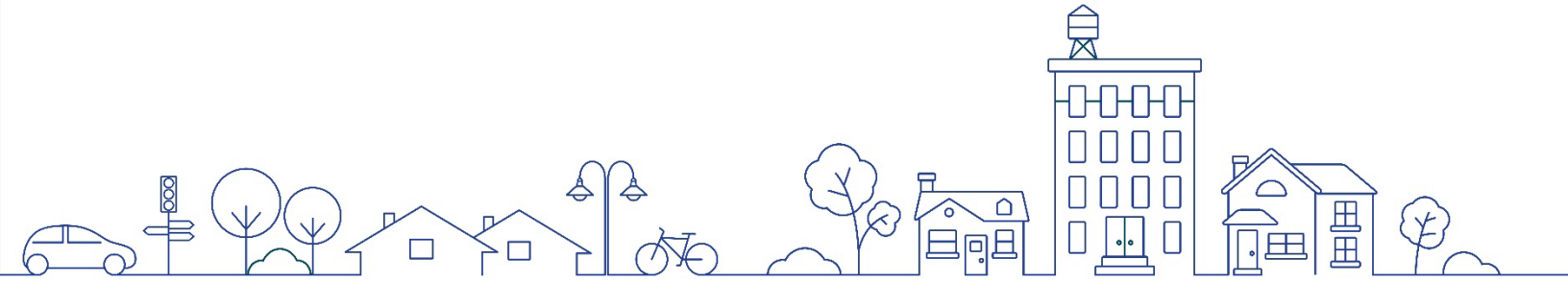
Oregon Municipal Handbook

CHAPTER 9:
PUBLIC MEETINGS LAW



League of Oregon Cities

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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] Additionally, the Oregon Legislature, in 2023, passed HB 2805, authorizing the Oregon Government Ethics Commission (OGEC) the authority to enforce Oregon's Public Meetings Law and conduct rulemaking to clarify specific OMPL rules. After rulemaking that occurred in 2024, the OGEC proposed 16 rules in total, two of which were amendments to existing rules, found in Oregon Administrative Rule (OAR) Chapter 199—Division 40 (Exeecutive Session) and Division 50 (Public Meetings).[3] The OGEC voted to approve the final rules on September 20, 2024, and the rules became effective October 1, 2024.

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.[4]

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.[5] 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.[6] The OPML also governs the location of meetings.[7] Finally, the OPML includes enforcement provisions for when these provisions are violated.[8]

Please note that this chapter is meant to provide the LOC members with an overview of the OMPL. The 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

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[1] ORS 192.620.
[2] *Id.*
[3] *See* Secretary of State - Oregon Government Ethics Commission website, https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=317423 (last accessed October 4, 2024).
[4] *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.
[5] ORS 192.610.
[6] ORS 192.630 to ORS 192.660. *See also* OAR 199-050-0055 (Effective October 1, 2024).
[7] *Id.*
[8] ORS 192.680.

Oregon Attorney General's Public Records and Meetings Manual (2019).[9] The LOC strongly recommends that cities purchase the print version of this manual, which is updated every two years.[10] 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.

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.[11] 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."[12] A public body includes state bodies, any regional council, a county, a city, a district, or any other municipal or public corporation.[13] A "public body" also includes a board, department, commission, council, bureau, committee, subcommittee, or advisory group of any of the aforementioned entities.[14] 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."[15] The following

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).

[9] The Oregon Department of Justice Attorney General's Office typically publishes an updated version every five years, however, due to the HB 2805 (2023) OGEC anticipated rulemaking process, the next version will be delayed.
[10] Note: as of October 2024, the most recent publication date of the Oregon AG Public Records and Meetings Manual was published in 2019.
[11] ORS 192.610(5); ORS 192.630(1).
[12] ORS 192.630(1).
[13] ORS 192.610(4).
[14] *Id.*
[15] ORS 192.610(3).

subsections examine in more detail the authority to make decisions and recommendations, and what entities might in turn qualify as a "governing body."

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.[16] 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.

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.[17] These recommending bodies are sometimes called "advisory bodies."[18] 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.[19]

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.[20]

iii. Exemptions: OPML does not apply to the following types of bodies

Pursuant to OAR 199-050-0010, there are three types of groups that the OMPL does not apply to.

(a) **Fact Gathering Bodies**. Bodies with only the authority to gather and provide purely factual information to a public body, and that do not have the authority to make decisions or recommendations.

[16] ORS 192.610(3).
[17] ORS 192.610(3).
[18] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 138 (2019).
[19] ORS 192.610(3).
[20] ORS 192.610(3).

(b) Bodies Advising Individual Public Officials. Bodies appointed by an individual public official with authority to make recommendations only to that individual public official who has the authority to act on the body's recommendations and is not required to pass the recommendations on unchanged to a public body.

(c) Certain Multi-Jurisdiction Bodies. Multi-jurisdictional bodies whose Oregon members do not constitute a majority of the governing body's voting members.

B. Governing Bodies of Certain Private Bodies

Technically, only "public bodies" are covered by the OPML.[21] 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.[22] 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.[23] 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.[24]

II. Covered Meetings

The previous section explained that the OPML applies to the "governing bodies" of a public body."[25] 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."[26]

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[21] ORS 192.610.
[22] *See Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451, 463-65 (1998) (interpreting ORS 192.311).
[23] *Id.*
[24] ORS 192.610(4).
[25] ORS 192.630(1).
[26] ORS 192.610(5).

Taken together, a meeting only occurs where a governing body convenes, reaches a quorum, and discusses or deliberates on city matters.[27] 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.[28] 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[29] with each other and staff to avoid holding a "meeting" under the OPML. In the 2023 Legislative session, House Bill 2805[30] amended ORS 192.610 and defined "convening"[31] as well the "deliberation."[32]

Outside in-person meetings, the OPML applies to teleconferences, web conferences, and more generally to "telephone or electronic communications."[33] Moreover, the OPML applies in exactly the same way to these meetings as it does to in-person meetings.[34] Inherent in this are logistical issues, such as guaranteeing public attendance to the meeting and ensuring that the

[27] *Id.* Under the OPML, a decision is any action that requires a "vote of the governing body." ORS 192.610(1).
[28] ORS 192.610(5).
[29] OAR 199-005-0005(1)(2) (Effective October 1, 2024) defines "**communicate**" as the act of a person expressing or transmitting information to another person though verbal, non-verbal, written, or electronic means. Non-verbal means includes gestures, such as thumbs-up and thumbs-down, as well as sign language, and "**communication**" as "the expression or transmission of information from one person to another through verbal, non-verbal, written or electronic means. Non-verbal means include gestures, such as thumbs-up and thumbs-down, as well as sign language."
[30] *See* https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2805 (last accessed October 9, 2024).
[31] ORS 192.610(1) defines "**convening**" as (a) Gathering in a physical location; (b) Using electronic, video or telephonic technology to be able to communicate contemporaneously among participants; (c) Using serial electronic written communication among participants; or (d) Using an intermediary to communicate among participants."
[32] ORS 192.610(3) defines "**deliberation**" as "discussion or communication that is part of a decision-making process."
[33] ORS 192.670.
[34] *Id.*

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.[35]

It may be possible for a governing body to convene through serial communications on a topic.[36] 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.[37] While the Oregon Supreme Court reversed the ruling, the court did not express an opinion one way or the other on serial communications.[38] 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.[39] 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."[40]

In the 2023 Legislative session, House Bill 2805 incorporated parts of the judicial holdings in the *Handy* cases and added "exceptions" to ORS 192.690(1)(m)[41] to exempt trainings, non-city business, and administerial activities.

As of October 1, 2024, the Oregon Government Ethics Commission completed its rulemaking process and prohibited serial communications.[42]

> (1) A quorum of the members of a governing body shall not, outside of a meeting conducted in compliance with the Public Meetings Law, use a series of communications

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[35] *Id.*
[36] *See Handy v. Lane County*, 274 Or App 644, 664-65 (2015), *reversed on other grounds*, 360 Or 605 (2016). *See also* OAR 199-050-0020 (Effective October 1, 2024).
[37] *Handy,* 274 Or App 644, 664-65 (2015).
[38] *See generally Handy v. Lane County*, 360 Or 605 (2016).
[39] *See Handy*, 274 Or App at 664-66 (2015).
[40] *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.*
[41] *See* HB 2805 (2023), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/HB2805 (last accessed October 8, 2024).
[42] OAR 199-050-0020 (Effective October 1, 2024).

of any kind, directly or through intermediaries[43], for the purpose of deliberating or deciding on any matter that is within the jurisdiction of the governing body.[44]

> (2) The prohibitions in section (1) apply to using any one or a combination of the following methods of communication:
>
> (a) In-person;
> (b) Telephone calls;
> (c) Videos, videoconferencing, or electronic video applications;
> (d) Written communications, including electronic written communications, such as email, texts, and other electronic applications;
> (e) Use of one or more intermediaries to convey information among members; and
> (f) Any other means of conveying information.[45]

This type of communication covers things such as social media posts, emails, and text messages, or any other means of conveying information. Serial Electronic Written Communications is defined as "a series of successive or sequential communications among members of a governing body using written electronic means, including emails, texts, social media, and other electronic applications that communicate the written word."[46]

B. Meeting 'Quorum'

By law, a meeting cannot take place without a "quorum" of the governing body.[47] The term "quorum" is defined as "the minimum number of members of a governing body required to legally transact business. In the absence of a statute, ordinance, rule, charter, or other enactment specifically establishing the number of members constituting a quorum, a quorum is a majority of the voting members of the governing body."[48] 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.[49]

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[43] "**Intermediaries**" is defined in OAR 199-050-0005(7) (Effective October 1, 2024) as "a person who is used to facilitate communications among members of a governing body about a matter subject to deliberation or decision by the governing body, by sharing information received from a member or members of the governing body with other members of the governing body. The term "intermediary" can include a member of the governing body."
[44] *Id*.
[45] *Id*.
[46] OAR 199-050-0005(10) (Effective October 1, 2024).
[47] ORS 192.630.
[48] OAR 199-050-0005(9) (Effective October 1, 2024).
[49] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 142 (2019).

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 clearly deliberations violate (if nothing more) the policy of OPML, which is to include the public in the decision-making process.[5051]

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."[52] 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.[53]

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.[54]

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.

[50] ORS 192.620.
[51] OAR 199-050-0005(4) (Effective October 1, 2024) defines decision-making process as "the process a governing body engages in to make a decision, such as (a) identifying or selecting the nature of the decision to be made; (b) gathering information related to the decision to be made; (c) identifying and assessing alternatives; (d) weighing information; and (e) making a decision."
[52] ORS 192.610(5); OAR 199-050-0005(3) (Effective October 1, 2024)
[53] ORS 192.610(1).
[54] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 144 (2019) (citing 38 Op Atty Gen 1471, 1474, 1977 WL 31327 (1977)).

Pursuant to recent rulemaking, Applicable meetings subject to PML to include the following: (1) regular meetings, (2) special meetings, (3) emergency meetings, (4) executive sessions (separate to or convened with another type of meeting), and (5) work sessions/workshops.[55] Noteworthy, there are enumerated exemptions, including the following:

(a) On-site inspections of projects or programs, provided the members of the governing body do not engage in deliberations or decisions on matters that could reasonably be foreseen to come before the governing body.

(b) The attendance of members of a governing body at any national, regional or state association to which the public body or the members belong, provided the members of the governing body do not engage in deliberations or decisions on matters that could reasonably be foreseen to come before the governing body.

(c) Communications between or among members of a governing body, including communications of a quorum of members, that are:

(A) Purely factual or educational in nature and that convey no deliberation or decision on any matter that might reasonably come before the governing body;
(B) Not related to any matter that, at any time, could reasonably be foreseen to come before the governing body for deliberation and decision; or
(C) Non-substantive in nature, such as communication relating to scheduling, leaves of absence and other similar matters.

(d) Any matters listed in ORS 192.690.

Lastly, this new rule specifically states that private meeting where a quorum of a governing body engages in discussions or communications that are part of the governing body's decision-making process on matters within the authority of the governing body violates the Public Meetings Law.

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.[56] Accordingly, the LOC recommends that members of governing bodies avoid discussing with each other <u>any</u> of the facts or context of local matters unless they are participating in a proper public meeting.

[55] OAR 199-050-0015.
[56] *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.[57] 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.[58]

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 ODOJ recommends that the list of principal subjects "be specific enough to permit members of

[57] ORS 192.640.
[58] *Id., see also* OAR 199-050-0040 (Effective October 1, 2024).

the public to recognize the matters in which they are interested."[59] 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."[60]

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."[61]

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.[62] 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.[63]

iii. Methods of Notice

There are a variety of ways a public meeting notice may be posted. A governing body satisfies the public notice requirement by providing notice of its meetings when displayed conspicuously in the following places: (1) public body's website; (2) Oregon Transparency website (non-state agencies may post here); (3) newspaper; (4) community / bulletin boards; (5) social media accounts; (6) email; or (7) mail.[64] Additionally, media notice may be required if a media representative has requested notice.[65]

iv. 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

[59] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).
[60] *Id.*
[61] ORS 192.640.
[62] ORS 192.630(5).
[63] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 151 (2019).
[64] OAR 199-050-0040(2) (Effective October 1, 2024).
[65] OAR 199-050-0040(2)(c) (Effective October 1, 2024).

interested persons including news media which have requested notice."[66] As much notice as reasonably possible, but no less than 48 hours advance notice is required.[67]

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."[68] The only exception to the 24-hour notice rule for special meetings is an emergency meeting.[69]

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.[70] Even these meetings require notice; the OPML requires that emergency meetings be noticed in a manner that is "appropriate to the circumstances."[71] Furthermore, an emergency meeting may only be used to discuss matters pertaining to the emergency.[72] 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.[73] The LOC recommends that cities use emergency meetings only in clear emergencies and only as a way to respond to the emergency.

v. 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.[74] In addition, the notice must be sent to each member of the governing body.[75] 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.[76] 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.[77]

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[66] ORS 192.640(1).
[67] OAR 199-050-0040(4)(a) (Effective October 1, 2024).
[68] ORS 192.640(3); *see also* OAR 199-050-0040 (4)(b) (Effective October 1, 2024).
[69] OAR 199-050-0040 (4)(c) (Effective October 1, 2024).
[70] *Id.*
[71] *Id.*
[72] *See Or. Ass'n of Classified Employees v. Salem-Keizer Sch. Dist*. 24J, 95 Or App 28, 32 (1989).
[73] *Id.*
[74] ORS 192.640(2); *see also* OAR 199-050-0040(3)(d) (Effective October 1, 2024).
[75] *Id.*
[76] *Id.*
[77] ORS 192.640(3).

The LOC Guide to Executive Sessions explores these issues and offers sample notices.[78]

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.**[79] Second, the meeting space must be within the right **geography**.[80] Third, the meeting space must satisfy criteria for **accessibility**.[81] Fourth, the space must be a place of **equality**.[82]

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."[83] 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.[84] 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.[85]

iii. Accessibility

In three main ways, the OPML requires accessibility for persons with disabilities.[86] First, meetings subject to the OPML must be held in places accessible to individuals with mobility and

[78] LEAGUE OF OREGON CITIES, GUIDE TO EXECUTIVE SESSIONS (2019), https://www.orcities.org/download_file/505/1852 (last accessed October 9, 2024).
[79] ORS 192.630(1).
[80] ORS 192.630(4)
[81] ORS 192.630(5).
[82] ORS 192.630(3).
[83] ORS 192.630(1).
[84] ORS 192.630(4). A fourth option for most public bodies is to hold a public meeting within "Indian country." *Id.*
[85] *Id.*
[86] See ORS 192.630(5)(a).

other impairments.[87] Second, the public body must make a "good-faith effort" to provide an interpreter at the request of deaf or hard-of-hearing persons.[88]

Third, due to the coronavirus pandemic, the government—state and local—were forced to adapt to virtual public meetings to meet the strict standards of allowing public access to the elected official and public policy decision-making process. Oregon Legislature passed House Bill 2560[89] in the 2021 session, requiring those remote options to continue.[90] This amendment became effective January 1, 2022, requiring government agencies, whenever possible, to allow the public to remotely attend public meetings—through telephone, video or other electronic means—as well as give the public the ability to testify remotely.[91]

The amendment emphasizes the requirement of governing bodies to make most public meetings (excludes executive sessions) remotely accessible when it's "reasonably possible."[92] Members of the media already have access to most executive sessions, but ORS 192.670 does not specify if governing bodies must also provide remote access to the media for these meetings.[93]

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.[94] 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."[95]

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.[96]

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[87] *Id.*
[88] *Id.*
[89] *See* HB 2560 (2021), https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2560 (last accessed October 8, 2024).
[90] ORS 192.670 (HB 2560) - Meetings by Means of Telephone or Electronic Communication.
[91] *Id.*
[92] *Id.*
[93] *But see* OAR 199-050-0050(4) (Effective October 1, 2024) (requiring media access to be allowed to virtually attend executive sessions if any other individual is virtually attending).
[94] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 154-55 (2019).
[95] ORS 192.630(5)(e).
[96] ORS 192.630(3).

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.[97]

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.[98] 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;[99]
> **(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. [100]

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."[101] Upon conclusion of the meeting, the minutes must also be available to the public "within a reasonable time."[102] 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."[103] The minutes or recordings required, which include executive sessions, shall provide for either written minutes or audio, video, or digital recordings.[104]

Finally, the OPML requires that minutes or another record of a public meeting must be preserved for a reasonable time.[105] However, the Secretary of State's Retention Schedule for

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[97] *Id.*
[98] ORS 192.650(1)
[99] 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)). *See also* OAR 199-050-0055 (Effective October 1, 2024).
[100] ORS 192.650(1).
[101] *Id.*, *see also* OAR 199-050-0060 (Effective October 1, 2024).
[102] *Id.*
[103] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 161 (2019).
[104] OAR 199-050-0060 (Effective October 1, 2024).
[105] *Id.* at 162 (citing *Harris v. Nordquist*, 96 Or App 19 (1989)).

cities requires minutes of non-executive session meetings to be retained permanently.[106] Executive session minutes must be retained for 10 years.[107] 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.[108] 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.[109]

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.[110] 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.[111] 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 meeting rules and a violation of these rules can be grounds for expulsion. For more information

[106] OAR 166-200-0235.
[107] *Id.*
[108] ORS 192.630(1).
[109] ORS 192.660(7)(d)(C); ORS 192.660(7)(d)(D).
[110] ORS 294.453
[111] OAR 660-025-0080(2).

on maintaining order in council meetings, consult the LOC's Model Rules of Procedure for Council Meetings.[112]

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."[113] 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.[114] While the right to speech is "enormous," it is subject to content-neutral limitations.[115] 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."[116]

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.[117] At a minimum, any expression of speech at a limited public forum in Oregon can be limited through time, place and manner restrictions.[118] 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.[119] The restrictions also must serve a "legitimate interest" and provide "ample alternatives for the intended message."[120]

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,

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[112] LEAGUE OF OREGON CITIES, MODEL RULES OF PROCEDURE FOR COUNCIL MEETINGS (2017), https://www.orcities.org/download_file/604/1852 (last accessed October 9, 2024).
[113] *See White v City of Norwalk*, 900 F2d 1421, 1425 (9th Cir 1990).
[114] *See Virginia v. Black*, 538 US 343, 358 (2003).
[115] *See White*, 900 F2d at 1425 (1990).
[116] *See Walsh v Enge*, 154 FSupp3d 1113, 1119 (D Or 2015) (quoting *Cornelius v. NAACP*, 473 US 788, 799 (1985)).
[117] *See White*, 900 F2d at 1425 (1990).
[118] *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 FSupp 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 F2d 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.
[119] *See White*, 900 F2d at 1425 (1990).
[120] *See Babson*, 355 Or at 408 (2014).

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.[121] That said, cities generally will avoid triggering the First Amendment if their restrictions serve "purposes unrelated to the content of expression."[122] This is true even if an otherwise valid restriction, under particular circumstances, "*incidentally* burdens some speakers, messages or viewpoints."[123]

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.[124] 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.[125] 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.[126] In reaching its decision, the *Norse* Court found that "[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."[127]

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[121] *See Norse v City of Santa Cruz*, 629 F3d 966, 976 (9th Cir 2010) (noting that viewpoint neutrality is a key element under the First Amendment),
[122] *Alpha Delta Chi-Delta Chapter v Reed*, 648 F3d 790, 800 (9th Cir 2011) (quoting, in part, *Ward v Rock Against Racism*, 491 US 781, 791(1989)).
[123] *Id.*
[124] *Norse*, 629 F3d at 976.
[125] *Id.*
[126] *Id.*
[127] *Id.*

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."[128] 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."[129] 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).[130]

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.[131]

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.[132]

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[128] *Reza v Pearce*, 806 F3d 497, 505 (9th Cir 2015).
[129] *See Walsh v Enge*, 154 FSupp. 3d 1113, 1119 (D Or 2015).
[130] League of Oregon Cities, Legal Guide to Handling Disruptive People in Public Meetings (2017), https://www.orcities.org/download_file/384/1852 (last accessed July 11, 2024).
[131] *See* ORS 192.660; *see also* ORS 192.610(2) (defining an executive session as a "meeting.").
[132] League of Oregon Cities, Guide to Executive Sessions (2017), https://www.orcities.org/download_file/505/1852 last accessed July 11, 2024).

A. Executive Sessions for Municipalities

The Oregon Legislative Assembly has identified 16 circumstances in which an executive session is authorized.[133] Of these, 12 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. However, only consideration of an initial employment is permissible under this section.[134] 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; [135] or

- To discuss an officer's salary.[136]

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.[137] 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.

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

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[133] ORS 192.660.
[134] OAR 199-040-0027 (Effective October 1, 2024).
[135] *See* ORS 192.660; *see also* ORS 192.660(7)(a)-(d).
[136] *See generally* 42 Op Atty Gen 362, 1982 WL 183044 (1982).
[137] ORS 192.660(2)(b).

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.[138] Note that this is one of the few meetings where news organizations and the media can be excluded from an executive session.[139]

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.[140] A real property transaction likely may include the purchase of real property, the sale of real property, and/or negotiations of lease agreements.[141] 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.[142]

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.[143] 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.[144]

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

A governing body may use executive sessions as a way to consult with legal counsel about current or pending litigation.[145] In the event the litigation is against a news organization, the governing body must exclude any journalist who is affiliated with the news organization.[146]

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[138] ORS 192.660(2)(c).
[139] ORS 192.660(4).
[140] ORS 192.660(2)(e).
[141] ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 165 (2019).
[142] *Id.* (citing Letter of Advice to Rep. Carl Hosticka, 1990 WL 519211 (OP-6376) (May 18, 1990)).
[143] ORS 192.660(2)(f).
[144] ORS 192.660(2)(g).
[145] ORS 192.660(2)(h).
[146] ORS 192.660(5).

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.[147] 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.[148] The final decision on these investments must occur in an open public meeting (see below).[149]

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.[150]

11. To consider matters relating to the safety of the governing body and of public body staff and volunteers and the security of public body facilities and meeting spaces.[151]

12. To consider matters relating to cyber security infrastructure and responses to cyber security threats.[152]

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."[153] While final decisions cannot be made, city councils

[147] ORS 192.660(2)(i).
[148] ORS 192.660(2)(j).
[149] ORS 192.660(6).
[150] ORS 192.660(2)(n).
[151] ORS 192.660(2)(o). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.
[152] ORS 192.660(2)(p). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.
[153] ORS 192.660(6).

and other public bodies may still reach an informal consensus during an executive session.[154] This provision simply guarantees that the public is made aware of the deliberations. Thus, a formal vote in a public session satisfies the requirement, even if the vote merely confirms the consensus reached in executive session.[155]

C. Media Representation at an Executive Session

Representatives of the news media must be allowed to attend all but two types of executive sessions.[156] 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.[157] 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.[158]

Even though news organizations are permitted to attend virtually every executive session, governing bodies may prohibit news organizations from disclosing certain specified information.[159] Media access must be allowed virtual attendance if any individual is attending virtually.[160] 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 OGEC advises that if media does report something in an executive session that they were advised not to disclose, the legal recourse options must be staffed with legal counsel.

The OGEC does provide a sample script to read at the start of any executive session that covers: (1) lists the statutory authorization of the executive session; (2) allows news media/designated staff to attend executive session; (4) representatives of news media are specifically directed not to report on any of the deliberations during the executive session except to state the general subject to the session as previously announced; (4) no decision may be made in the session; and (5) at the completion of the session, the open session will resume.

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[154] OAR 199-040-0060 (Effective October 1, 2024).
[155] *See* ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL 173-75 (2019); *see also* OAR 199-050-0055 (Effective October 1, 2024).
[156] ORS 192.660(5).
[157] *Id.*
[158] ORS 192.660(5).
[159] ORS 192.660(4).
[160] ORS 192.670; *see also* OAR 199-050-0050(4) (Effective October 1, 2024).

The term "representatives of the media" is not defined by the OPML or in case law.[161] 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."[162] 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.[163]

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.[164] Some cities may seek to establish a stricter media 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.[165] Denying "representatives of the media" access to meetings can lead to costly litigation.

V. TRAINING REQUIREMENT

A. Governing Body Member Training Requirement

The OGEC, during the 2024 rulemaking process, created a new training requirement for all members of governing bodies.[166] This training requirement applies to (1) all governing body members; (2) with expenditures more than $1 million dollars in a fiscal year[167]; (3) attend an OGEC approved OPML training; (4) once per term.

The OGEC has indicated that a person who holds multiple positions, can attend a certified course and that will count for the positions held at that time. The member must maintain a record of the training, and truthfully report completion upon request of the OGEC.[168] The OGEC is authorized to provide advice on whether an individual must comply.

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[161] Additionally, OGEC has stated they cannot define media.
[162] *See generally* Op Atty Gen 8291 (2016).
[163] *Id.*
[164] The OGEC states that public bodies may determine if individual meets requirement in opinion and can adopt procedures to do so.
[165] *See* OAR 199-050-0050(4) (Effective October 1, 2024).
[166] OAR 199-050-0080 (Effective October 1, 2024).
[167] OGEC indicated the $1 million dollar expenditure requirement was limited to governing body members that authorized the expenditures of the $1 million dollars (or exceeding thereof).
[168] *Id.*

The LOC will be submitting all relevant trainings for OGEC approval, to satisfy this training requirement, but as of October 8, 2024, there are no approved trainings, other than the OGEC trainings found on their website: https://www.oregon.gov/ogec/training/Pages/default.aspx.

VI. Grievance and Complaint Process

A. General Enforcement

The OGEC is authorized to investigate and adjudicate OPML violations. The new administrative rule, OAR 199-050-0070, clarifies requirements of ORS 192.705 for filing a written grievance with a public body alleging violations of OPML. As of October 1, 2024, there are new requirements for public bodies. For assistance in creating your local grievance process policy/procedure, please contact OGEC[169] and your legal counsel for advice.

B. Filing Public Meetings Complaints

i. There are three prerequisites for when an individual who thinks an OPML violation has occurred:

   a. Submit written grievance to the public body;

   b. Within 30 days of the alleged violation; and

   c. The public body[170] has 21 days to respond to complainant.[171] The public body must respond in writing to both the complainant and a copy to the OGEC (by email: pbgr@ogec.oregon.gov or via mail), at the same time. The response may contain the following options: (1) deny facts/deny violation; (2) admit facts/deny violation; or (3) admit facts / admit violation. [172]

ii. After 21-day period is over, complainant may submit a compliant to the OGEC, which must include a copy of the grievance submitted to the public

[169] OGEC contact information: www.oregon.gov/ogec / 503-378-5105 / mail@ogec.oregon.gov.
[170] The public body must respond, not individual members of the governing body.
[171] ORS 192.705(1); OAR 199-050-0070 (Effective October 1, 2024).
[172] ORS 192.705(2).

body and must provide public body's response.[173] If the complainant fails to provide the above, the OGEC will dismiss the complaint.

iii. The public body must provide information on the grievance notice process, specifically, who to submit grievances to and how to submit grievances.[174]

C. OGEC Complaint Process

The OGEC will review received complaints for satisfaction of prerequisites; conduct a preliminary review; and possibly initiate an investigation.[175]

The OGEC may issue sanctions for OPML violations to include: (1) civil penalty (up to $1,000 fine); (2) letters of education; and/or (3) training requirement.[176]

VII. 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.[177] Lawsuits may be filed by "any person who might be affected by a decision that might be made."[178]

A plaintiff may also file suit to determine whether the OPML applies to meetings or decisions of the governing body.[179] 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.[180]

A successful plaintiff may be awarded reasonable attorney fees at trial or on appeal.[181] Whether to award these or not is in the court's discretion.[182] If a court finds that a violation of the

[173] ORS 192.705(2); OAR 199-050-0070 (Effective October 1, 2024).
[174] OAR 199-050-0070(3) (Effective October 1, 2024).
[175] ORS 192.685; ORS 244.260. *See also* OAR 199-050-0075 (Effective October 1, 2024).
[176] ORS 244.350.
[177] ORS 192.680(2).
[178] *See Harris v. Nordquist*, 96 Or App 19, 23 (1989).
[179] ORS 192.680(2).
[180] ORS 192.680(5).
[181] ORS 192.680(3).
[182] *Id.*

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.[183]

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.[184] The law permits a governing body that violates the OPML to reinstate the decision while in compliance with the law.[185] 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.[186]

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 the governing body."[187] In that case, the court will void the decision "unless other equitable relief is available."[188]

B. Civil Penalties for Violations of ORS 192.660

Apart from the enforcement provisions described above, the Oregon Government Ethics Commission (OGEC) may review complaints that a public official has violated the executive session provisions of the OPML as provided in ORS 244.260.[189] 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.[190] If the commission finds a violation of the executive sessions provisions, the commission may impose a civil penalty not to exceed $1,000.[191] 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.[192]

Further, the OGEC was granted additional authority in the 2024 Legislative Session in House Bill 4117.[193] This legislation expanded the scope of authority of the OGEC to give advice

[183] ORS 192.680(4).
[184] ORS 192.680(1).
[185] *Id.*
[186] *Id.*
[187] ORS 192.680(3).
[188] *Id.*
[189] ORS 192.685(1).
[190] ORS 192.685(2).
[191] ORS 244.350(2)(a).
[192] ORS 244.350(2)(b).
[193] *See* HB 4117 (2024), https://olis.oregonlegislature.gov/liz/2024R1/Measures/Overview/HB4117 (last accessed October 9, 2024).

on public meetings laws, issue advisory opinions on the application of the public meetings law to actual or hypothetical circumstances, authorized the executive director of the commission to issue staff advisory opinions or written or oral staff advice on the application of the public meetings law to actual or hypothetical circumstances, and permits other commission staff to issue written or oral staff advice on the public meetings law. The OGEC now hears complaints and renders decisions about allegations of impermissible ethics, executive sessions, and all provisions of the public meeting laws, effective March 20, 2024.