

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 192.690, discussed below.² Additionally, the Oregon Legislature, in 2023, passed HB 2805, authorizing the Oregon Government Ethics Commission (OGE) the authority to enforce Oregon’s Public Meetings Law and conduct rulemaking to clarify specific OPML rules. After rulemaking that occurred in 2024, the OGE proposed 16 rules in total, two of which were amendments to existing rules, found in Oregon Administrative Rule (OAR) Chapter 199—Division 40 (Executive Session) and Division 50 (Public Meetings).³ The OGE 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 OPML. 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 Oregon Attorney General’s Public Records and Meetings Manual (2024).⁹ The LOC strongly recommends that

¹ ORS 192.620.

² *Id.*

³ See Secretary of State website - <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=317423> (last accessed February 2025).

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. Note, HB 2464 (2025) renumbered ORS 192.610(6) to ORS 192.610(7) which defines “public body.”

⁶ ORS 192.630 to ORS 192.660. See also OAR 199-050-0055 (Effective October 1, 2024).

⁷ *Id.*

⁸ ORS 192.680.

⁹ The Oregon Department of Justice Attorney General’s Office typically publishes an updated version every two years.

cities purchase the print version of this manual, which is updated every two years. A free online version is available.¹⁰ 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 and/or contact the OGEC.

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 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.¹⁶ For instance, cities are public bodies and their governing bodies are city councils.

¹⁰ <https://www.doj.state.or.us/wp-content/uploads/2024/12/2024-PRM-Manual.pdf>. (last accessed October 2025).

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).

¹⁶ ORS 192.610(3).

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 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.

(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.

¹⁷ ORS 192.610(3).

¹⁸ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, P. 121 (2024).

¹⁹ ORS 192.610(3).

²⁰ ORS 192.610(3).

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 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

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).

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).

- 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 communicate²⁹ with each other and staff to avoid holding a “meeting” under the OPML. In the 2023 Legislative session, House Bill 2805³⁰ 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 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.

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 February 2025).

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.*

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).

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 administrative 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 of any kind, directly or through intermediaries⁴³, 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

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 February 2025).

⁴² OAR 199-050-0020 (Effective October 1, 2024).

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.*

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

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. In practice, cities should avoid deliberating towards 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:

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, p. 124 (2024).

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)

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.

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.

Pursuant to recent rulemaking, Applicable meetings subject to OPML 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.⁵⁴ 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.

⁵³ ORS 192.610(1).

⁵⁴ OAR 199-050-0015.

(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.⁵⁵ 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.

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.⁵⁶ Therefore, all regular, special, and emergency meetings

⁵⁵ *Id.*; ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL, p. 125 (2024); 38 Op Atty Gen 1471, 1977 WL 31327 (1977); *see Oregonian Publishing Co. v. Bd. of Parole*, 95 Or App 501, 505–06 (1989) (Board of Parole had to open the information-gathering portions of its meetings to the public); Letter of Advice to Ron Eachus, at 6 (a quorum of the Public Utility Commission could not meet with staff in private to receive informational briefings on public utility regulation and agency administration).

⁵⁶ ORS 192.640.

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.⁵⁷

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 the public to recognize the matters in which they are interested.”⁵⁸

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.”⁵⁹

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.⁶⁰

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;

⁵⁷ *Id.*, see also OAR 199-050-0040 (Effective October 1, 2024).

⁵⁸ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p. 132 (2024).

⁵⁹ ORS 192.640.

⁶⁰ ORS 192.630(5); ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p. 134-35 (2024).

or (7) mail.⁶¹ Additionally, media notice may be required if a media representative has requested notice.⁶²

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 interested persons including news media which have requested notice.”⁶³ As much notice as reasonably possible, but no less than 48 hours advance notice is required.⁶⁴

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.”⁶⁵ The only exception to the 24-hour notice rule for special meetings is an emergency meeting.⁶⁶

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.⁶⁷ Even these meetings require notice; the OPML requires that emergency meetings be noticed in a manner that is “appropriate to the circumstances.”⁶⁸ Furthermore, an emergency meeting may only be used to discuss matters pertaining to the emergency.⁶⁹ 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.⁷⁰ 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.⁷¹ In addition, the notice must be sent to each member of the governing body.⁷² 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

⁶¹ OAR 199-050-0040(2) (effective October 1, 2024).

⁶² OAR 199-050-0040(2)(c) (effective October 1, 2024).

⁶³ ORS 192.640(1).

⁶⁴ OAR 199-050-0040(4)(a) (effective October 1, 2024).

⁶⁵ ORS 192.640(3); *see also* OAR 199-050-0040 (4)(b) (effective October 1, 2024).

⁶⁶ OAR 199-050-0040 (4)(c) (effective October 1, 2024).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See Or. Ass’n of Classified Employees v. Salem-Keizer Sch. Dist.* 24J, 95 Or App 28, 32 (1989).

⁷⁰ *Id.*

⁷¹ ORS 192.640(2); *see also* OAR 199-050-0040(3)(d) (effective October 1, 2024).

⁷² *Id.*

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.⁷³ 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.⁷⁴

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**.⁷⁵ Second, the meeting space must be within the right **geography**.⁷⁶ Third, the meeting space must satisfy criteria for **accessibility**.⁷⁷ Fourth, the space must be a place of **equality**.⁷⁸

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.”⁷⁹ 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.⁸⁰ 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.⁸¹

⁷³ *Id.*

⁷⁴ ORS 192.640(3).

⁷⁵ ORS 192.630(1).

⁷⁶ ORS 192.630(4).

⁷⁷ ORS 192.630(5).

⁷⁸ ORS 192.630(3).

⁷⁹ ORS 192.630(1).

⁸⁰ ORS 192.630(4). A fourth option for most public bodies is to hold a public meeting within “Indian country.” *Id.*

⁸¹ *Id.*

iii. Accessibility

In three main ways, the OPML requires accessibility for persons with disabilities.⁸² First, meetings subject to the OPML must be held in places accessible to individuals with mobility and other impairments.⁸³ Second, the public body must make a “good-faith effort” to provide an interpreter at the request of deaf or hard-of-hearing persons.⁸⁴

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 2560⁸⁵ in the 2021 session, requiring those remote options to continue.⁸⁶ 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.⁸⁷

The amendment emphasizes the requirement of governing bodies to make most public meetings (excludes executive sessions) remotely accessible when “reasonably possible.”⁸⁸ 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.⁸⁹

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.⁹⁰ 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.”⁹¹

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.⁹² Generally, a

⁸² See ORS 192.630(5)(a).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See HB 2560 (2021), <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2560> (last accessed February 2025).

⁸⁶ ORS 192.670 (HB 2560) - Meetings by Means of Telephone or Electronic Communication.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *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).

⁹⁰ See ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p. 134-35 (2024).

⁹¹ ORS 192.630(5)(e).

⁹² ORS 192.630(3).

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.⁹³

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.⁹⁴ 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;⁹⁵
- (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.⁹⁶

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.”⁹⁷ Upon conclusion of the meeting, the minutes must also be available to the public “within a reasonable time.”⁹⁸ 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.”⁹⁹ The minutes or recordings required, which include executive sessions, shall provide for either written minutes or audio, video, or digital recordings.¹⁰⁰

Finally, the OPML requires that minutes or another record of a public meeting must be preserved for a reasonable time.¹⁰¹ However, the Secretary of State’s Retention Schedule for cities requires minutes of non-executive session meetings to be retained permanently.¹⁰² Executive session

⁹³ *Id.*

⁹⁴ ORS 192.650(1)

⁹⁵ 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, p. 138-39 (2025) (citing *Gilmore v. Bd. of Psychologist Examiners*, 81 Or App 321, 324 (1986)). See also OAR 199-050-0055 (effective October 1, 2024).

⁹⁶ ORS 192.650(1).

⁹⁷ *Id.*, see also OAR 199-050-0060 (effective October 1, 2024).

⁹⁸ *Id.*

⁹⁹ ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p 139 (2024).

¹⁰⁰ OAR 199-050-0060 (Effective October 1, 2024).

¹⁰¹ *Id.* at 162 (citing *Harris v. Nordquist*, 96 Or App 19 (1989)).

¹⁰² OAR 166-200-0235.

minutes must be retained for 10 years.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷ 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 on maintaining order in council meetings, consult the LOC’s Model Rules of Procedure for Council Meetings.¹⁰⁸

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

¹⁰³ *Id.*

¹⁰⁴ ORS 192.630(1).

¹⁰⁵ ORS 192.660(7)(d)(C); ORS 192.660(7)(d)(D).

¹⁰⁶ ORS 294.453

¹⁰⁷ OAR 660-025-0080(2).

¹⁰⁸ LEAGUE OF OREGON CITIES, MODEL RULES OF PROCEDURE FOR COUNCIL MEETINGS, https://www.orecities.org/download_file/604/1852 (last accessed February 2025).

“directing speech about public issues to those who govern their city.”¹⁰⁹ 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.¹¹⁰ While the right to speech is “enormous,” it is subject to content-neutral limitations.¹¹¹ 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.”¹¹²

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.¹¹³ At a minimum, any expression of speech at a limited public forum in Oregon can be limited through time, place and manner restrictions.¹¹⁴ 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.¹¹⁵ The restrictions also must serve a “legitimate interest” and provide “ample alternatives for the intended message.”¹¹⁶

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.¹¹⁷ That said, cities generally will avoid triggering the First Amendment if their restrictions serve “purposes unrelated to the content of expression.”¹¹⁸ This is true

¹⁰⁹ See *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

¹¹⁰ See *Virginia v. Black*, 538 U.S. 343, 358 (2003).

¹¹¹ See *White*, 900 F.2d at 1425 (1990).

¹¹² See *Walsh v. Enge*, 154 F.Supp.3d 1113, 1119 (D. Or. 2015) (quoting *Cornelius v. NAACP*, 473 U.S. 788, 799 (1985)).

¹¹³ See *White*, 900 F.2d at 1425 (1990).

¹¹⁴ 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.

¹¹⁵ See *White*, 900 F.2d at 1425 (1990).

¹¹⁶ See *Babson*, 355 Or. at 408 (2014).

¹¹⁷ 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),

¹¹⁸ *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 800 (9th Cir. 2011) (quoting, in part, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

even if an otherwise valid restriction, under particular circumstances, “*incidentally* burdens some speakers, messages or viewpoints.”¹¹⁹

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.¹²⁰ 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 prevent 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.¹²¹ 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.¹²² 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.”¹²³

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.”¹²⁴ Similarly, in *Walsh v. Enge*, a federal district court found that the city of Portland could not “prospectively exclude

¹¹⁹ *Id.*

¹²⁰ *Norse*, 629 F3d at 976.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Reza v Pearce*, 806 F3d 497, 505 (9th Cir 2015).

individuals from future public meetings merely because they have been disruptive in the past.”¹²⁵ 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.

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.¹²⁶

For a thorough assessment of how executive sessions apply to cities see Oregon Government Ethics Commission Executive Session Handout.¹²⁷

A. Executive Sessions for Municipalities

The Oregon Legislative Assembly has identified 16 circumstances in which an executive session is authorized.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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.¹³¹

¹²⁵ See *Walsh v Enge*, 154 F Supp. 3d 1113, 1119 (D Or 2015).

¹²⁶ See ORS 192.660; see also ORS 192.610(2) (defining an executive session as a “meeting.”).

¹²⁷ <https://www.oregon.gov/ogec/training/Documents/Training%20Resource%20Charts%20%26%20Materials/Exec%20Session%20Handout.pdf> (last accessed October 2025).

¹²⁸ ORS 192.660.

¹²⁹ OAR 199-040-0027 (effective October 1, 2024).

¹³⁰ ORS 192.660(7). This provision applies for a chief executive officer, public officer, employee, or staff member only if the vacancy for the position has been advertised; if regular procedures for hiring have been adopted; and, for a public officer, if the public has had opportunity to comment on the employment.

¹³¹ ORS 192.660(7)(d)(D). This provision is for a chief executive officer, and the governing body must have adopted hiring standards, criteria, and policy directives at meetings open to the public in which the public had the opportunity to comment.

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;¹³² or
- Consideration of general employment policies;¹³³ or
- To discuss an officer's salary.¹³⁴

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.¹³⁵ 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.

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.¹³⁶ Note that this is one of the few meetings where news organizations and the media can be excluded from an executive session.¹³⁷

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.¹³⁸ Real property transactions are not limited to the purchase or sale of real property. For example, negotiations for a long-term lease transaction undoubtedly would be included within this provision.¹³⁹ The deliberations conducted during an executive session held under this provision must concern a specific

¹³² See ORS 192.660; see also ORS 192.660(7)(a)-(d).

¹³³ ORS 192.660(2)(a).

¹³⁴ See generally 42 Op Atty Gen 362, 1982 WL 183044 (1982).

¹³⁵ ORS 192.660(2)(b).

¹³⁶ ORS 192.660(2)(c).

¹³⁷ ORS 192.660(4).

¹³⁸ ORS 192.660(2)(e).

¹³⁹ ODOJ, ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL, p. 143 (2024).

piece of property or properties—the session may not be used to discuss a city’s long-term property needs.¹⁴⁰

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.¹⁴¹ 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.¹⁴²

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.¹⁴³ In the event the litigation is against a news organization, the governing body must exclude any journalist who is affiliated with the news organization.¹⁴⁴

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.¹⁴⁵ 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.

¹⁴⁰ *Id.* (citing Letter of Advice to Rep. Carl Hosticka, 1990 WL 519211 (OP-6376) (May 18, 1990)).

¹⁴¹ ORS 192.660(2)(f).

¹⁴² ORS 192.660(2)(g).

¹⁴³ ORS 192.660(2)(h).

¹⁴⁴ ORS 192.660(5).

¹⁴⁵ ORS 192.660(2)(i).

This provision allows cities to conduct negotiations about certain public investments.¹⁴⁶ The final decision on these investments must occur in an open public meeting (see below).¹⁴⁷

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.¹⁴⁸

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.¹⁴⁹

12. To consider matters relating to cyber security infrastructure and responses to cyber security threats.¹⁵⁰

The executive session statutes are each narrowly tailored to address limited circumstances. If the subject of the proposed meeting does not fit within one of these circumstances, the executive session is prohibited, and the meeting must be held in open session. Complaints alleging a violation of the executive session laws by a public official may be made to the OGEA for review, investigation, and possible imposition of personal liability of civil penalties up to \$1,000.¹⁵¹

LOC advises members to consult with their attorney if they have questions regarding executive sessions.

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.”¹⁵² While final decisions cannot be made, city councils and other public bodies may still reach an informal consensus during an executive session.¹⁵³ 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.¹⁵⁴

¹⁴⁶ ORS 192.660(2)(j).

¹⁴⁷ ORS 192.660(6).

¹⁴⁸ ORS 192.660(2)(n).

¹⁴⁹ ORS 192.660(2)(o). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.

¹⁵⁰ ORS 192.660(2)(p). HB 2806 (2023) Oregon Legislature added this topic to qualify for executive session.

¹⁵¹ ORS 192.685; ORS 244.350(2).

¹⁵² ORS 192.660(6).

¹⁵³ OAR 199-040-0060 (effective October 1, 2024).

¹⁵⁴ See ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p. 149-50 (2024); see also OAR 199-050-0055 (effective October 1, 2024).

C. Media Representation at an Executive Session

Representatives of the news media must be allowed to attend all but two types of executive sessions.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

Even though news organizations are permitted to attend virtually every executive session, governing bodies may prohibit news organizations from disclosing certain specified information.¹⁵⁸ Media access must be allowed virtual attendance if any individual is attending virtually.¹⁵⁹ 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; (3) 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.

The term “representatives of the media” is not defined by the OPML or in case law.¹⁶⁰ 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.”¹⁶¹ 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

¹⁵⁵ ORS 192.660(5).

¹⁵⁶ *Id.*

¹⁵⁷ ORS 192.660(5).

¹⁵⁸ ORS 192.660(4).

¹⁵⁹ ORS 192.670; *see also* OAR 199-050-0050(4) (effective October 1, 2024).

¹⁶⁰ OGEc has stated they cannot define media; *see also* ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p. 151-53 (2024).

¹⁶¹ *See generally* Op Atty Gen 8291 (2016).

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.¹⁶²

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.¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ This training requirement applies to (1) all governing body members; (2) with expenditures more than \$1 million dollars in a fiscal year¹⁶⁶; (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.¹⁶⁷ The OGEC is authorized to provide advice on whether an individual must comply.

The LOC has OGEC approval to teach this required certified training, which satisfies this training requirement. Also, OGEC offers this training and can 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

¹⁶² *Id.*

¹⁶³ The OGEC states that public bodies may determine if individual meets requirement in opinion and can adopt procedures to do so.

¹⁶⁴ *See* OAR 199-050-0050(4) (effective October 1, 2024).

¹⁶⁵ OAR 199-050-0080 (effective October 1, 2024).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

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 OGEC¹⁶⁸ 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 body¹⁶⁹ has 21 days to respond to complainant.¹⁷⁰ 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.¹⁷¹
- 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 body and must provide public body's response.¹⁷² 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.¹⁷³

C. OGEC Complaint Process

The OGEC will review received complaints for satisfaction of prerequisites; conduct a preliminary review; and possibly initiate an investigation.¹⁷⁴

¹⁶⁸ OGEC contact information: www.oregon.gov/ogec / 503-378-5105 / mail@ogec.oregon.gov.

¹⁶⁹ The public body must respond, not individual members of the governing body.

¹⁷⁰ ORS 192.705(1); OAR 199-050-0070 (effective October 1, 2024).

¹⁷¹ ORS 192.705(2).

¹⁷² ORS 192.705(2); OAR 199-050-0070 (effective October 1, 2024).

¹⁷³ OAR 199-050-0070(3) (effective October 1, 2024).

¹⁷⁴ ORS 192.685; ORS 244.260. *See also* OAR 199-050-0075 (effective October 1, 2024).

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.¹⁷⁵

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.¹⁷⁶ Lawsuits may be filed by “any person who might be affected by a decision that might be made.”¹⁷⁷

A plaintiff may also file suit to determine whether the OPML applies to meetings or decisions of the governing body.¹⁷⁸ 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.¹⁷⁹

A successful plaintiff may be awarded reasonable attorney fees at trial or on appeal.¹⁸⁰ Whether to award these or not is in the court’s discretion.¹⁸¹ 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.¹⁸²

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.¹⁸³ The law permits a governing body that violates the OPML to reinstate the decision while in compliance with the law.¹⁸⁴ 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.¹⁸⁵

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

¹⁷⁵ ORS 244.350.

¹⁷⁶ ORS 192.680(2).

¹⁷⁷ See *Harris v. Nordquist*, 96 Or App 19, 23 (1989).

¹⁷⁸ ORS 192.680(2).

¹⁷⁹ ORS 192.680(5).

¹⁸⁰ ORS 192.680(3).

¹⁸¹ *Id.*

¹⁸² ORS 192.680(4).

¹⁸³ ORS 192.680(1).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

intentional disregard of the law or willful misconduct by a quorum of the members of the governing body.”¹⁸⁶ In that case, the court will void the decision “unless other equitable relief is available.”¹⁸⁷

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 244.260.¹⁸⁸ 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.¹⁸⁹ If the commission finds a violation of the executive sessions provisions, the commission may impose a civil penalty not to exceed \$1,000.¹⁹⁰ 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.¹⁹¹

Further, the OGEC was granted additional authority in the 2024 Legislative Session in House Bill 4117.¹⁹² This legislation expanded the scope of authority of the OGEC to give advice 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.

¹⁸⁶ ORS 192.680(3).

¹⁸⁷ *Id.*

¹⁸⁸ ORS 192.685(1).

¹⁸⁹ ORS 192.685(2).

¹⁹⁰ ORS 244.350(2)(a).

¹⁹¹ ORS 244.350(2)(b).

¹⁹² See HB 4117 (2024), <https://olis.oregonlegislature.gov/liz/2024R1/Measures/Overview/HB4117> (last accessed February 2025).

VIII. APPENDIX A – GUIDE TO EXECUTIVE SESSIONS

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Introduction

The policy behind the Oregon public meetings law (OPML) is that government, including municipal government, requires an informed citizenry to be “aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made.”¹⁹³ Within the OPML policy statement is an affirmative declaration that a governing body’s decisions should “be arrived at openly.”¹⁹⁴ Executive sessions are the antithesis of the OPML policy as an executive session is a meeting of a governing body that “is closed to certain persons for deliberation on certain matters.”¹⁹⁵ Because holding an executive session so contravenes the overarching purpose of the OPML, this type of meeting may only be used in limited circumstances, and in most instances members of the media must be allowed to attend.

This “Guide to Executive Sessions” (Guide) provides a comprehensive review of when, where, and how municipal governments may conduct executive sessions. Additionally, the Guide summarizes the rights provided to news media as they relate to executive sessions, while also providing a legislative history of why news organizations are given an opportunity to attend executive sessions when the general public is prohibited.

Finally, the Guide contains various model forms and policies that may be useful for public officials to review in creating their own forms and policies. Any model document provided by the League is intended to be used as a starting point in an individual city’s development of their own documents. Each city is unique, and any document or policy adopted should be individually tailored to meet the city’s unique needs.

Disclaimer

This Guide is not intended as a substitute for legal advice. Some of the legal issues highlighted herein are not settled law. A city should consult with its city attorney before choosing a course of action based on how much risk the city is willing to take.

Definitions

Below are definitions for several relevant and often-used terms when discussing executive sessions in Oregon. These definitions are found in state law and administrative rules set forth by the Oregon Government Ethics Commission.

Decision means 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.¹⁹⁶

¹⁹³ ORS 192.620.

¹⁹⁴ *Id.*

¹⁹⁵ ORS 192.610(2).

¹⁹⁶ ORS 192.610(1); *see also* OAR 199-050-0005(3) (Effective October 1, (2024)

Decision-Making Process means 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.¹⁹⁷

Deliberate means the consideration or debate of a matter.¹⁹⁸

Discussion means the consideration or debate of a matter.¹⁹⁹

Executive Session means any meeting or part of a meeting of a governing body which is closed to certain persons for deliberation on certain matters.²⁰⁰

Governing Body means the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration.²⁰¹

Public Body means the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee, subcommittee, advisory group, or any other agency thereof.²⁰²

Meeting means the **convening** of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. It does not include: (1) any on-site inspection of any project or program; or (2) the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong.²⁰³

- **The definition of convening** was amended in HB 2805 (2024) which amended ORS 192.610(1) to read: (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.²⁰⁴
- **Communicate** means 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.²⁰⁵

¹⁹⁷ OAR 199-050-0005(4) (Effective October 1, 2024).

¹⁹⁸ OAR 199-050-0005(5) (Effective October 1, 2024), *see also* ORS 192.610(3) (amended by HB 2805 (2024)).

¹⁹⁹ OAR 199-050-0005(6) (Effective October 1, 2024).

²⁰⁰ ORS 192.610(2).

²⁰¹ ORS 192.610(3).

²⁰² ORS 192.610(4).

²⁰³ ORS 192.610(5).

²⁰⁴ ORS 192.610(1).

²⁰⁵ OAR 199-050-0050(1) (Effective October 1, 2024).

- **Communication** – means 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.²⁰⁶
- **Intermediary** means 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.²⁰⁷
- **Serial Electronic Written Communication** means 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.²⁰⁸

It is important to note that the OPML, and the executive session provisions contained therein, is applicable to all of Oregon’s 241 cities. The law applies to executive sessions held by any of the following:

- City councils;
- Subcommittees of a city council if the subcommittee requires a quorum to conduct business and the subcommittee has the power to make policy or administrative decisions for the council itself or make recommendations to the council;
- City boards or commissions, provided the board or commission requires a quorum to conduct business and the board or commission has the power to make policy or administrative decisions on its own or make recommendations to the council;
- Intergovernmental agencies created pursuant to agreements adopted in accordance with ORS Chapter 190; and
- Any other public body which requires a quorum to conduct business and has the authority to make policy or administrative decisions or make recommendations to a governing body with authority to make policy or administrative decisions.²⁰⁹

Location of Executive Sessions

Executive sessions are to be held within the geographic boundaries over which the public body holding the session has jurisdiction.²¹⁰ These sessions should typically be held at city hall—or any

²⁰⁶ OAR 199-050-0050(2) (Effective October 1, 2024).

²⁰⁷ ORS 192.610(1); *see also* OAR 199-050-0050(7) (Effective October 1, 2024).

²⁰⁸ OAR 199-050-0050(10); *see also* OAR 199-050-0020 (Effective October 1, 2024).

²⁰⁹ ORS 192.610 and 42 Op Atty Gen 187, 188 (1981).

²¹⁰ ORS 192.630(4).

location where the city council usually holds its regular public meetings.²¹¹ If the executive session cannot be held within the city’s jurisdiction, it must be held at the nearest practical location.²¹²

There may come a time when a city council, or one of a city’s boards or commissions, needs to hold an executive session with another governing body of a different jurisdiction. In that circumstance, the executive session is to be held within the geographic boundaries controlled by one of the public bodies participating in the session.²¹³

In Oregon, public bodies are not permitted to hold an executive session in any place that discriminates against any person on the basis of race, color, creed, sex, sexual orientation, national origin, age, or disability.²¹⁴

If any member of the governing body is attending a executive session by telephone, video, or other electronic means, the governing body must also provide a virtual attendance option to representatives of the media.²¹⁵

Accommodations for Persons with Disabilities at Executive Sessions

Public bodies are required to hold executive sessions in locations that are accessible to persons with disabilities.²¹⁶ If a hearing-impaired person will attend an executive session, the governing body holding the session is required to provide the hearing-impaired person with an interpreter if a request for such an interpreter is made at least 48 hours in advance of the session.²¹⁷

Also, the U.S. Americans with Disabilities Act (ADA) imposes requirements on public bodies that are in addition to those required by Oregon law. For example, the ADA requires cities to ensure that their communications with persons with disabilities are as effective as communications with persons who have no disabilities.²¹⁸ Persons with vision impairments may need to be accommodated if written materials are used during public meetings. Cities should be aware that they generally cannot charge a disabled person to cover the cost of providing the additional services or aides. Lastly, recent OGEK rulemaking added the requirement of name, telephone number, and email address of a person at the public body to contact to request an interpreter or other communication aids.²¹⁹

Attendance at Executive Sessions by Telephone or Electronic Means

An executive session can be held via the use of a telephone or other electronic means, provided all other requirements of the OPML are satisfied.²²⁰ If an executive session is being conducted via telephone or other electronic means, it is imperative that the media be provided the ability to attend the

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ ORS 192.630(3).

²¹⁵ OAR 199-050-0050(4) (Effective October 1, 2024).

²¹⁶ ORS 192.630(5)(a).

²¹⁷ ORS 192.630(5)(b).

²¹⁸ 42 USC §12131(2); 42 USC § 12132; 28 CFR § 35.160.

²¹⁹ OAR 199-050-040(3)(c) (Effective October 1, 2024).

²²⁰ ORS 192.670(1).

meeting. For example, if an executive session is being held via telephone and an access code is required to join the teleconference, the media should be provided the access code.

Notice Requirements for an Executive Session

If the only type of meeting to be held is an executive session, the governing body holding the executive session is required to give notice of the session to the following persons or entities:

1. Each member of the governing body (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);
2. The general public; and
3. Any news media which has requested to be notified of executive sessions. If a news organization has requested to receive notice of all public meetings of the governing body without specifically referencing a desire to be notified of executive sessions, the news organization in question should also be notified of each executive session.²²¹

When providing notice of an executive session, the notice is required to state the specific provision of the Oregon public meetings law that authorizes the executive session.²²² 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.²²³ A "Model Notice of Executive Session" for each instance authorized by the OMPL is included in this guide (see Appendices B through J).

Executive sessions are often held in conjunction with regular public meetings of the governing body. In these instances, the notice required for the executive session, in compliance with the requirements described above, shall be given simultaneously with the notice of the regular meeting.²²⁴ The regular meeting shall be noticed in such a way that it is "reasonably calculated to give actual notice to interested persons" of the time and place of the regular meeting.²²⁵ Any news organization that has requested to be notified of regular meetings is required to receive notice of the regular meeting and should also be provided notice of the executive session being held in conjunction with the regular meeting.²²⁶ A governing body satisfies the interested persons notice requirement in subsection (1) by providing notice through: (A) Interested person lists, mailing lists, or other lists of persons or groups maintained by the governing body to provide notice or communications; (B) Social media platforms normally utilized by the governing body for communications; or (C) Any other means reasonably calculated to provide actual notice to interested persons known to the governing body.²²⁷

²²¹ ORS 192.640(2), *see also* OAR 199-050-0040(3)(d) (Effective October 1, 2024).

²²² *Id.*

²²³ ORS 192.640(3).

²²⁴ ORS 192.640(1).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ OAR 199-050-0040(2) (Effective October 1, 2024).

To ensure compliance with the requirement that reasonable accommodations be provided to those with disabilities, any notice published for either an executive session or a regular session should direct those with disabilities to an appropriate city employee who can obtain interpreters and/or equipment that ensures the meeting is accessible to all.

Because of the subject matter often discussed in executive sessions, it is not uncommon for executive sessions to be part of a governing body's response to an emergency. When executive sessions are held due to an emergency, it may only be held if notice is given "as is appropriate for the circumstances," and the minutes of the emergency executive session "describe the emergency justifying less than 24 hours' notice."²²⁸ It is recommended that, even in the event of an emergency executive session, all members of the governing body be notified of the session and that any news organization who has requested notice of meetings also be provided notice.

Permitted Reasons for an Executive Session

As already noted, executive sessions are only permitted for specific statutorily authorized reasons. Note, even when a topic or issue is permitted to be discussed during an executive session, a governing body may choose to discuss the issue during an open public meeting.

The Oregon Legislative Assembly has identified 16 circumstances in which an executive session is authorized. Of the 12 circumstances in which an executive session may be held, twelve are likely to be used by municipalities and are discussed herein.

1. **To consider the initial employment of a public officer, employee, staff member or individual agent.**²²⁹ Members of governing bodies may generally deliberate whether to employ individuals that meet this description, however, only consideration of initial employment is permissible under this section.²³⁰ This **does not allow** an executive session to be held to:

- Employ a chief executive officer, public officer, employee or staff member **unless**:
 - The position vacancy has first been advertised;
 - There already exists an adopted regular hiring procedure;
 - In the case of a public officer, the public has had the opportunity to comment on the employment of the officer; and
 - In the case of a chief executive officer, there already exists adopted hiring criteria and policy directives. The adopted hiring criteria and policy directives had to be discussed and adopted in a meeting open to the public and wherein the public had an opportunity to provide comments on the criteria and directives.²³¹

²²⁸ ORS 192.640(3); *see also* OAR 199-050-0040(3)(d) and (4)(c) (Effective October 1, 2024).

²²⁹ ORS 192.660(2)(a); *see also* OAR 199-040-0027 (Effective October 1, 2024).

²³⁰ OAR 199-040-0027 (Effective October 1, 2024).

²³¹ ORS 192.660(7)(d).

- Fill a vacancy in any of the following: elected office; public committee; public commissions; or advisory group;
 - Consider general employment practices, like adopting a personnel manual²³²; or
 - Discuss an officer's salary in connection with the hiring of that officer.²³³
2. **To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.**²³⁴ In order to allow the affected person time to request an open hearing, sufficient notice of the hearing date and time should be provided. Note, absent a local ordinance, personnel manual provisions, or collective bargaining agreements to the contrary, nothing requires that the affected person be allowed to attend the hearing or receive a continuance of the hearing.
 3. **To conduct deliberations with persons designated by the governing body to carry on labor negotiations.**²³⁵ 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. Also of note, this is one of the few times news organizations and the media can be excluded from an executive session.²³⁶
 4. **To conduct deliberations with persons designated by the governing body to negotiate real property transactions.**²³⁷ 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. A real property transaction may include the purchase of real property, the sale of real property, and/or negotiations of lease agreements. The deliberations conducted during an executive session held under this provision must concern a specific piece of property or properties—the executive session may not be used as a general discussion of a city's long-term property needs or goals.²³⁸
 5. **To consider information or records that are exempt by law from public inspection.**²³⁹ In order to hold an executive session under this provision, the information and records to be reviewed must be those identified in:
 - ORS 192.368 (home address, personal telephone number or email address of certain individuals);

²³² ORS 192.660(7)(a)-(c).

²³³ ORS 192.660(7)(c) and 42 Op Atty Gen 362 (1982).

²³⁴ ORS 192.660(2)(b).

²³⁵ ORS 192.660(2)(d).

²³⁶ ORS 192.660(4).

²³⁷ ORS 192.660(2)(e).

²³⁸ Letter of Advice dated May 18, 1990, to Representative Carl Hosticka (Or. Op. Atty. Gen. OP-6376).

²³⁹ ORS 192.660(2)(f).

- ORS 192.371 (identification card or badge of an employee that contains the employee’s photograph unless the employee has provided his/her consent);
 - ORS 192.398 (mental or physical health records of a living person that are less than 75 years old; records sealed under a court order that are less than 75 years old; records of a person who was in state custody or under state supervision if they are less than 25 years old; or student records);
 - ORS 192.345 (Records which are conditionally exempt from disclosure. The list of such records is long and should be viewed by reading this statute in its entirety); or
 - ORS 192.355 (Additional records exempt from disclosure. The list of such records is long and should be viewed by reading this statute in its entirety).
6. **To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.**²⁴⁰ 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 regarding the matters intended for discussion.²⁴¹
 7. **To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.**²⁴² The attorney general believes that city councils “should be able to engage in a private and candid discussion with counsel about the legal issues raised by the litigation. Such discussion may include not only procedural options, but also substantive analysis of the legal merits, risks and ramifications of the litigation.”²⁴³ A governing body is to exclude any member of the press if the news organization the reporter represents is a party to the litigation being discussed.²⁴⁴
 8. **To review and evaluate the 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.**²⁴⁵ In order to allow the affected person time to request an open hearing, sufficient notice of the hearing date and time should be provided. Note, with the exception of a local ordinance, personnel manual provisions, or a collective bargaining agreement to the contrary, nothing requires that the affected person be allowed to attend the hearing or receive a continuance of the hearing. An executive session under this provision may not be used to do the following:

²⁴⁰ ORS 192.660(2)(g).

²⁴¹ 42 Or Op Atty Gen 392, 397 (1982).

²⁴² ORS 192.660(2)(h).

²⁴³ *Attorney General’s Public Records and Meetings Manual*, Public Meetings Chapter, p. 166 (June 2019).

²⁴⁴ ORS 192.660(5).

²⁴⁵ ORS 192.660(2)(i).

- Conduct a general evaluation of a city goal, objective or operation, or any directive given by the city council to personnel considering said goal, objective or operation;²⁴⁶ or
- Discuss an officer's salary in connection with his or her job performance evaluation.²⁴⁷

9. To carry on negotiations under ORS Chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.²⁴⁸ While this provision allows cities to conduct negotiations during an executive session, remember that a final decision or resolution to the negotiations must occur in an open public meeting.

10. To discuss information about review or approval of programs relating to the security of any of the following:

- A nuclear-powered thermal power plant or nuclear installation;
- Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation;
- Generation, storage or conveyance of:
 - Electricity;
 - Gas in liquefied or gaseous form;
 - Hazardous substances as defined in ORS 453.005(7)(a)(b) and (d);
 - Petroleum products;
 - Sewage; or
 - Water.
- Telecommunication systems, including cellular, wireless or radio systems; or
- Data transmissions by whatever means provided.²⁴⁹

Labor negotiations may occur in executive session if both parties to the negotiation agree to such an executive session. If a labor negotiation occurs in an executive session, the notification requirements of ORS 192.640 are not applicable.²⁵⁰

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.²⁵¹

²⁴⁶ ORS 192.660(8).

²⁴⁷ 42 Op Atty Gen 362 (1982).

²⁴⁸ ORS 192.660(2)(j).

²⁴⁹ ORS 192.660(2)(n).

²⁵⁰ ORS 192.660(3).

²⁵¹ ORS 192.660(2)(o). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.

12. To consider matters relating to cyber security infrastructure and responses to cyber security threats.²⁵²

News Organizations

Representatives of the news media must be allowed to attend all but two types of executive sessions.²⁵³ 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.²⁵⁴ However, if media is allowed to attend, media access must be allowed virtual attendance if any individual is attending virtually.²⁵⁵ Also, remember that a city council or other public body is to 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.²⁵⁶

Even though news organizations are permitted to attend virtually every executive session, governing bodies may prohibit news organizations from disclosing certain specified information.²⁵⁷ Unless a governing body specifies what information is prohibited from disclosure, news organizations are free to report on the entire executive session. An example of how to specify what information the news organization may not report is provided in the Sample Script to Announce the Start of an Executive Session located in Appendix N. *It is important to note that there is no penalty for a news organization reporting on a portion of an executive session which the city asked to be kept confidential.*

The term “representatives of the media” is not defined by the ORS or by any judicial opinion to date and the Oregon Government Ethics Commission also has not defined “media.” However, the Oregon Attorney General’s office 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.”²⁵⁸ 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. A copy of the attorney general opinion is provided in Appendix K.

The League also analyzed the legislative history of the purpose behind allowing the media to attend executive sessions. The League’s analysis and conclusions differ slightly from the attorney general’s conclusions. A copy of the League’s analysis is provided in Appendix L.

Because there is no bright line determination as to why the Legislature permitted the press to attend executive sessions, the question of which entities or persons qualify as the press is also a question with

²⁵² ORS 192.660(2)(p). HB 2806 in 2023 Oregon Legislature added this topic to qualify for executive session.

²⁵³ ORS 192.660(5).

²⁵⁴ *Id.*

²⁵⁵ ORS 192.670; *see also* OAR 199-050-0050(4) (Effective October 1, 2024).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Op Atty Gen 8291 (2016); available at <https://www.doj.state.or.us/wp-content/uploads/2017/06/op8291.pdf> (last viewed October 14, 2024).

no steadfast answer. A conservative reading of the law and legislative analysis leads one to conclude that any person providing the public with news, including internet bloggers, are to be permitted into executive sessions. However, a more liberal interpretation of the law may allow cities to exclude non-traditional media representatives from executive sessions, and arguably may further allow cities to limit the number of reporters in the executive session to no more than one. Taking the conservative interpretation is the safest way to ensure compliance with state law and provides the best chance at avoiding litigation. If a city wishes to follow a more liberal reading of the executive session statutes that relate to news organizations, the League strongly encourages the city to undertake a meaningful and in-depth discussion with its city attorney before proceeding down such a path. A liberal reading of the statutes may result in costly litigation.

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.²⁵⁹ 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.²⁶⁰ Denying "representatives of the media" access to meetings can lead to costly litigation.

The League, following a more conservative reading of state law, has updated its model media attendance policy, which is included as Appendix M.

Starting an Executive Session

When starting an executive session, there are four things the presiding officer should keep in mind.

- First, to ensure accurate minutes, the presiding officer should specifically note that the meeting is being held in executive session.
- Second, the presiding officer should publicly announce the ORS provision that allows for the meeting to be held in executive session.
- Third, the presiding officer should announce those persons who are required to exit the meeting space.
- Fourth, the presiding officer should advise the media in attendance of what they can and cannot disclose to the public.

A model script of how a presiding officer should start an executive session is provided in Appendix N.

Final Actions or Final Decisions Prohibited

²⁵⁹ The OGE states that public bodies may determine if individual meets requirement in opinion and can adopt procedures to do so.

²⁶⁰ See OAR 199-050-0050(4) (Effective October 1, 2024).

Final actions and/or final decisions cannot legally be made in an executive session.²⁶¹ This does not prohibit city councils or other public bodies from reaching an *informal* consensus in the executive session, but just ensures that the consensus is formally announced in an official fashion during a public meeting wherein the citizenry can witness the announcement.²⁶² The reason a city council’s decision, or other public body’s decision, must be made in a public meeting is to ensure that the public is made aware of the result of the city council’s deliberations and discussions. 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.²⁶³

Minutes

Even though executive sessions are held outside of the eye of the public, minutes are still required to be taken and maintained. ORS 192.650(2) requires the minutes to include, at a minimum, the following information:

1. Names of all members of the governing body present at the meeting;
2. All proposals, resolutions, orders, ordinances, measures or topics discussed;
3. The substance of any discussion on any matter; and
4. A reference to any document being discussed at the meeting.

Minutes of executive sessions do not have to be reduced to writing; rather, they can be kept in the form of a sound or video tape or digital recording.²⁶⁴ The executive session recording does not have to be transcribed unless required by law (for example, if ordered to do so by a court).²⁶⁵ 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.”²⁶⁶

The materials discussed and reviewed during an executive session do not have to be revealed or made public if doing so is “inconsistent with the purpose for which a meeting” in executive session is authorized.²⁶⁷ If excluded materials from an executive session become relevant to a court case, the judge is permitted to review the materials privately to render a determination as to whether the materials must be disclosed to a particular party in the litigation or made public.²⁶⁸

Oregon law requires minutes to be retained in accordance with the Secretary of State’s Retention Schedule. Pursuant to OAR 166-200-0235(5), executive session minutes are to be retained for a

²⁶¹ ORS 192.660(6).

²⁶² OAR 199-040-0060 (Effective October 1, 2024).

²⁶³ See ODOJ, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, p. 149 (2024); see also OAR 199-050-0055 (Effective October 1, 2024).

²⁶⁴ ORS 192.650(2).

²⁶⁵ *Id.*

²⁶⁶ ORS 192.650(1); see also OAR 199-050-0060 (Effective October 1, 2024).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

minimum of ten years.²⁶⁹ Audio or visual recording devices made during the executive session shall be retained for a minimum of one year after the date the official minutes have been prepared and approved.²⁷⁰ Any other records related to the executive session but not put forth as part of the minutes are to be retained for a minimum of five years.²⁷¹

Violations and Liability

In addition to the general penalty provisions for violations of the public meetings law described in ORS 192.680, violations of the executive session provisions of the public meetings law carry their own unique penalties. A person who believes that an executive session has been held in violation of state law may file a complaint with the Oregon Government Ethics Commission (“commission”).²⁷² It is the commission’s responsibility to review the allegation and investigate the complaint.²⁷³

As part of its investigation into any allegation of an executive session violation, the commission may do the following: interview witnesses; review minutes; review other records; and obtain and consider any other information pertaining to the executive session in question.²⁷⁴ The city is required to provide the commission the documents it needs to conduct its investigation, but the documents still retain their confidentiality.²⁷⁵

If the commission determines that a violation of the executive session statutes occurred, it may impose a civil penalty in an amount that does not exceed \$1,000.²⁷⁶ The civil penalty is imposed on individual public officials (i.e., city council members) for violating any executive session provision.²⁷⁷ Public officials can avoid the risk of this civil penalty by taking one simple action—getting a legal opinion from the city attorney wherein the city attorney advises that the executive session is lawfully permitted under Oregon law.²⁷⁸ As long as a city attorney has advised a governing body that the executive session is legally permissible, the individual city officials cannot have a civil penalty imposed on them by the commission.

Should the commission decide not to pursue a complaint of an executive session violation at any time before a contested hearing on the matter occurs, the public official who is the subject of the complaint may be entitled to reimbursement of expenses he or she incurred in defending themselves, including attorney fees.²⁷⁹ Any such reimbursement is to be deposited in a fund controlled by the governing body.²⁸⁰

²⁶⁹ Cities may adopt their own retention schedules which require these minutes to be retained for longer than ten years.

²⁷⁰ OAR 166-200-0235(5).

²⁷¹ *Id.*

²⁷² ORS 192.685(1).

²⁷³ *Id.*

²⁷⁴ ORS 192.685(2).

²⁷⁵ *Id.*

²⁷⁶ ORS 244.350(2)(a).

²⁷⁷ *Id.*

²⁷⁸ ORS 244.350(2)(b).

²⁷⁹ ORS 192.685(3).

²⁸⁰ *Id.*

The Oregon Government Ethics Commission does have authority to investigate and adjudicate grievances related to OPML, including executive sessions.

Additional Resources

The Oregon Attorney General’s Manual on Public Records and Public Meetings has several additional resources public officials may use when determining whether an executive session is appropriate or when holding an executive session. The manual is available on the attorney general’s website.²⁸¹

Conclusion

Executive sessions are deviations from the standard rule that the public is entitled to attend public meetings and be privy to discussions held by governing bodies. Because of this deviation, the standards and procedures established by the Legislative Assembly are nuanced and require a thorough understanding by any governmental official who wishes to utilize an executive session. Considering the financial penalties that may be imposed upon public officials who violate the executive session statutes, consultation with the city attorney in advance of any executive session is strongly recommended. Executive sessions are an important tool in successfully governing communities, but the tool should be used wisely and in full compliance with all applicable laws.

²⁸¹ Accessible at: <https://www.doj.state.or.us/wp-content/uploads/2024/12/2024-PRM-Manual.pdf> (last accessed October 2025).

Model Notice of Executive Session

To Consider the Employment of a Public Officer, Employee or Staff Member

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(a), to consider the *initial* employment of a public officer, employee, staff member or individual agent.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸²

²⁸² It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

To Consider the Dismissal or Disciplining of, or to Hear Complaints or Charges Brought Against, a Public Officer, Employee, Staff Member or Individual Agent

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(b), to consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸³

²⁸³ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

*To Conduct Deliberations with Persons Designated to Carry on Labor Negotiations on
Behalf of the City*

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(d), to conduct deliberations with a person designated to carry on labor negotiations on behalf of the city.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸⁴

²⁸⁴ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

*To Conduct Deliberations with Persons Designated by the City to Negotiate
Real Property Transactions*

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(e), to conduct deliberations with persons designated by the city to negotiate real property transactions.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the Notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸⁵

²⁸⁵ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

To Consider Information or Records that are Exempt by Law from Public Inspection

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(f), to consider information or records that are exempt by law from public inspection, specifically:

- ☐ Records exempt under ORS 192.368;
- ☐ Records exempt under ORS 192.371;
- ☐ Records exempt under ORS 192.398;
- ☐ Records exempt under ORS 192.345; or
- ☐ Records exempt under ORS 192.355 [check the applicable box].

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸⁶

²⁸⁶ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

To Consider Preliminary Negotiations Involving Matters of Trade or Commerce in which the City is Competing with Governing Bodies in Other States or Nations

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(g), to consider preliminary negotiations involving matters of trade or commerce in which the city is competing with governing bodies in other states or nations.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸⁷

²⁸⁷ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

*To Consult with Legal Counsel Concerning the Legal Rights and
Duties of the City with Regards to Litigation*

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(h), to consult with legal counsel concerning the legal rights and duties of the city with regards to litigation.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸⁸

²⁸⁸ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

*To Review and Evaluate the Employment-Related Performance of the Chief Executive Officer,
a Public Officer, Employee or Staff member*

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(i), to review and evaluate the employment-related performance of the chief executive officer, a public officer, employee or staff member.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁸⁹

²⁸⁹ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

*To Carry on Negotiations under ORS Chapter 293 Regarding Proposed Acquisition,
Exchange or Liquidation of Public Investments*

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(j), to carry on negotiations under ORS Chapter 293 regarding proposed acquisition, exchange or liquidation of public investments.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁹⁰

²⁹⁰ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

To Discuss Information about Review or Approval of Programs Relating to Security

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(n), to discuss information about the review or approval of programs relating to security, specifically:

- ☐ A nuclear-powered thermal power plant or nuclear installation;
- ☐ Transportation of radioactive material derived from or destined for a nuclear-fueled thermal power plant or nuclear installation;
- ☐ Generation, storage or conveyance of: electricity, gas in liquefied or gaseous form, hazardous substances as defined in ORS 453.005(7)(a)(b) and (d), petroleum products, sewage or water;
- ☐ Telecommunication systems, including cellular, wireless or radio systems; or
- ☐ Data transmissions by whatever means provided [check the applicable box].

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁹¹

²⁹¹ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

To Discuss Information about, Review, or Approve Programs Relating to the Safety of Governing Body and/or Public Body Staff/Volunteers and/or Security of Public Body Facilities

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(o), 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.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁹²

²⁹² It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Model Notice of Executive Session

To Discuss Information about, Review, or Approve of Programs Relating to Cyber Security Infrastructure and/or Cybersecurity Threats

NOTICE OF EXECUTIVE SESSION

The City Council of [insert name of city], Oregon, will hold an executive session on [insert month, day and year] at [insert time of day, including a.m. or p.m.] at City Hall, [insert complete street address].

The executive session is being held pursuant to ORS 192.660(2)(p), to consider matters relating to cyber security infrastructure and responses to cyber security threats.

The meeting location is accessible to persons with disabilities. A request for an interpreter for the hearing impaired or for other accommodations for persons with disabilities should be made at least 48 hours prior to the executive session. Please contact [insert name of city employee who will handle accommodation requests] at [insert phone number of relevant city employee] to make a request for an interpreter or other accommodations for persons with disabilities.

Distributed to:

- All members of the city council;
- [Individually list all news media organizations provided a copy of the notice];
- [Individually list any other person or entity provided a copy of the notice]; and
- Posted and/or displayed publicly at [insert all applicable locations].²⁹³

²⁹³ It is recommended that whoever posts and/or distributes the notice keeps a record of the date and time the notice was posted and/or distributed.

Formal Attorney General Opinion No. 8291

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April 18, 2016

No. 8291

This opinion answers several questions asked by the Oregon Government Ethics Commission concerning the Public Meetings Law requirement that “representatives of the news media” be allowed to attend executive sessions of public meetings. We first provide a short summary of the opinion, then set out the questions and our short answers, followed by a lengthier discussion.

SUMMARY

The Oregon Public Meetings Law, ORS 192.610 to 192.690, generally requires Oregon governing bodies to allow the public to attend their meetings. ORS 192.660, the “executive session law,” sets out the exceptions. That provision allows a governing body to have a discussion in “executive session” under certain circumstances. Although the public may be excluded from executive sessions, “representatives of the news media” must be allowed to attend except in very limited cases. ORS 192.660(4). The Oregon Government Ethics Commission (commission), among its other functions, investigates complaints that public officials have violated the executive session law. ORS 192.685.

This opinion addresses several issues pertaining to the commission’s duty to investigate and enforce the requirement that representatives of the news media be allowed to attend executive sessions. It first attempts to clarify the meaning of “representatives of the news media.” We conclude that the law permits news-gathering representatives of institutional media to attend executive sessions. We determine that the term “news media” is broad and flexible enough to encompass changing technologies for delivering the news. We also clarify the meaning of several related terms as set out below in “Question 1.”

We next conclude that a governing body may not exclude a representative of the news media from an executive session except as provided in ORS 192.660(4) and (5). We then address the commission’s authority to make rules to carry out its duty to enforce the executive session law. Since the commission first inquired, the Legislative Assembly has clarified in



ORS 244.290 that the commission may adopt rules to carry out its duty to enforce the executive session law. The legislature established one exception, however: The commission is prohibited from adopting a rule that establishes which entities are considered representatives of the news media. ORS 192.660(10).

We next explain that a governing body may not lawfully enforce a policy that permits it to exclude from executive session a representative of the news media who would be permitted to attend under ORS 192.660(4) and (5). Finally, we conclude that in evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute regardless of a governing body's policies.

QUESTIONS AND SHORT ANSWERS

QUESTION 1

What is the meaning of the following terms as used in ORS 192.660(4), ORS 192.660(5), and the ATTORNEY GENERAL'S PUBLIC RECORDS AND MEETINGS MANUAL (2014)(Manual):

1. "Representatives of the news media" [ORS 192.660(4)];
2. "Employee, agent or contractor of a news media organization" [ORS 192.660(5)];
3. "Member of the news media" [ORS 192.660(5)];
4. "Institutionalized news media" [MANUAL p 172]; and,
5. "Bloggers and others using these technologies" [MANUAL p 172]?

SHORT ANSWER

1. For purposes of ORS 192.660(4), "representatives of the news media" means individuals who gather news and who have a formal affiliation, whether through employment, by contract or some other agency authorization from or with an institutional news media entity, including both general interest media and media that cover specific subject areas for special audiences.

2. For purposes of ORS 192.660(5):

(a) "employee of a news media organization" means a person who is paid wages or a salary by a news media organization;

(b) "contractor of a news media organization" means a person who contracts to perform work for a news media organization; and,

(c) "agent of a news media organization" means a person who is authorized to act for or in the place of a news media organization.

3. "Member of the news media" as used in ORS 192.660(5) is effectively synonymous with a representative of the news media.

4. "Institutionalized news media" means an entity that is formally organized for the purpose of gathering and disseminating news.

5. "These technologies" as used in the phrase "bloggers and others using these technologies" in the Manual refers to more recent news mediums, including the internet, that are used to disseminate news in addition to traditional print, radio and television. "Bloggers" refers to individuals who use online technology to disseminate the news. A "blog" in the sense of a regular feature appearing as part of an online publication may qualify as a "news medium," depending on the particular facts.

QUESTION 2

Are there any permissible grounds to exclude representatives of the news media from attendance at executive sessions other than those identified in ORS 192.660(4) and (5)?

SHORT ANSWER

No.

QUESTION 3

May the commission adopt administrative rules to carry out the duties imposed on it by ORS 192.685?

SHORT ANSWER

Yes. As amended in 2015, ORS 244.290(2) gives the commission explicit authority to adopt rules necessary to carry out its duties under ORS 192.660 and 192.685. However, ORS 192.660(10) prohibits the commission from adopting a rule to establish which entities are representatives of the news media for purposes of ORS 192.660(4). ORS 244.290(2)(h) also requires the commission to adopt a rule specifying the criteria it will use to impose civil penalties for violations of ORS 192.660.

QUESTION 4

When evaluating alleged violations of ORS 192.660(4), what is the significance of policies adopted by governing bodies to implement the statutes? Specifically, what would be the legal significance of a policy to exclude a person who:

1. Does not meet adopted screening criteria to determine who qualifies as a "representative of the news media";
2. Does not gain preapproval of media credentials in advance of executive sessions;
3. Fails to give advance notice of attendance; or,

4. Is believed to have unlawfully reported on a prior executive session or to represent a news media organization that did?

SHORT ANSWER

Public bodies are required to comply with the statute. They cannot modify the statutory requirement by adopting a policy. In evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute regardless of a governing body's policies.

With respect to the specific types of policies the commission asks about (numbered 1 through 4 above) we answer as follows:

1. If enforcement of the policy definition results in the exclusion of a representative of the news media, that exclusion would violate ORS 192.660(4).

2. To the extent that a credentialing requirement simply requires an individual to demonstrate that he or she is a representative of the news media, its enforcement would be consistent with the law. But if a policy requires specific credentials, and an individual offering different credentials that are sufficient to demonstrate that he or she is a representative of the news media is excluded based on that policy, that exclusion would not be consistent with ORS 192.660(4).

3. Advance notice of attendance is not required by the Oregon Public Meetings Law. Excluding a representative of the news media for failure to comply with a policy requiring advance notice of attendance would violate ORS 192.660(4).

4. The Oregon Public Meetings Law does not authorize any mechanism for enforcing the requirement that representatives of the news media refrain from reporting designated information discussed in executive session. Enforcement of a policy excluding representatives of the news media on this basis would violate ORS 192.660(4).

DISCUSSION

I. Statutory background

A. ORS 192.660 – Executive session law

ORS 192.630(1) requires governing bodies to allow the public to attend their meetings “except as otherwise provided by ORS 192.610 to 192.690.” ORS 192.660(2) lists eighteen subjects that governing bodies may discuss privately in “executive session.” For example, when a governing body consults with its attorney about pending litigation, it may do so privately.

Although the public may be excluded from executive sessions, “representatives of the news media” usually must be allowed to attend. ORS 192.660(4). However, governing bodies may exclude even the news media when deliberating with their labor negotiators, considering the expulsion of minor students, or examining students’ confidential medical records. *Id.* And governing bodies meeting with their counsel about pending or likely litigation must exclude a “member of the news media” who is a party to the litigation or an “employee, agent or contractor of a news media organization that is a party to the litigation.” ORS 192.660(5). When representatives of the news media attend executive sessions, the governing body “may require that specified information be undisclosed.” ORS 192.660(4).

C. ORS 192.685 – Commission’s authority to enforce executive session law

ORS 192.685(1) permits persons to complain to the commission that a public official violated the executive session law. When the commission receives a complaint, it reviews and investigates it “as provided by ORS 244.260” and may impose civil penalties “as provided by ORS 244.350.” ORS 192.685(1).

D. ORS 244.260 – Procedure for addressing alleged violations

ORS chapter 244 sets out ethics laws for Oregon public officials and charges the commission with enforcing those laws. ORS 244.260 establishes the complaint, investigation and adjudicatory process for violations of ORS chapter 244. ORS 192.685 requires the commission to use the process specified in ORS 244.260 to respond to complaints of executive session law violations.

E. ORS 244.350 – Civil penalties

ORS 244.350(2)(a) authorizes the commission to impose civil penalties of up to \$1000 for a violation of any provision of ORS 192.660, except as provided in subsection 2(b). Subsection 2(b) prohibits the commission from imposing a civil penalty “if the violation occurred as a result of the governing body of the public body acting upon the advice of the public body’s counsel.”

II. Question 1 - Meaning of terms concerning news media

We first address the meaning of “representatives of the news media” for purposes of ORS 192.660(4). We then clarify the meaning of terms used in Attorney General Opinions that attempted to clarify the meaning of “representatives of the news media,” specifically “institutionalized” news media and “bloggers and others using these technologies.” Last, we discuss the meaning of “member” of the news media and “employee, agent or contractor of a news media organization” as used in ORS 192.660(5).

A. “Representatives of the news media”

The fundamental issue underlying the commission’s questions is the difficulty of interpreting and applying the provisions of the Public Meetings Law permitting “representatives of

the news media” to attend executive sessions of public meetings. Understanding the scope of this statutory phrase will illuminate many of the related questions posed by the commission. The Public Meetings Law itself does not define “representatives of the news media” for purposes of ORS 192.660(4) and Oregon appellate courts have not interpreted the phrase. This office has interpreted the phrase in several Attorney General Opinions, including the Manual. We start by summarizing those opinions.

1. Attorney General Opinions

a. 1976 Opinion

ORS 192.660(4) was enacted as part of the original Public Meetings Law in 1973. Or Laws 1973, ch 172, § 6. In 1976 we were asked to specify the criteria that a public body should use to determine whether a person qualifies as a “representative of the news media.” We were also asked whether high school newspapers qualified as “news media.” Letter of Advice dated May 31, 1978, to Representative Dave Frohnmayer. We opined that by using the word “representatives,” the legislature intended the requirement to be limited to “institutionalized” news media. We did not expound on our thinking or explain what we meant by “institutionalized.” We also concluded that “news media” encompassed only media that have a natural interest in the subject matter of the executive session, because only they would use information gained in executive sessions for future reporting. We further opined, based on federal law from another context, that the size of the medium’s audience is not a proper criterion. Finally, we advised that determining who is a representative of the news media is a question of fact to be made in accordance with those criteria. Applying those criteria, we concluded that a reporter for a high school newspaper was a representative of the news media. *Id.* at 2.

b. 1979 Opinion

In 1979 we were asked essentially the same question – whether a high school newspaper reporter qualified as a representative of the news media for purposes of an executive session held by a school board. 39 Op Atty Gen 600 (1979). We observed that the purpose for allowing news media representatives to attend executive session was twofold: (1) to permit them to get background information to understand and report about the ultimate decision; and, (2) to serve as watchdogs to help ensure that governing bodies use executive sessions for legitimate purposes. *Id.* at 600-01. We concluded that the first purpose:

is fulfilled by attendance of *news-gathering* representatives (i.e. reporters) of those news-disseminating media which ordinarily report activities of the body. Thus the advertising manager of a newspaper is *not* a representative of the newspaper for purposes of this statute, and a periodical containing only hunting and fishing news and related material is not a news medium for purposes of the statute.

Id. at 603 (emphasis in original).

We concluded that a “bona fide representative of a school newspaper” is a representative of the news media if “the newspaper ordinarily covers news germane to the subject of the executive session.” *Id.* We further concluded that, if the board had prohibited the paper from covering the matters discussed in executive session (such as faculty discipline), the paper would not qualify as a news medium for purposes of ORS 192.660(4), because it would not cover news germane to the subject of the executive session. In other words, it was not enough that the paper ordinarily reported about activities of the school board, it qualified as a news medium for purposes of ORS 192.660(4) only if it also covered the matters to be discussed in the executive session.

c. 2014 Manual

In Attorney General Manuals issued after those opinions, including the 2014 update, we clarified that:

[Representatives of the news media] include[s] *news-gathering* representatives of institutionalized news media that ordinarily report activities of the body. This interpretation should be expanded to include representatives of media that ordinarily report to the general public on matters of the nature under consideration by the body.

MANUAL at 172 (2014) (footnote omitted) (emphasis in original). Under that test, a person could qualify as a representative of the news media *either* because the news medium that they represent ordinarily reports activities of the governing body *or* because the medium ordinarily reports to the general public on the matters being considered by the governing body.

In addition, the Manual observes that “[c]urrent technologies make it easy to disseminate information to a potentially broad audience. Bloggers and others using these technologies sometimes * * * assert[] that they are representatives of the news media.” *Id.* We opined that “representatives of the news media” is not limited to “traditional print media[.]” *Id.* We advised that, because “[t]he law does not establish bright lines regarding publication schedule, the size of the media organization, or audience size” and “no clear definition of ‘news media’ exists” the decision whether representatives of non-traditional news media qualify “must be made on a case-by-case basis.” *Id.* We advised governing bodies to consult with counsel when faced with such a request. *Id.*

2. Reconsidering the meaning of “representatives of the news media”

a. Methodology for interpreting statutory text

The commission asks us to clarify the meanings of “representatives of the news media,” “institutionalized” and “bloggers and others using these technologies.” It also asks whether a governing body may exclude a person claiming to be a representative of the news media because the person is not a “news-gathering” representative, or because the medium they represent does not ordinarily report about the activities of the governing body or matters under consideration by the body.

Our 1976 and 1979 opinions predate the Oregon Supreme Court's adoption of the current statutory interpretation methodology in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) as modified in *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). These questions prompt us to revisit the meaning of "representatives of the news media" applying that methodology.

Under that methodology, the goal is to determine the legislature's intent. We do so by examining the text, context and pertinent legislative history. *State v. Gaines*, 346 Or at 171-172. If the meaning of the text remains ambiguous after examining the text, context and pertinent history, we may apply maxims of statutory interpretation. *Id.* at 172.

b. Text

Courts usually give commonly-used terms their ordinary meanings. *See, e.g., State v. Briney*, 345 Or 505, 511, 200 P3d 550 (2008) (stating rule). The phrase "representatives of the news media" has no commonly-accepted plain meaning. *See* MANUAL (1973) at 5, n 3 ("there is no common definition of 'representatives of the news media.'"), MANUAL (2014) at 172 ("no clear definition of 'news media' exists.").

Alternatively, courts will apply the well-established legal meaning of a phrase. *See, e.g., Nibler v. ODOT*, 338 Or 19, 22, 105 P3d 360 (2005) (applying well-established legal meaning of a term gleaned from the case law). But "representatives of the news media" does not have a well-established legal meaning either. To the contrary, many courts have pointed out that determining who is a representative of the media is notoriously difficult. *See, e.g., Snyder v. Phelps*, 580 F3d 206, 219 n 13, (4th Cir 2009), *aff'd* 131 S Ct 1207 (2011) ("Any effort to justify a media/nonmedia distinction rests on unstable ground given the difficulty of defining with precision who belongs to the 'media.'"); *Flamm v. Am. Ass'n of Univ. Women*, 201 F3d 144, 149 (2d Cir 2000) ("a distinction drawn according to whether the defendant is a member of the media or not is untenable.").

Because the phrase has no clear ordinary meaning or well-established legal meaning, we attempt to determine its meaning by first parsing its constituent words. There are two pertinent ordinary meanings of the noun "representatives." The first is "one that stands for a number or class (as of persons or things) : one that in some way corresponds to, replaces, or is equivalent to someone or something else[.]" WEBSTER'S THIRD NEW INT'L DICTIONARY at 1926-27 (2002).^{1/} The second is "one that *represents* another or others in a special capacity: such as * * * * *b* (1) : one that represents another as agent, deputy, substitute, or delegate usually being invested with the authority of the principal[.]" *Id.* It is not clear from the text alone, whether the legislature intended "representative" in the first or second sense.

Turning to "news media," the plain meanings of "news" are "a report of a recent event: new information: fresh tidings[.]" "what is reported in a newspaper, news periodical, or news broadcast[.]" and "matter that is interesting to newspaper readers or news broadcast audiences : matter that is suitable for news copy." *Id.* at 1524. "Media" is the plural of "medium" the pertinent definition of which is "a channel, method, or system of communication [or]

information * * * <a book needs the widest possible discussion in the reviewing *media* of the country – whether magazine, newspaper, radio, television, or public platform[>.]” *Id.* at 1401, 1403, respectively. Putting the terms together, “news media” means channels, methods, or systems of communicating recent events or new information of interest to the recipients. Daily or weekly newspapers or broadcasts, for instance, would qualify as they report “recent events” and “new information” that is newsworthy.

Questions left unanswered by examination of the text alone are: (1) whether a person must demonstrate a special relation to a particular news medium to qualify as a “representative”; (2) if so, what that relationship must be; (3) whether and what “public platforms” qualify as “news media” and, (4) how often a medium must publish or broadcast for what it reports to be considered “recent events” or “new information?”

c. Context

Turning to the context, the phrase is used in ORS 192.660, the executive session law. The purpose of that law is to permit governing bodies to discuss certain matters outside of public view. It reflects the legislature’s judgment that the public is better served by confidentiality than transparency in those circumstances. Consistent with that judgment, ORS 192.660(4) permits governing bodies to require news media who attend executive sessions not to disclose sensitive information to the public. At the same time, the function of the news media is to disseminate news to the public. ORS 192.660(4) permits media representatives to attend executive sessions and report non-confidential information to the public while keeping sensitive information confidential. This statutory context does not shed much light on who the legislature intended “representatives of the news media” to include.²¹ On the other hand, the history of media technology advances prior to 1973 provide compelling contextual reasons to think that the legislature would have anticipated that new mediums for disseminating news could emerge. There is nothing to suggest that the legislature intended to preclude individuals working in as-yet undeveloped mediums from qualifying as representatives of the media for purposes of executive session attendance.

d. Legislative history

ORS 192.660(4) was a provision of the original Public Meetings Law, which was enacted in 1973 as Senate Bill 15 (1973). Or Laws 1973, ch 172, § 6. As introduced, Senate Bill 15 did not require governing bodies to allow news media to attend executive sessions. The first suggestion that it should permit such attendance arose in a public hearing before the Joint Special Committee on Professional Responsibility. Co-chair Ingalls mentioned that “newspapers” had been attending school board meetings and labor negotiations and asked if the bill would close those meetings. He also asked whether school boards or teachers could vote to close those meetings to “the press.” Charles Habernigg, representing Common Cause, responded that although the public would not have a right to attend labor negotiations, if a “member of the press” had a previous understanding, it should continue. Minutes, Joint Special Committee on Professional Responsibility (SB 15), February 26, 1973 at 6. Myer Avedovech, Attorney for the City of Milwaukie, testified that the city council often held “pre-meetings” before its public

meetings. Representative Paulus asked if “the press” was invited to those meetings. He replied that they were invited but most chose not to attend; usually one reporter came. *Id.* at 9.

In a March 5th meeting of the committee, two other witnesses testified about instances where “the press” had been allowed to attend private meetings. A Woodburn Common Council member, Harold Reaume, testified that the city regularly held non-public pre-meetings that “the press” was welcome to attend. He opined that when the press did not attend “undesirable things” happened. He said that pre-meetings were used to obtain agreement before the public meeting and that statements made in the pre-meeting were not repeated in the public meeting, hence citizens had no way of knowing their public officials’ opinions on the issues. Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 5, 1973 at 2.

Bill Keller, an education reporter for *The Oregonian*, testified about an instance where “the press” had been allowed to attend a closed school board meeting but had been asked not to disclose any information except the board’s general direction. He testified that although there were times that school board business should be conducted privately, the privilege could be abused. He suggested that when a school board met privately, the press should be allowed to attend “as observers.” In response to a question from Co-chair Ingalls, he testified that he felt no obligation to obey a prohibition on reporting certain information and would report matters he felt vital to the public unless given good reason not to. *Id.* at 3-4.

Representatives from several local newspapers and from the Oregon Newspapers Publishers Association (ONPA) testified at a hearing on March 12th. Wally Cowen, a local newspaper publisher and representative of the ONPA, testified that “the press” and the public were the same thing and that the press was a vehicle for information to the public. He felt that Senate Bill 15 did not afford any privilege to the press, but assured the public access, through the media, to the workings of the bureaucracy. Cowen testified that the ONPA’s position was that all meetings should be open to the public. Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 12, 1973 at 1-2. Senator Fadeley asked whether he would support executive sessions if the press was allowed to attend but the public was not. Cowen answered that if the press were entitled to attend, then everyone should be invited. *Id.* at 2.

Phil Bladine, also a newspaper publisher and representative of the ONPA, testified against allowing any executive sessions except in personnel cases where he suggested that the press should be allowed to attend but “use good judgment in relating things to the public.” He stressed that it was a “newspaperman’s responsibility” to see that the public get to meetings. He said that in sensitive areas concerning individuals the press “has a confidence with that individual and it is seldom broken.” Chair Ripper asked about the problem of an “unfriendly press” and what should be done when it distorted facts. Bladine responded that everyone should not be penalized for the actions of a few. *Id.* at 3. Hal Schlitz, a publisher of a local paper, testified that relations between the paper and the public bodies had been very good. *Id.* at 4.

Following that testimony, the bill was amended to permit – but not require – representatives of the news media to attend executive sessions. It specified that they could attend under such conditions governing the disclosure of information “as may now exist” and may be

agreed to by the governing body and the representatives of the news media. Amendments to Second Amended Draft SB 15, § 6(3) (1973). The committee considered those amendments at a March 19th work session. An unidentified legislator suggested that the section be deleted. Senator Heard responded that the section was in the bill because of the testimony heard by the committee that some members of the press had good relations with governing bodies and that if the section was not included, this relationship would change. Co-chair Ingalls said that without the section the press could be excluded from meetings where they were presently included. Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 19, 1973 at 10. Senator Fadeley suggested making the requirement mandatory rather than permissive. Co-chair Ingalls suggested deleting the “as may now exist” language. Both suggestions were adopted. *Id.*

At an April 7th meeting, Senator Carson moved to delete the requirement, which he considered potentially “dangerous.” Minutes, Joint Special Committee on Professional Responsibility (SB 15), April 7, 1973 at 7. He stated that the press in Lane County had an excellent working relationship with governing bodies that should not be disturbed by permitting the press to be the only “public” invited to watch the governing body. He argued that if the meeting concerned something the public should know, the public should be allowed to attend and a requirement that allowed only “the press” to watch the governing body might endanger good relations with governing bodies, because who, he asked, would watch the press? He also observed that allowing the press to attend and to operate under a shield law would put them in a very interesting position. *Id.*

Co-chair Ingalls replied that the press was allowed to attend executive sessions not to report the meeting but to use the results of the meeting as background information for future reporting. *Id.* He asked Roger Williams, a representative of the ONPA, for his thoughts. Williams testified that “the press” did not want the privilege of attendance; it wanted to be the vehicle for reporting. *Id.* at 7-8. Senator Carson’s motion to delete the requirement failed. *Id.* at 8.

Subsequent discussions and proposed amendments concerned whether the requirement should be mandatory or permissive and whether the governing body and representative were required to agree to nondisclosure. For example, on May 15, 1973, Senator Carson expressed concern that the bill mandated that parties agree to what could not be disclosed and the effect would be to have “the news media (rather than the legislature) determining what is or is not an executive session.” He recommended remedying that by making both press attendance and nondisclosure agreements discretionary. Minutes, Joint Special Committee on Professional Responsibility (SB 15), May 15, 1973 at 1.

Senator Heard agreed and said that he felt the Senate members on the floor would feel the same way. *Id.* Co-chair Ingalls said that the “question was a matter of honor” and “the news media would not print information until they received background information.” *Id.* Senator Heard suggested that the news media be excused from the meeting if agreement could not be reached about what could be reported. Senator Carson agreed. Co-chair Ingalls felt that the bill already stated that. *Id.* The committee ultimately decided to amend the bill to provide that

representatives of the news media “shall” be allowed to attend “under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media prior to such executive session.” Or Laws 1973, ch 172, § 6(4).

In sum, legislators and lay witnesses alike referred to “the press” when discussing the requirement to permit “representatives of the news media” to attend executive session. They appeared to consider “representatives of the news media” to be synonymous with “the press.” Pertinent definitions of the “press” are “newspapers, periodicals, and often radio and television news broadcasting regarded as a group * * * news reporters, publishers, and broadcasters as a group.” WEBSTER’S at 1794. Those definitions are consistent with “representatives of the news media” in the sense of representatives of newspapers, news periodicals and radio and television news broadcasts. Additionally, representatives of state and local newspapers, newspaper publishing associations and broadcasting associations were the ones who testified at the Public Meetings Law hearings generally and specifically about having been invited to attend closed meetings in the past.

The history also reveals that the purposes of the requirement were to: (1) require governing bodies to continue to allow news-gathering representatives who had been invited to closed meetings before enactment of the Public Meetings Law to attend executive sessions after enactment of the Public Meetings Law; (2) to foster good relations with news media organizations; (3) to provide a mechanism to ensure that governing bodies limited executive sessions to permissible purposes; and, (4) to permit the media to gain valuable background information for future reporting. At the same time, the legislature was concerned about the press not disclosing confidential information.

It is evident from the history that the legislature had in mind the news-gathering representatives of state and local newspapers who had been invited to attend closed meetings before enactment of the Public Meetings Law. Permitting their attendance served all of the purposes identified for the requirement. That limited and known group of trained professional journalists also would have been accountable for disclosing conflicts, reporting fairly, and protecting legitimately confidential information.

On the other hand, the legislature used broad and ambiguous language in enacting the requirement that potentially includes many other types of media representatives. The history contains no discussion about whether other types of media representatives should be allowed to attend executive sessions. And the 1973 Legislative Assembly could not have foreseen subsequent technological changes that would enable the rise of a large class of “citizen journalists.”

3. Application of Interpretative Methodology to the Commission’s Questions

Having set out the framework for interpreting these provisions, and having identified the relevant text, context and legislative history, we now apply those tools to the commission’s various questions about the phrase “representatives of the news media.”

a. “Representatives” means news gatherers

We conclude that “representatives” in the phrase “representatives of the news media” is intended to encompass “news-gathering representatives.” This determination is based on the legislative history, which strongly suggests that news gatherers were the people the legislature had in mind. The history establishes that news-gathering representatives would have been the ones invited to closed meetings before enactment of the Public Meetings Law, which is the practice that the legislature sought to codify. They are also the ones who would report non-confidential information and gather information for future reporting.

b. “News media” means “institutionalized” news media

We next address whether the requirement is limited to “institutionalized media” as our earlier opinions conclude, and, if so, what that means. “Institutional media” is a phrase often employed by the federal courts as a synonym for “the media” or “the press.” *See e.g., Austin v. Michigan Chamber of Commerce*, 494 US 652, 668, 110 S Ct 1391, 108 L Ed 2d 652 (1990) (stating that the “media” exception is meant to prevent hindrance to the “institutional press.”); *Dun & Bradstreet, Inc. v. Greenmoss Building Inc.*, 472 US 749, 784, 105 S Ct 2939, 86 L Ed2d 593 (1985) (distinguishing between “institutional media” and “other individuals or organizations engaged in the same activities”). “Institutional media” appears to be used as a term to distinguish between “media” and individual speakers engaged in speech. *Id.* at 784 & n 10 (noting the distinction between “institutional media” and other individual speakers and organizations as the distinction between “media” and “nonmedia.”); *see also* 39 Op Atty Gen at 601 (concluding that “news media” means “institutionalized news media” because it applies to “representatives.”).

As discussed, a “representative” represents others or another, rather than appearing personally. The statute’s use of the term “representatives” is consistent with our longstanding interpretation that “news media” means institutional news media. An “institution” is commonly understood to mean an established society, corporation or organization. Hence, “institutional” news media” means an established news media organization.

Federal courts have not attempted to define “institutional media” with any precision. Instead, they consistently have concluded that it is not possible, for purposes of First Amendment analysis, to distinguish between the “institutional media” and other speakers. An Oregon Federal District Court, for instance, stated that:

The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others writings, or tried to get both sides of a story.

Obsidian Finance Group v. Cox. No. 12-35319 at 7 (January 17, 2014).

But ORS 192.660(4) is not intended to ensure a First Amendment right. The United States Supreme Court has opined that the press has no constitutional right to access information not available to the public or to attend executive sessions. See *Branzburg v. Hayes*, 408 US 665, 684-85, 92 S Ct 2646, 33 L Ed 2d 626 (1972) (observing that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally and that the press is regularly excluded from executive sessions); see also, *Trimble v. Johnson*, 173 F Supp 651 (D DC 1959) (press has no constitutional right to attend meetings closed to the public). In fact, we are not aware of *any* other jurisdiction that permits representatives of the news media to attend executive sessions.

In this context, the legislature appears to have intended to distinguish between individuals and media entities and to permit only the latter to attend executive sessions. Without that distinction executive sessions essentially would be open to the public. Accordingly, we conclude that “representatives of the news media” for purposes of ORS 192.660(4) includes news-gathering representatives who have a formal affiliation with an institutional news medium. A news media entity is institutional if it is formally organized for the purpose of gathering and disseminating news. As discussed below, however, the proliferation of technologies for disseminating information can make it difficult to identify which entities are institutional news media.

c. Specialty publications and broadcasts may qualify to attend

We conclude that media that cover specific subject areas for a special audience rather than a general audience also may qualify as news media if they regularly publish or broadcast the news. In previous guidance we have suggested that representatives of such media entities could only attend executive sessions if the entities ordinarily report on the activities of the governing body. Occasionally, we have also suggested that the specialty media must also ordinarily cover matters that are the subject of a particular executive session. Under that approach, a representative of a periodical containing only hunting and fishing news could attend the executive sessions of the Fish and Wildlife Commission but not of the Board of Chiropractic Examiners.

We see nothing in the text of the statute that requires or even suggests this result. Nor does the legislative history provide any reason to think that the legislature intended a rule under which news-gatherers would be admitted to some executive sessions but not to others. The text unambiguously permits representatives of the news media to attend executive sessions. Presumably the legislature intended that those representatives would select for themselves which executive sessions they were professionally interested in attending. Although that rule might marginally increase the likelihood of individuals attending executive sessions for reasons other than the reasons the legislature had in mind, we do not see any reason to expect that representatives of specialty media would be more likely to do so than representatives of general news media. We consequently conclude that news gathering representatives of specialty media entities are permitted to attend executive sessions, whether or not the public body generally exercises authority relevant to their specialty area.

d. Use of technology to distribute news

We next address whether the requirement applies to mediums of communication like the internet. We suggest in the Manual that the requirement might apply, depending on the particular facts to “bloggers and others using these technologies.” MANUAL at 172. When the 1973 Legislative Assembly enacted the language in ORS 192.660(4) technologies like the internet, cable and satellite broadcasting either did not exist or were not commonly used to disseminate news.

But there is no indication that the 1973 Legislative Assembly intended to foreclose mediums that did not yet exist from qualifying as “news media.” On the contrary, the Oregon Supreme Court has declared that there is a “familiar legislative penchant for using general terms like a bucket, allowing various concepts to fall in (or out) with the passage of time. * * * * [T]he legislature need not constantly update each new addition to * * * [a] class—[if] the general terms are broad and flexible enough to adjust to changing circumstances.” *Cook v. Workers’ Comp. Dept.*, 306 Or 134, 142, 758 P2d 854 (1988).

In this particular context, that “familiar legislative penchant” is consistent with the reality that legislators in 1973 probably did not regard “news media” as a fixed concept. Television news, for example, had started to become prominent only in the late 1940s – meaning that it was approximately 25 years old when the Public Meetings Law was adopted. The use of the medium for news distribution purposes had continued in the intervening years. Smith ed., *Television: An International History* (Oxford University Press 1995), 122-133 (tracing the development of television news from the late 1940s through the 1970s). Indeed, *local* television news came to prominence in the United States “[s]ometime around 1970[.]” *Id.* at 131. That shift presumably would have been familiar to legislators in 1973. And, given that the reporters most likely to attend executive sessions would be local reporters, the development would presumably have informed legislators’ understanding about the nature of the “news media” in this context. Radio news, meanwhile, was approximately fifty years old, having developed since the 1920s and 1930s. Gorman and MacLean, *Media and Society in the Twentieth Century* (Blackwell 2003) at 57-58 (explaining the development of radio as a news medium starting in these decades). Both of these innovations represented significant advancement from the distribution of printed news following the introduction of the mobile printing press to Europe in the fifteenth century. There is nothing in the text, context or legislative history of the Public Meetings Law that suggests that, notwithstanding this history of innovation and change, legislators intended to adopt a definition of “news media” that would tie that concept to specific formats prevalent in 1973. We conclude that the term “news media” is broad and flexible enough to encompass subsequent technologies for delivering the news.

As a result, whether an online publication or broadcast qualifies depends on the same criterion for existing mediums: the entity must be institutional. “Blogs,” for example, come in two general varieties. The first is “an online personal journal with reflections, comments and often hyperlinks, videos, and photos provided by the writer.” www.merriam-webster.com/.^{3/} The second is “a regular feature appearing as part of an online publication that typically relates to a particular topic and consists of articles and personal commentary by one or more authors[.]”

Id. The first type of “blogger” is an individual rather than a representative of a news media organization. But the second type of blogger might qualify as a representative of the news media depending on whether the particular facts demonstrated that the blogger represented an institutional news medium. Indications that an entity is institutional might include its business structure, the nature of its overall operations, regular public dissemination of news, and similar factors that demonstrate that it is formally organized for the purpose of gathering and disseminating news. For instance, an individual who regularly posts for websites maintained by traditional media companies, such as nytimes.com or cnn.com, would constitute a “representative of the news media” within the meaning of ORS 192.660(4). Short of an affiliation with a traditional media outlet, indications that a blogger represents institutionalized media might include the existence of staff (rather than a single individual), a formal business structure within which the blog operates and regular publication.

B. Terms used in ORS 192.660(5)

We now turn to the meaning of terms used in ORS 192.660(5). A governing body may convene an executive session to consult with counsel about current litigation or litigation likely to be filed. ORS 192.660(2)(h). ORS 192.660(5) requires governing bodies to “bar any member of the news media from attending the executive session if the member of the news media is a party to the litigation or is an employee, agent or contractor of a news media organization that is a party to the litigation.” The commission asks us to clarify the meaning of the terms used in that provision relating to the news media.

1. Member of the news media

The relevant definition of “member” is “one of the individuals composing a society, community, association or other group.” WEBSTER’S at 1408. “Member” appears at first to be a potentially broader term than “representative.” However, as ORS 192.660(5) is implicated only if a person is a “representative of the news media” otherwise entitled to attend executive sessions, in practice a “member of the news media” may be treated as synonymous with a “representative of the news media.” The obvious purpose of this language is to bar individuals from using ORS 192.660(4) to gain access to confidential attorney-client discussions about litigation to which they are parties whether or not the media organization that they represent is a party.

2. Employee, agent or contractor of a news media organization

The prohibition on admitting “an employee, agent, or contractor of a news media organization that is a party to the litigation” precludes a news media organization from gaining access through their representative to confidential discussions about litigation to which the organization is a party. An “employee” is “one employed by another usually in a position below the executive level and usually for wages.” *Id.* at 743. The pertinent definition of “employ” in this context is “to provide with a job that pays wages or salary or with a means of earning a living.” *Id.* An “employee of a news media organization” would mean a person who has a job with a news media organization that pays the person wages or a salary. The pertinent definition of “contractor” is “one that contracts: a party to a bargain: one that formally undertakes to do

something for another * * * one that performs work according to a contractual agreement.” *Id.* at 495. A person who contracts with a news media organization to cover stories or to report on matters specified in a contract would be a contractor of a news media organization. An “agent” is a person “who is authorized to act for or in the place of another.” *Id.* at 40. “Agent” is a broad term and may include representatives who are not “employees” or “contractors.” The legislature likely specified all three of these terms to ensure that everyone who might qualify as a “representative of the news media” for purposes of gaining admittance to a meeting where the governing body discussed litigation with its counsel would be barred from attending if the news media organization that they represent is a party to the litigation.

III. Question 2 - Permissible Grounds to Exclude News Media Representatives

The commission next asks whether governing bodies may exclude representatives of the news media from executive sessions for any reason other than those identified in ORS 192.660(4) (exclusion from deliberations with labor negotiators and meetings to consider confidential student records or expulsion) and ORS 192.660(5) (exclusion for parties to litigation being discussed with counsel).

A. Limit attendance to one representative from each news medium

The Manual states:

[a] governing body probably would be able to limit attendance to one representative of each medium wishing to be represented. The body should be able reasonably to limit total attendance to a number that would not interfere with deliberations.

MANUAL at J-5. Although this is a sensible policy and would not thwart the apparent purposes of the requirement, no statutory language supports it. The statute requires governing bodies to admit “representatives of the news media.” That requires governing bodies to admit any person who qualifies as a representative of a news medium and who is not subject to exclusion under ORS 192.660.

An alternative interpretation would require us to insert language into the statute to specify that governing bodies are required to admit “one” representative from each medium. A governing body could request that a news medium send only one representative, but, in the event that the request is ignored, the governing body should admit representatives who ask to attend.

B. Representatives with a personal interest in the matter discussed

The Manual also states that, with the exception of ORS 192.660(5) for parties to litigation being discussed with counsel, ORS 192.660 does not permit a governing body to exclude representatives who have a personal interest in the matter being discussed or a close relationship with someone who does. But we say that “[i]f the attendance of a reporter with a *direct* personal interest would frustrate the purpose of the executive session, a governing body could justify

barring the individual. A reporter's mere relationship to someone with a personal stake in the matter is probably not sufficient justification." MANUAL at J-6.

On reconsideration, we conclude that a governing body has no authority to exclude a reporter who has a direct personal interest in the matter being discussed other than as provided in ORS 192.660(5). ORS 192.660(4) requires governing bodies to permit representatives of the news media to attend executive sessions. While the scope of the statutory phrase "representatives of the news media" may be ambiguous, the requirement to admit those who qualify is not. ORS 192.660(5) states the only ground on which a governing body may exclude a representative who has a direct personal interest in the matter being discussed. The legislature could have specified other grounds, but it did not.

C. Exclusion for failure to agree to nondisclosure or for disclosing confidential information from a prior executive session

The commission next asks whether it is lawful for a governing body to exclude a reporter who disclosed information from an earlier executive session that the governing body had specified should not be disclosed. ORS 192.660(4) requires governing bodies to allow media representatives to attend, but permits the body "to require that specified information be undisclosed." "Require" means "to ask for authoritatively or imperatively : claim by right or authority : insist upon usually with certainty or urgency : DEMAND, EXACT." WEBSTER'S at 1929. Although the provision does *not* state that a representative who refuses to agree to nondisclosure may be excluded from the meeting, one plausible interpretation is that the authority is necessarily implied from the governing body's authority to "require" that specified matters not be disclosed.

But the provision's amendment history does not support that interpretation. See *Krieger v. Just*, 319 Or 328, 336, 876 P3d 754 (1994) (amendment history is context for present version of statute); *Strunk v. Public Employees Ret Bd.*, 338 Or 145, 189-90, 108 P3d 1058 (2005) (applying presumption that material changes in language create material changes in meaning). As enacted in 1973, the provision required governing bodies to allow representatives to attend "under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media prior to executive session." Or Laws 1973, ch 172, § 6(4). That language generally was construed to allow governing bodies to exclude representatives who refused to agree to nondisclosure and to bar attendance at future sessions for violating an agreement. 38 Op Atty Gen 2122, 2124 (1978). That interpretation was consistent with the legislative history of the 1973 version of the statute discussed above.

But the 1975 Legislative Assembly amended the statute to remove the language that had been construed to allow governing bodies to condition attendance on a nondisclosure agreement and to bar future attendance for violating an agreement. Or Laws 1975, ch 664, § 3. This office explained that:

The purpose of this amendment was evidently to make clear that news media representatives *must* be allowed to attend executive sessions * * *. At the same

time, the governing body is given specific authority to *require* that specified information be undisclosed. However no specific statutory sanction is provided for use against a reporter who violates the nondisclosure requirement. The legislature apparently chose to rely upon the good faith of reporters in complying with the requirement.

38 Op Atty Gen at 2125.

In 1981, we specifically addressed whether a governing body could exclude a reporter who had disclosed confidential information from an earlier executive session until the reporter agreed to nondisclosure. Letter Opinion of the Attorney General dated March 30, 1981, to Representative Ben ‘Kip’ Lombard. We concluded that the statute provided no means of enforcement and we refused to imply one:

While it is possible that a court will hold that the right to impose an appropriate sanction is implied, we decline to read into the statute something not placed there by the legislature. It is quite conceivable that the legislature did intend to rely only on the good faith of media representatives. We accordingly construe the statute as it reads, and it reads ‘[r]epresentatives of the news media shall be allowed to attend executive sessions.’ We conclude that such a representative, who has arguably or actually violated a valid instruction not to disclose, cannot be barred from attending a later executive session.

In a 1982 opinion, we were asked whether a governing body had any method to ensure that the media does not disclose confidential information. In light of that question “we reconsidered [the 1981 opinion] but f[ound] no basis for modifying it.” 42 Op Atty Gen 392 (1982). We opined that a governing body “has no method of insuring that the media will not disclose confidential information. It can only request nondisclosure and rely on the good faith cooperation of the media, or drastically limit its own use of confidential information.” *Id.* at 398. We continue to hold to the conclusion in those opinions.

IV. Question 3 - Commission’s authority to adopt rules to carry out its duties

We are next asked whether the commission has authority to adopt administrative rules to carry out its duty to review and investigate alleged violations of the executive session law. At the time the commission asked the question, it did not have explicit statutory authority to make rules. But since the commission asked the question, the Legislative Assembly has amended ORS 244.290, which gives the commission express rulemaking authority. Section (2) provides:

The commission shall adopt rules necessary to carry out its duties under ORS 171.725 to 171.785, 171.992, 192.660 and 192.685 and this chapter.

But the legislature simultaneously amended ORS 192.660 to exclude from the commission’s rulemaking authority the ability to determine by rule who qualifies as a representative of the news media:

(10) Notwithstanding ORS 244.290, the Oregon Government Ethics Commission may not adopt rules that establish what entities are considered representatives of the news media that are entitled to attend executive sessions under subsection (4) of this section.

Hence, the legislature has given the commission express authority to adopt rules necessary to carry out its duties under ORS 192.660 and 192.685. However, the commission may not adopt a rule that establishes what entities are representative of the news media.

We note that, in addition to its general rulemaking authority, the commission is required by ORS 244.290 to adopt one particular rule. Specifically, ORS 244.350(2)(a) authorizes the commission to impose civil penalties of up to \$1000 for a violation of ORS 192.660. ORS 244.290(2) requires the commission to adopt certain rules to implement ORS chapter 244, subsection (h) of which requires the commission to adopt a rule to “[s]et criteria for determining the amount of civil penalties that the commission may impose.” ORS 244.350(2) is a provision of ORS chapter 244 that authorizes the commission to impose civil penalties; therefore it must adopt a rule setting criteria for determining the amount of those penalties pursuant to ORS 244.290(2)(h).

V. Question 4 – Effect of policies adopted by governing bodies

The next question arises because local governing bodies have begun adopting comprehensive policies establishing who they will consider to be “representatives of the news media” and what proof they will require to prove that status. The commission asks about the legal significance of such policies that: (1) impose screening criteria for determining who qualifies as a representative of the news media; (2) require preapproval of media credentials; (3) require advance notice that a representative of the news media will attend; or, (4) exclude persons for failing to give advance notice of attendance.

The short answer to this question is that governing bodies are bound by the statutory requirement to admit representatives of the media to executive sessions. To the extent that enforcing a policy would result in the exclusion of a person statutorily entitled to attend an executive session, the policy is inconsistent with ORS 192.660(4). In evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute regardless of a governing body’s policies.

Turning to the first particular type of policy the commission is concerned about, governing bodies may adopt screening criteria for “representatives of the news media” that are consistent with the meaning intended by the legislature as described in this opinion.

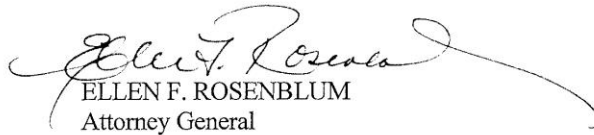
On the other hand, governing bodies are not required to accept a person’s mere assertion that they qualify as a representative of the news media. Consequently, a policy requiring proof of media status can be consistent with the Oregon Public Meetings Law. If the application of the policy results in excluding a person who offers sufficient proof to demonstrate that the person is, indeed, a representative of the news media, that outcome would be out of compliance with the

Public Meetings Law. (This seems most likely to arise if a policy requires specific types of credentials.) Similarly, the statute does not authorize excluding representatives of the news media for failure to provide their credentials within certain deadlines. The same is true for a policy requesting media representatives to notify the governing body in advance of their intent to attend an executive session. While that might be a good idea, and a courtesy, it cannot be made a requirement.

Finally, as discussed above, the Public Meetings Law does not permit a public body to exclude media representatives who have disclosed confidential information from prior executive sessions or who represent news media organizations that have done so. Enforcing a policy to the contrary would violate the statute.

CONCLUSION

The law permits news-gathering representatives of institutional media to attend executive sessions. The statutory term “news media” is broad and flexible enough to encompass changing technologies for delivering the news. A governing body may not exclude a representative of the news media from an executive session except as specifically allowed by ORS 192.660(4) and (5). The commission generally may adopt rules to carry out its duty to enforce the executive session law, but it is prohibited by ORS 192.660(10) from adopting a rule that establishes which entities are considered representatives of the news media. Governing bodies may adopt policies relating to the admission of media representatives to executive sessions, but those policies cannot limit the statutory right of representatives of the news media to attend executive sessions. In evaluating allegations that an individual was wrongly excluded from executive session, the commission must assess compliance with the statute, regardless of a governing body’s policies.


ELLEN F. ROSENBLUM
Attorney General

AEA:nog/DM6782066

¹¹ The phrase was enacted by the 1973 Legislative Assembly. Or Laws 1973, ch 172, § 6. The pertinent definitions in the 1971 version of Webster’s do not differ from the 2002 version so we cite to the latter for ease of reference.

²¹ ORS 192.660(5), which excludes from attending certain executive sessions “members of the news media” and an “employee, agent or contractor of a news media organization” does not shed light on the meaning of ORS 192.660(4), because the latter was adopted by the 1973 Legislative Assembly and the former was not adopted until 1997. Or Laws 1997, ch 596, § 1; See *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997) (stating that a later-enacted statute is not context for interpreting an earlier statute).

³¹ “Blog” is not defined in the 2002 print version of Webster’s, but is defined in the online version.

LOC's Opinion on Media and Executive Sessions

Introduction

This memorandum addresses the purposes behind the executive session provision in Oregon's public meetings law. Specifically, this memorandum answers why the Oregon Legislature included a requirement that "representatives of the news media" be allowed to attend executive sessions, even though other members of the public were excluded from those same meetings.

The legislative history of Oregon's public meetings law demonstrates that the Legislature believed that members of the news media should be allowed to attend executive sessions for primarily two reasons: (1) information gathering for future reporting, and (2) to act as a "watchdog" over a governing body, in light of the fact that no other member of the public would be in attendance. The following analysis lays out the evidence supporting those two purposes.²⁹⁴

Analysis

The Legislature first enacted the public meetings law as Senate Bill (SB) 15 (1973). *Or Laws 1973, ch 172*. As introduced, SB 15 did not require governing bodies to allow members of the media to attend executive sessions. SB 15 moved to the Joint Special Committee on Professional Responsibility. At a committee meeting on February 26, co-chair Robert Ingalls noted that "newspapers" had traditionally attended school board meetings and labor negotiations, and asked if the bill would end that practice. *Minutes, Joint Special Committee on Professional Responsibility (SB 15), Feb. 26, 1973, at 6*. Various witnesses responded that many governing bodies had informal agreements with the press to allow the press to attend closed meetings. Those witnesses opined that the practice could continue under the new law.

The committee met again on March 5, 1973 and heard extensive testimony on SB 15. Relevant here, some witnesses testified that the press should be allowed to attend executive sessions because, otherwise, no one from the public could act as a watchdog on the governing body. For example, Woodburn Common Council member Harold Reaume testified that the city regularly held non-public pre-meetings, at which the press was welcome to attend. Mr. Reaume worried that if the press was excluded from those non-public meetings, "undesirable" things would occur, such as public officials reaching a consensus on an issue out of the public eye. *Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 5, 1973, at 2*. *Oregonian* education reporter Bill Keller

²⁹⁴ This memorandum uses the terms "representatives of the news media," "members of the news media," and "the press" synonymously. The Attorney General takes the view that "representatives of the news media" means:

"[I]ndividuals who gather news and who have a formal affiliation, whether through employment, by contract or some other agency authorization from or with an institutional news media entity, including both general interest media and media that cover specific subject areas for special audiences."

Op Atty Gen No 8291, p. 2 (April 18, 2016).

echoed that concern, but also noted that the press needed access to private meetings for information gathering purposes. Mr. Keller acknowledged that school board business should sometimes be conducted privately, but even in those circumstances the press should be allowed to attend as “observers.” Mr. Keller testified that the press was under no obligation to refrain from reporting on matters in the public interest. *Id. at 3-4.*

The committee held another hearing on March 12, 1973. Most of the witnesses who testified at the March 12, 1973 meeting took the view that the press should be allowed to attend executive sessions for information gathering purposes. For example, Wally Cowen of the Oregon Newspaper Publishers Association testified that the “press” and “public” were the same thing, and the press was simply a vehicle for conveying information to the public at large. *Minutes, Joint Special Committee on Professional Responsibility (SB 15), March 12, 1973, at 1-2.* Mr. Cowen further argued that SB 15 should permit members of the press to attend executive sessions to ensure that the wider public had access to “the workings of democracy.” *Id.* Other witnesses made similar comments, emphasizing the important role of the press in conveying information to the public.

Following the March 12, 1973 meeting, SB 15 was amended to permit, but not require, representatives of the news media to attend executive sessions. The amendment specified that the press could attend under such conditions that covered the disclosure of information “as may now exist” and may be agreed to by the governing body and the representatives of the news media. *Amendments to Second Amended Draft, SB 15, § 6(3) (1973).* The committee considered those amendments to SB 15 at a March 19 work session. Senator Fadeley suggested making the requirement mandatory and co-chair Ingalls suggested deleting the “as may now exist” language. The committee adopted both suggestions. As amended on March 19, 1973, SB 15 stated, in part:

“Representatives of the news media shall be allowed to attend executive sessions under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media.”

SB 15, § 6(3), March 19, 1973.

At the April 2, 1973 committee meeting, Senator Carson moved to delete Section 6(3), viewing it as “dangerous.” In Senator Carson’s view, if a meeting concerned something in the public interest, the entire public should be allowed to attend, not just the press. *Minutes, Joint Special Committee on Professional Responsibility (SB 15), April 2, 1973, at 7.* Senator Carson further argued that allowing only the press to attend executive sessions may foster adverse relationships between the press and the governing body. Co-chair Ingalls replied that, in his view, the press was not permitted to attend executive stories to simply report on the meeting. Rather, the press would use the information from the meeting as background for future reporting. *Id.* Co-chair Ingalls then asked Roger Williams, the representative from the Oregon Newspaper Publishers Association, for his thoughts. Mr. Williams agreed with co-chair Ingalls’ understanding of the media’s role; that is, Williams agreed that members of the media would use access to executive sessions as a way of gathering background information for new stories. *Id. at 8.*

Ultimately, as enacted by the Legislature, SB 15 required governing bodies to allow representatives of the news media to attend executive sessions, but left the details regarding disclosure of information up to agreements between the media and the governing body:

“Representatives of the news media shall be allowed to attend executive sessions under such conditions governing the disclosure of information as may be agreed to by the governing body and the representatives of the news media prior to such executive session.”

Or Laws 1973, ch 172, § 6(4), codified at ORS 192.660(4).

The Legislature has amended ORS 192.660 numerous times since 1973. See, e.g., Or Laws 1975, ch 664, § 2; Or Laws 1979, ch 644, § 5; Or Laws 1985, ch 657, § 2; Or Laws 1995, ch 779, § 1; Or Laws 1997, ch 173, § 1; Or Laws 2003, ch 524, § 4; Or Laws 2007, ch 602, § 11; Or Laws 2015, ch 421, § 2; Or Laws 2015, ch 666, § 3. For example, the Legislature specified that representatives of the news media are not entitled to attend executive sessions held under ORS 192.660(2)(d) (labor negotiations) or ORS 332.061 (executive sessions allowed to consider expelling minor student from a public school or to examine the medical records of a minor student). Interestingly, in 2015 the Legislature amended ORS 192.660 to provide that the Oregon Government Ethics Commission “may not adopt rules that establish what entities are considered representatives of the news media that are entitled to attend executive sessions[.]” ORS 192.660(10). Those amendments may affect what types of executive sessions the media can attend, but does not alter the basic purpose for allowing the media to attend such meetings.

Conclusion

The foregoing legislative history demonstrates that the Legislature had two purposes in mind when crafting a law that would permit members of the media to attend executive sessions. First, witnesses at the committee hearings spoke of the role of the media as a “watchdog” for the governing body, and worried about adverse consequences if the press was excluded from executive sessions. Second, legislators themselves (such as co-chair Ingalls) expressed the view that members of the media would use the information learned during an executive session as “background” material for future news stories. Those purposes, of course, are not mutually exclusive. But, because the lawmakers who ultimately enacted the law emphasized the fact-finding function of the media in attendance at an executive session, the scale likely tips more towards that purpose than towards the oversight purpose.

Model Media Policy

City of [Insert name of City] Executive Session News Media Attendance Policy

WHEREAS, Oregon public meetings law provides that representatives of the news media shall be allowed to attend certain executive sessions of public bodies, but may be requested to not disclose specified information (ORS 192.660(4)); and

WHEREAS, because at the time state law relating to media attendance at executive session was adopted, “news media” consisted of entities that were institutionalized and structured to support compliance with the requirements of ORS 192.660(4), the law includes no express mechanism for enforcing those requirements; and

WHEREAS, technological advances since the time the public meetings law was initially adopted have resulted in development of communication mechanisms allowing virtually any individual or entity to disseminate information widely; and

WHEREAS, the city council finds that in that absence of a statutory definition of “news media” as that term is used in ORS 192.660(4) it is necessary to adopt a policy that implements the intent of the public meetings law relating to executive session attendance without precluding attendance by internet-based or other “non-traditional” information disseminators that are institutionalized and committed to compliance with ORS 192.660(4); and

WHEREAS, the city council recognizes that this policy is solely for determining eligibility to attend executive sessions, which requests non-disclosure of specified information from executive sessions, and is not intended to otherwise define “news media” or to determine eligibility to report on the city’s activities or to limit access to other city meetings by any person;

The city council hereby adopts the following policy:

1. Recognized News Media Organizations. The following entities are recognized as news media organizations eligible to attend executive sessions:
 - (A) Daily newspapers, non-daily, and small-market newspapers/publications, as well as those publications that are released as digital and multiplatform products; or
 - (B) A newspaper or publication that the city uses for publication of public notices and that meets the requirements of ORS 193.020; or
 - (C) An entity that is organized and operated to regularly and continuously publish, broadcast, transmit via television, radio or the internet or otherwise disseminate news to the public, and that regularly reports on activities of public concern.
2. Attendance at Executive Sessions. Representatives of news media organizations recognized pursuant to Section 1 of this policy shall be allowed to attend executive sessions, except as described below in paragraphs (C) and (D) of this section, pursuant to the following process:
 - (A) The representative must provide substantial evidence persuading the city that he or she is a news reporter for the recognized news media organization. In making its

determination whether to recognize the person as a representative of the news media organization, the city may require:

- (a) A press badge or identification issued by the recognized news media organization, plus proof of identity (such as a driver's license); or
- (b) A recently published news article in the recognized news media organization publication or broadcast, with the person's byline, or a masthead showing the person's name as a member of the news gathering staff of the news media organization, plus proof of identity; or
- (c) A letter on letterhead from an editor of the recognized news media organization in which the editor states that the reporter is covering the meeting for the news media organization, plus proof of identity.
- (d) Any other credentials or evidence sufficient to demonstrate that the individual is a representative of the news media.

The city requires that requests to be recognized as a representative of a news media organization be made in writing on a form provided by the city. The form shall require disclosure of the person's name, and the entity for which he or she is a representative and shall require submission of evidence described in subsections 2(A) of this policy. The form shall also include a certification that the person is a representative of a recognized news media organization, that the information given is true, and that the person agrees to comply with ORS 192.660(4). The form will be made available on the city's webpage and upon request by any individual.²⁹⁵

- (B) The city council is prohibited from making final decisions on any matter in executive session. Therefore, representatives are requested to provide the above evidence to persuade the city that they are a representative of the recognized new media organization in advance of the scheduled executive session. In the event that a person claiming to be a representative of the news media fails to provide advance evidence of their credentials, the representative should either be allowed to attend the executive session, or the executive session shall be postponed until a later time.²⁹⁶
- (C) Representatives of the news media are not permitted to attend executive sessions involving deliberations with persons designated to carry on labor negotiations. ORS 192.660(4).

²⁹⁵ A model form is included below.

²⁹⁶ The LOC intentionally selected the words "should either be allowed to attend" in this policy as it is the most conservative approach related to permitting news media representatives — please seek city attorney advice on the use of this word in your policy. See Op Atty Gen No 8291, 2016 WL 2905510 (Apr 18, 2016), available at <https://www.doj.state.or.us/wp-content/uploads/2017/06/op8291.pdf> (last accessed October 2024), and Or Atty Gen Public Record and Meetings Manual (2019) at 175-177.

The process for postponement will depend upon each individual city's local procedures. One method may be for the presiding officer and city manager to decide to postpone the executive session prior to the meeting being called to order.

- (D) If the executive session is being held to confer with counsel about current litigation or litigation likely to be filed, the city shall exclude any member of the news media from attending if the member is a party to the litigation to be discussed or is an employee, agent or contractor of a news media organization that is a party to the litigation. ORS 192.660(5).
- 3. Recording Devices Prohibited. Cameras, tape recorders and other recording devices shall not be used in executive sessions, except for the official executive session tapes made by city staff.
- 4. Application to Boards and Commissions. These policies and procedures shall apply to the city council and all of its boards and commissions.

Model Recognized New Media Representative Application²⁹⁷

Pursuant to the City of [city name]'s Media Policy, those claiming to be representatives of the news media are requested to complete this form. Please provide the requested information below, complete and sign the certification section, and submit the completed form to [designated staff member's name] in advance by: (1) personal delivery to [designated staff member]; (2) sending the completed form via e-mail to [e-mail address]; or (3) delivering a completed copy to city hall located at [address].

NOTE: If the city is unable to verify this information prior to the start of an executive session, your attendance at the executive session may be denied or the executive may be postponed.

YOUR NAME

NAME OF THE NEWS MEDIA ORGANIZATION REPRESENTED

CERTIFICATION OF REPRESENTATION:

I, _____ certify the following to be true and accurate:

I represent the following:

- ☐ A daily newspaper, non-daily, or small-market newspaper/publication, or publication that is released as a digital or multiplatform product.
- ☐ A newspaper or publication that the city uses for publication of public notices and meets the requirements of ORS 193.020.
- ☐ A news media organization that is organized and operated to regularly and continuously publish, broadcast, transmit via the internet or otherwise disseminate news to the public, and that regularly reports on actives of the city or matters of the nature under consideration by the city council.

The news media organization that I represent is committed to complying with the requirement that confidential executive session information be undisclosed.

I have provided the following credentials sufficient to allow the city to determine that I am a representative of the above identified news media organization (select all that apply):

- ☐ A press badge or identification issued by the news media organization, plus proof of my identity;

²⁹⁷ The LOC intentionally selected the words “may be denied” in the “Note” textbox to provide specific notice to the applicant that the city could reject their application based on what evidence of media relations provided. This language differs slightly with the policy language in Appendix O(2)(B). See Op Atty Gen No 8291, 2016 WL 2905510 (Apr 18, 2016), available at <https://www.doj.state.or.us/wp-content/uploads/2017/06/op8291.pdf> (last accessed October 14, 2024), and Or Atty Gen Public Record and Meetings Manual (2025), p. 369.

- ☐ A copy of a recently published news article showing my name as a member of the news gathering staff of the news media organization, plus proof of my identity;
- ☐ A letter on letterhead from an editor of the news media organization that states that I am covering the meeting for the news media organization, plus proof of my identity; or
- ☐ The following evidence sufficient to show that I am a representative of the above identified news media organization:_____

As a representative of the news media, I agree to comply with ORS 192.660(4).

SIGNATURE

DATE

Sample Script to Announce Start of Executive Session

Given by Presiding Officer

“The city council will now meet in executive session for the purpose of [cite the specific purpose(s) for each subject to be discussed – this should mirror the language found on the notice of the executive session].

“The executive session is held pursuant to ORS 192.660 [cite the specific statute that authorizes the executive session for each subject to be discussed – this should mirror the section(s) found on the notice of the executive session].

Representatives of the news media and designated staff and other persons²⁹⁸ shall be allowed to attend the executive session. All other members of the audience are asked to leave the room.

Representative of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced.

No decision will be made in this executive session.

At the end of the executive session, we will return to open session and welcome the audience back into the room.”

²⁹⁸ The city council may choose to allow other specified persons to attend the executive session.

IX. APPENDIX B – FAQ ON NOTICE REQUIREMENTS FOR PUBLIC MEETING

FREQUENTLY ASKED QUESTIONS: Public Meeting Notice Requirements

While public officials in Oregon are typically well-versed in the purpose and need for the state’s public meetings law, the LOC often receives inquiries from members about the rules for public notices. Questions range from the content the public notice is required to cover, to where and how the notices are to be posted.

This *Frequently Asked Questions (FAQ)* is meant to answer the questions most often posed to the LOC about the notice requirements associated with public meetings. It is not intended to provide an exhaustive legal analysis of the state’s public meetings law, nor is it intended to be a substitute for legal advice. It is meant to serve as a baseline for understanding the notice requirements for public meetings in Oregon.

Each city in Oregon is subject to its own individual charter, municipal code, and rules of procedures. In many instances, individual Oregon cities have established notice requirements in addition to the requirements under the state’s public meetings law. Any person reading this *FAQ* is strongly encouraged to 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.

When Must the Government Give Public Notice of One of its Meetings?

ORS 192.640(1) requires public notice to be given *any time* the governing body of a public body holds a public meeting under the law. Notice is required for regular, special, emergency meetings, work sessions/workshops, and executive sessions.²⁹⁹ A public body includes each Oregon city and any board, department, commission, committee, subcommittee, or advisory group thereof.³⁰⁰ The governing body of a public body means “the members of any public body which consists of *two or more members*, with the

²⁹⁹ ORS 192.630, ORS 192.690, ORS 192.610, ORS 192.685, and OAR 199-050-0015.

³⁰⁰ ORS 192.610(4).

authority *to make decisions or recommendations* to a public body on policy or administration.”³⁰¹

What Information Must a Public Notice Contain for a Meeting Open to All Members of the Public?

ORS 192.640(1) requires a notice for meetings to contain, at a minimum, the following information:

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

How Detailed of a Description of the Principal Subjects Anticipated for Consideration is Required in the Public Notice?

The Oregon Attorney General advised that the list of principal subjects “should be specific enough to permit members of the public to recognize the matters in which they are interested ... it should be sufficiently descriptive so that interested persons will get an accurate picture of the agenda topics.”³⁰² Additionally, OAR 199-050-0040 prescribes that the public notice must be reasonably calculated to give actual notice of the meeting and details and subjects to the public at large, interested persons, and media representatives that have requested notice.

The LOC recommends that instead of using a generic description like “consideration of a public contract,” the notice states “consideration of contract with X company to provide Y services.”

What Information Must a Public Notice Contain for a Meeting Being Held in Executive Session?

ORS 192.640(1) and (2) require a notice for meetings held in executive session to contain, at a minimum, the following information:

- Time of the meeting;
- Place of the meeting; and

³⁰¹ ORS 192.610(3).

³⁰² Attorney General’s Public Records and Meetings Manual (2024), p. 140.

- The specific Oregon Revised Statute provision authorizing the executive session. Further, OAR 199-050-0040(3)(d) sets forth additional notice requirements.

Does the Oregon Attorney General Recommend Public Notices Contain Information Not Specifically Required by Statute?

Yes, the Oregon Attorney General recommends that cities can best satisfy the requirements of ORS 192.630(5) (accommodations for persons with disabilities) and the federal Americans with Disabilities Act by including the following additional information:

- The name of a city employee who can help a person in need of accommodation in facilitating that accommodation; and
- The telephone number of the relevant city employee.

Does the Public Meetings Law Require Notices of Public Meetings to be Published in Newspapers or Online?

No, the Oregon public meetings law does not require notices of public meetings to be published in newspapers or online. However, ORS 192.640(1) requires cities to provide notice which is “reasonably calculated to give actual notice to interested persons including news media which have requested notice.”

Who is Required to Receive a Copy of the Meeting Notice Under the Oregon Public Meetings Law?

The public meetings law requires cities to give a general notice to the public at large and then also provide actual notice to identified interested persons of their public meetings. Public officials representing the body holding the meeting should also receive notice of the meeting.

How Should Notice of a Public Meeting be Given?

ORS 192.640 and OAR 199-050-0040 set forth public meeting notice requirements, including method of notice.

Methods of Notice include:³⁰³

- Providing notice of its meetings to be displayed conspicuously on the public body's or governing body's website or on a publicly accessible website hosted by a third-party and linked to the public body's or governing body's website.
- If the governing body does not maintain a publicly accessible website, the governing body shall satisfy the public notice requirements through other means such as:
 - Posting on the Oregon Transparency Website,
 - Community postings,
 - Bulletin boards,
 - Newspaper notice, or
 - Any other means reasonably calculated to provide actual notice to the general public.

Regarding Interested Persons Notice Requirement, methods of notice include³⁰⁴:

- Interested person lists,
- Mailing lists, or
- Other lists of persons or groups maintained by the governing body to provide notice or communications,
- Social media platforms normally utilized by the governing body for communications;
- Any other means reasonably calculated to provide actual notice to interested persons known to the governing body.

The Oregon Attorney General recommends cities give notice in the following manner:

- Press releases containing the meeting notice should be given to news organizations and members of the media.
 - For most local matters, it is recommended that local newspapers, radio stations, or television stations are notified.
- Cities should create mailing lists, or email lists, of parties who are regularly and consistently interested in receiving copies of public meeting notices. Examples may include:
 - Local media or news organizations;

³⁰³ OAR 199-050-0040(2).

³⁰⁴ OAR 199-050-0040(2)(b)

- Neighborhood associations;
- Community organizations; and/or
- Chambers of Commerce.
- If cities are aware of persons who are or could reasonably be expected to be interested in a public meeting, cities should provide notice of the meeting to these interested persons. For example, if the public meeting is a land-use hearing that will impact particular properties, the owners of these properties should receive notice of the public meeting.
- Some cities, particularly those with smaller populations, use a designated bulletin board in either city hall or another public place, perhaps a local library, to post notices of public meetings.³⁰⁵

How Far in Advance of a Scheduled Meeting does the Oregon Public Meetings Law Require a Notice of the Meeting to be Given?

The number of days in advance a city must give notice of a public meeting depends on the type of meeting to be conducted.

- ORS 192.640(1) requires that notice of a **regular meeting** be *reasonably calculated* to give actual notice of the time and place of the meeting to any interested person and the media. A typical rule is to provide no less than 48 hours' notice.³⁰⁶ The LOC, as a public body itself, typically prefers to provide notice of its regularly meetings at least seven to ten days in advance of the meeting.
- ORS 192.640(3) requires at least 24 hours' notice for any **special meeting**.³⁰⁷ Again, the public, news media, and interested parties are to be provided notice of a special meeting.
- **Emergency meetings** can be called with less than 24 hours' notice.³⁰⁸ However, the city is required to identify why the meeting could not be delayed with the reasons articulated in the minutes of the meeting.³⁰⁹ Even if an emergency

³⁰⁵ Attorney General's Public Records and Meetings Manual (2024), p. 133.

³⁰⁶ OAR 199-050-0040 (4)(a).

³⁰⁷ OAR 199-050-0040(4)(b).

³⁰⁸ OAR 199-050-0040(4)(c).

³⁰⁹ ORS 192.640(3).

meeting must be called, cities are still required to attempt to contact interested persons and the media.

The Oregon Attorney General provides guidance on what constitutes an emergency meeting in the Public Meetings Chapter of its Public Records and Meetings Manual.³¹⁰

“The governing body must be able to point to some reason why the meeting could not be delayed allowing at least 24 hours’ notice... The Oregon Court of Appeals has indicated that it will scrutinize closely any claim of an ‘actual emergency.’ Any claimed ‘actual emergency’ must relate to the matter to be discussed at the emergency meeting. An actual emergency on one matter does not ‘justify a public body’s emergency treatment of all business coming before it at approximately the same time.’ Nor do the work schedules of board members provide justification for an emergency meeting. The court noted: ‘An actual emergency, within the contemplation of the statute, must be dictated by events and cannot be predicated solely on the convenience or inconvenience of members of the governing body.’”³¹¹

³¹⁰ (2024), p 131. .

³¹¹ *Or. Assoc. of Classified Emp. v. Salem-Keizer*, 95 Or App 28, 32-34 (1989).

X. APPENDIX C – WHITE PAPER ON DISRUPTIVE CITIZENS IN PUBLIC MEETINGS

1. Introduction³¹²

Almost every local government official will be in a public meeting at some point in his or her career and experience the near or total derailment of the meeting by a disruptive member of the public. Whether it is the person who refuses to relinquish their position at the podium during public comment or the audience member who repeatedly shouts their dismay about a comment being made by a recognized speaker, such disruptions can be annoying, and in some cases so severe that officials are unable to conduct the public's business.

These types of situations can be challenging, as the governing body attempts to find a way to deal with the disruption without escalating the situation, or worse, inviting a lawsuit.

Sometimes, the governing body simply ignores the disruption. In other situations, it may be necessary to end the meeting and resume at a later date, hoping a period of cooling off will prevent a disruption when the meeting is resumed. If those efforts do not work, public officials are often left wondering if they can legally remove the person, and if so, whether they can prohibit the person from returning to future meetings. Public officials also refer to the removal of a person from a public meeting or their suspension from future meetings as “trespassing a person.” The purpose of this guide is to explore those latter options for dealing with disruptive behavior.

This guide begins with an overview of public meetings law and whether and when the public has a right to speak at public meetings. The guide then turns to the constitutional issues on what types of speech are protected, and the issues that are involved in removing someone from a council meeting. Finally, the guide summarizes the relevant case law in this area and concludes with some practical advice for addressing members of the public who are disruptive to a city council meeting.

2. Public Attendance Versus Public Participation

Although Oregon's public meetings law requires governmental meetings to be open to the public, it is not a law that requires the government to allow the public to participate in its meetings. In relevant part, ORS 192.630(1) states that “all meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting.”

³¹² This Publication was prepared in cooperation with CityCounty Insurance Services (CIS).

Oregon’s attorney general has explicitly said that the “right of public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment.”³¹³

Although Oregon’s public meetings law does not require governments to allow public participation, it is often required by other state laws or local ordinances. For example, state law requires a city to hold a public hearing before adopting its budget. State law also requires city councils to hold public hearings when making certain land use decisions. In addition, many cities have adopted rules of procedure for their city council meetings that allow the public to speak on certain matters of public concern at a council meeting.

3. Controlling Public Participation

When state or local rules allow the public to speak, any restrictions that a city desires to impose must fall within constitutional parameters.

A. Constitutional Amendment Protections Provided to Public Meetings

In the United States, the First Amendment ensures that “debate on public issues should be uninhibited, robust, and wide-open.”³¹⁴ “Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city.”³¹⁵ However, cities are not 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. Even in a democracy, the government need not tolerate actual disruptions of government business.”³¹⁶

In recognition of the fact that public meetings are a highly important place for the public to share concerns with their governing leaders, and equally recognizing the importance of a governing body’s need to actually govern, a city council meeting (or other public meeting) is considered to be a limited public forum. In general, a limited public forum is a forum created by the government for expressive activity, wherein the activity can be moderately limited through time, place, and manner restrictions, with the caveat that the restrictions are viewpoint neutral.

The Oregon Constitution, Article I, Section 8 also protects the free speech rights of the public. Although the Oregon courts have not decided a case involving free speech and public meetings, they have made clear that any content-based restriction is unconstitutional under the Oregon

³¹³ Attorney General’s *Public Records and Meeting Manual* (2024), p. 135.

³¹⁴ *Walsh v Enge*, 154 F Supp 3d 1113, 1119 (D Or, 2015) (quoting, *N.Y. Times Co. v Sullivan*, 376 US 254, 270(1964)).

³¹⁵ *White v City of Norwalk*, 900 F2d 1421, 1425 (9th Cir 1990).

³¹⁶ *Walsh v Enge*, 154 F Supp 3d at 1119.

Constitution. Consequently, where the law allows the public to speak, the council must take extreme caution to not take action that limits what the person is allowed to say.

B. Time, Place, and Manner Restrictions

Under the federal constitution, it is clear that city councils may impose content-neutral time, place, and manner restrictions. Time, place, and manner restrictions are simply that: a rule regulating the specific time in which a person may speak, the location from which a person can speak, and the manner in which the speech can be made. For example, a city council may choose to limit public comment to certain points in a proceeding and (subject to any state law) limit the amount of time a person may speak. For example, a rule that “the public may provide testimony only during that time noted as ‘Public Comment’ on the agenda, with said testimony being provided from the designated podium, and shall be limited to no more than three minutes per speaker” has been upheld by the Oregon Court of Appeals and the Ninth Circuit Court of Appeals.³¹⁷

The more difficult part for governing bodies in controlling people’s speech during public meetings is ensuring that the control measures imposed are both viewpoint neutral and enforced consistently and equally to all speakers. A measure which “serves purposes unrelated to the content of expression and only incidentally burdens some speakers, messages, or viewpoints” is considered viewpoint neutral.³¹⁸ For example, the court has noted that requiring a member of the public to limit their testimony to the topic presently being discussed by the overall governing body is an acceptable viewpoint neutral regulation.

C. Removing Disruptive People from Public Meetings

Disruptive people can be removed from public meetings (public officials often refer to this removal as “trespassing”). However, the person must actually be disrupting the meeting. The Ninth Circuit has specifically stated, “Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption.”³¹⁹ A *nunc pro tunc* disruption is one where the speech could cause a disruption after the fact.

To that end, individuals who refuse to sit down when their allotted speaking time has ended can be removed from the public meeting. Persons who interrupt a meeting’s proceeding by repeatedly shouting out and yelling can also be removed. Even individuals located in a different room than an actual public meeting who are protesting so loudly that it interferes with the

³¹⁷ *Kindt v. Santa Monica Rent Control Bd.*, 67 F3d 266 (1995).

³¹⁸ *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)).

³¹⁹ *Norse v City of Santa Cruz*, 629 F3d 966, 976 (9th Cir 2010).

meeting can be removed from the area. On the other hand, a person who rolls his or her eyes, repeatedly sighs, shakes their head or guffaws is probably not actually disrupting the meeting. A person who is merely a distraction is not necessarily an actual disruption, and thus, should be ignored.

Because the requirement is that an actual disruption of the proceedings occur, it is not appropriate to remove a person because of some type of symbolic expression that does not interrupt or halt the meeting itself. For example, the Ninth Circuit found that while a person giving a Nazi salute may be offensive, giving the salute did not interfere with or interrupt the public meeting itself. And because the actual meeting was not interfered with by the salute, the removal of the person giving the salute from the meeting amounted to “viewpoint discrimination” by the governing body. Having a person removed from a public meeting because their view on a matter is offensive to some or all of the other people in attendance at the meeting is not legally permissible.

The Nazi salute case is one to be particularly cognizant of because it is applicable to audience members. The federal courts recognize that audience members in limited public forums (like city council meetings) are “subject to the same constitutional rules that apply to those addressing the chamber.”³²⁰ In practice, this means that audience members who wear clothing that may generally be described as offensive, who make what is commonly thought of as crude or inappropriate hand gestures, and in some instances (absent a rule or ordinance prohibiting otherwise) passively hold signs or symbols that some find distasteful, may only be removed from the public meeting if those actions truly impede the public body’s ability to conduct the meeting.

D. Suspending Disruptive Persons from Future Public Meetings

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 (otherwise known as issuing a trespass order). While the temptation to bar a disruptive person from future meetings is great, the legal ability to do so is questionable.

Two relatively recent federal court opinions 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 to the U.S. Constitution. The federal district court for Oregon specifically held in *Walsh v. Enge*³²¹ that a government may not “prospectively exclude individuals from future public meetings merely because they have been disruptive in the past.”

³²⁰ *Reza v Pearce*, 806 F3d 497, 505 (9th Cir 2015).

³²¹ *Walsh v Enge*, 154 F Supp 3d 1113 (D Or 2015).

In a separate decision, *Reza v. Pearce*,³²² 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” established under First Amendment jurisprudence. Both decisions are explained below more fully.

1. Walsh v. Enge, Hales, and City of Portland

In the *Walsh* case, the city of Portland’s municipal code permitted the city to indefinitely suspend a person from city hall and the city council’s chambers if the person disrupted a city council meeting. During a city council meeting, Mr. Walsh raised his voice and interrupted the meeting to the point that he was asked to leave by the mayor. After the meeting concluded, Mr. Walsh received a notice of exclusion from the city which prohibited him from attending any city council meeting or appearing in city hall for a period of 60 days.

The Oregon District Court found that the Portland ordinance violated the First Amendment to the U.S. Constitution. In its decision, the court noted that if Portland’s ordinance was permitted to stand, it could “lead to officials shutting the government’s doors to those whose viewpoints the government finds annoying, distasteful, or unpopular. Permanent or even lengthy exclusions for past disruptive behavior conduct could become a convenient guise for censoring criticism directed toward the powerful. The First Amendment’s guarantees, although not absolute, are not so flimsy.”³²³

In issuing its ruling, the Oregon District Court noted that the suspension from future meetings was not reasonable under First Amendment jurisprudence. In order for the ordinance to have been found reasonable, the ordinance would need to fulfill a legitimate need. Portland argued that the ordinance was needed for two reasons. First, the ordinance was necessary to protect the public’s safety. Second, even though Mr. Walsh was prohibited from attending city council meetings, he had ample alternatives to communicate his concerns with Portland’s governing leaders. Neither of Portland’s arguments were held to be valid by the court.

The court noted that while public safety is a legitimate concern and could potentially allow for a person to be prospectively banned from attending a city council meeting, there was nothing in the record that showed that Mr. Walsh himself was a threat to any person. “Mere speculation that some persons may make others feel unsafe or engage in additional disruptions is an insufficient basis upon which to erect a governmental power to bar those who wish to express their views from participating in public debate.”³²⁴ The court was particularly insistent that if Mr. Walsh was disruptive in the future, he could simply be escorted out of the meeting.

³²² *Reza v Pearce*, 806 F3d 497 (9th Cir 2015).

³²³ *Walsh v Enge*, 154 F Supp 3d at 1119.

³²⁴ *Id.* at 1132.

In addition, the court found that Portland’s ordinance did not provide Mr. Walsh with any reasonable alternatives to voice his concerns about public matters. The court appears to recognize that there is a fundamental difference between making a verbal statement at a city council meeting on a matter of public concern and sending in a letter. In the holding, the court stated, “prospective exclusions defeat the very purpose of the forum: to provide the opportunity for discourse on public matters.”³²⁵

2. *Reza v. Pearce*

In this case, Arizona State Senator Pearce issued an order barring Mr. Reza from the state Capitol because he had previously been disruptive during a hearing chaired by Senator Pearce on an omnibus immigration bill. In addition to barring Mr. Reza from the Capitol, Senator Pearce adopted a new rule which required individuals who disrupted the Senate’s proceedings from being excluded from the Capitol for two weeks for a first offense and for 60 days for any subsequent offenses. When Mr. Reza attempted to enter the Capitol to attend a previously-scheduled meeting with another senator to discuss obtaining permits for a protest, he was refused entry to the building.

The Ninth Circuit specifically held that banishment from the state Capitol was unreasonable under the First Amendment. In the opinion, the court specifically notes that the ban at issue excluded Mr. Reza “from all future hearings on any subject, based on the purported fear that he could be disruptive in the future”.³²⁶ The court additionally noted that the ban prevented Mr. Reza from “visiting his elected representatives to urge legislative action on any subject.”³²⁷ And while the court noted that public safety can be a reasonable ground to deny entry to a public building, there was no real threat to public safety established in the case, and the ban was therefore not reasonable.

3. *Public Safety Exception*

In both of the appellate cases described above, the courts reference that public safety concerns may be a legitimate reason to prospectively prohibit a person from entering and participating in a public meeting. But in both cases, the court found no real threat to public safety. These cases leave open the possibility that if a city council establishes that a real threat to public safety exists, it may be able to prospectively prohibit a person from attending a future public meeting. However, as there is no decision on point, it is reasonable to assume that any such suspension should be significantly limited in duration.

After conferring with legal counsel, if a city determines that a person should be prospectively prohibited from entering and participating in a public meeting, the attached Appendix A, entitled

³²⁵ *Id.* at 1133.

³²⁶ *Reza v Pearce*, 806 F3d 497 at 507.

³²⁷ *Id.*

“Notice of Exclusion,” may be used as starting point in drafting an appropriate exclusion order. Any such notice of exclusion must be carefully crafted to ensure that the following occurs: (1) definitive evidence of a threat to public safety is established; (2) the subject of the order is provided appropriate due process; and (3) the subject of the order is given an opportunity to appeal the notice.

E. Arresting Individuals Who Disrupt Public Meetings

Having a disruptive person removed from a public meeting often results in the person simultaneously being arrested for disorderly conduct. Oregon has two criminal statutes related to disorderly conduct, one pertaining to disorderly conduct in the first degree, the other pertaining to conduct in the second degree. Both statutes generally prohibit a person, in relevant context to this discussion, “with intent to cause public inconvenience, annoyance or alarm,” or creating a risk thereof, from: engaging in violent or threatening behavior; making unreasonable noise; or disturbing lawful assemblies. The fundamental purpose behind both disorderly conduct statutes is “to protect the general public from conduct that threatens to erode the community’s sense of safety and security.”³²⁸

Individuals have challenged the validity of the disorderly conduct statutes on the basis that they violate a person’s right of free speech and expression under Article 1, Section 8 of the Oregon Constitution. The Oregon Court of Appeals has determined that this type of constitutional challenge to the disorderly conduct statutes requires a court to determine if an arrest for disorderly conduct “had as its objective the prevention of some harm within its power to prevent or whether its objective was to prevent protected speech.”³²⁹

In *State v Rich*, a defense attorney was arrested outside of a courtroom for disorderly conduct when he yelled at a police officer for more than a minute. The yelling was so loud that it could be heard outside in a hallway and in offices that opened to the hallway. At least some employees of the courthouse indicated the yelling was so loud it stopped them from working. The defense attorney argued that his arrest for disorderly conduct violated Article 1, Section 8 of the Oregon Constitution in that he was arrested because the officer did not like the words he was yelling (the defense attorney was using profane language).

After reviewing the matter, the Court of Appeals determined that the defendant was not arrested because of the words he was uttering, but rather, as a result of the volume at which he was uttering those words. Finding that the basis of the disorderly conduct arrest was “the speech’s noncommunicative elements,” the court found that the arrest was proper and Constitutional. It

³²⁸ ORS 166.023; ORS 166.025.

³²⁹ *State v Rich*, 218 Or App 642, 647 (2008).

was the volume of the speech and the effect it had on the public (causing work to cease) that caused the disorderly conduct, not the words themselves.

When a person is arrested at a public meeting for disorderly conduct, it should be clear that the person is not only disrupting the meeting from occurring, but that the person's behavior (and not the words being used) is what is eroding the public's sense of safety and security.

4. Conclusion

Public officials do not have to allow people to disrupt or derail their ability to conduct the people's business. It is perfectly acceptable for a governing body to establish rules that dictate when public comment can be made, how long the public comment can be given, and the topic that the public comment must surround. Governing bodies are also permitted the right to remove any person from a public meeting when that person actually disrupts the meeting. If a person's disruption of a meeting is so deleterious that it threatens the safety and security of the public, the governing body can request that the person in question be arrested for disorderly conduct. And while public officials may wish to prospectively ban consistently disruptive people from future meetings, officials are warned that the only time such an action may even be legally permissible is if the officials can prove that the disruptive people proves to be an actual threat to the public safety—and even then, a limited suspension is perhaps most prudent. As a general rule, cities should utilize the least restrictive option to a disruptive citizen's rights when trying to regain and retain order of a public meeting.

5. Model Exclusion Notice

NOTICE OF EXCLUSION

Dear [SIR/MADAM]:

You are hereby excluded from the following property: [LOCATION/ADDRESS] (“property”).

This letter is to inform you of the conditions and processes associated with your Notice of Exclusion. This exclusion is effective as of [DATE TRESPASSED]. You are prohibited from entering the property for a period of [LENGTH OF EXCLUSION/HOURS/EVENT].

In order to facilitate necessary actions or protected activities, you may be permitted upon prior approval to enter the property by giving at least one-day advance notice to [EXCLUDING AUTHORITY]. This Notice of Exclusion is given pursuant to ORS 164.245, as well as [MUNICIPAL/COUNTY CODE §]. Your entry upon the property without express permission may result in adverse consequences including, but not limited to, initiation of civil or criminal proceedings against you.

Should you feel this Notice of Exclusion has been made in error, or you desire to contest this Notice of Exclusion, an appeal may be made to the Municipal Court pursuant to [MUNICIPAL CODE §] by filing a notice of appeal within ____ days of your receipt of this Notice of Exclusion. The exclusion from the property shall remain in effect pending your appeal. On appeal, evidence may be offered and arguments made before an impartial hearings officer. You are not entitled to court appointed counsel at that appeal, however, you may retain counsel at your own expense.

Should you choose to not to appeal, this exclusion will expire by its own terms on [DATE EXCLUSION ENDS].

Sincerely,

[Signed by Person Authorized to Issue]