORS 192.680(3).

¹⁴³ *Id.*

¹⁴⁴ ORS 192.685(1).

¹⁴⁵ ORS 192.685(2).

¹⁴⁶ ORS 244.350(2)(a).

¹⁴⁷ ORS 244.350(2)(b).