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Topic Specificity Requirements for Executive Session Announcements Under Colorado’s Open Meetings Law

Colorado Revised Statutes 24-6-402(4): “The members of a local public body subject to this part 4, upon the announcement by the local public body to the public of the topic for discussion in the executive session, including specific citation to the provision of this subsection (4) authorizing the body to meet in an executive session and identification of the particular matter to be discussed *in as much detail as possible* without compromising the purpose for which the executive session is authorized, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the following matters; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, except the review, approval, and amendment of the minutes of an executive session recorded pursuant to subparagraph (II) of paragraph (d.5) of subsection (2) of this section, shall occur at any executive session that is not open to the public.”

Why the topic announcement requirement matters: Colorado’s Court of Appeals has held, on three separate occasions, that when a public body fails to comply “strictly” with announcement prerequisites prior to convening an executive session meeting, the closed-door meeting that follows such non-compliance was an illegally closed meeting (not an “executive session” at all), and the recording of that illegally closed meeting is a public record, open for inspection, despite the fact that the meeting *could have been* a proper executive session. See *Zubeck v. El Paso Cnty. Retirement Plan*, 961 P.2d 597(Colo. App. 1998); *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (*cert denied*, Aug. 22, 2005); *WorldWest LLC v. Steamboat Springs Sch. Dist. RE-2 Bd. of Educ.*, No. 07-CA-1104, 37 Media L. Rep. (BNA) 1663 (Colo. App. Mar. 26, 2009).

In these series of rulings, the Court of Appeals has made it clear that a public body cannot merely announce the statutory description of the *topic* of an authorized executive session discussion (e.g. “personnel matters” or “discussions with an attorney . . . for purposes of receiving legal advice on specific legal questions”). Instead, the public body must also state the “particular matter” that is going to be discussed with “*as much detail as possible* without undermining the purpose for which the executive session is held.” See §§ 24-6-402(3)(a) and -402(4), C.R.S. (emphasis added).

In *WorldWest LLC, supra*, the Court of Appeals held that the Steamboat School District had failed to “strictly comply” with the topic announcement requirement when it announced it would convene an executive session to discuss “personnel matters involving access to information” when it planned to discuss the release of survey results to the school board. Furthermore, the board’s announcement of “personnel matter” and its correct citation of the applicable statutory provision “was deficient in not identifying that the ‘personnel matter’ was specifically the performance of the Superintendent.” As a result, the entire recording of the Board’s closed door meeting, including its discussion with its attorney to receive legal advice on the above matters, was required to be disclosed.

The specificity of announcement requirement serves three interrelated purposes: (1) to provide the public with “specific” information as to what their public officials are discussing behind closed doors, (2) to create a more effective

mechanism for policing whether public bodies have complied with their obligation to *vote* whether to discuss the specific topics outside of public view, and (3) to help public officials avoid straying into topics that are not authorized for executive sessions discussions.

Guidance/advice on specificity required for statutory exemptions: Below are recommendations about how much specificity is required for a COML announcement under each of the specifically enumerated statutory bases for executive sessions. (Note: with the exception of the ones cited above, there are no published precedential cases on these issues).

Executive session exemptions for *local* public bodies

- “Purchase, acquisition, lease, transfer, or sale of any real, personal or other property interest.” § 24-6-402(4)(a), C.R.S.
 - The public body **must** announce what *kind* of acquisition is under discussion, *i.e.*, a “purchase” or a “lease” or a “sale.”
 - If a particular project is to be discussed, *e.g.*, “the site of the new police sub-station,” that, too, should be announced.
 - Because of the effect that an announcement might have on the price of private property being purchased, the public body will likely **not** be required to identify the particular property under discussion. However, this rationale does not to apply to a *sale* of public property.
- “Conferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions.” § 24-6-402(4)(b), C.R.S.
 - The public body **must** actually meet with its lawyer(s), and cannot discuss amongst themselves a legal question (*e.g.*, a lawyer for the public body must be present).
 - To the extent the discussion concerns an ongoing case, the public body **must** announce the particular case that has given rise to the legal question that will be discussed.
 - To the extent the discussion concerns an actual threat or notice of potential litigation, the public body **must** announce the particular nature of the potential litigation and the name of the claimant(s).
 - If the discussion concerns the possibility of future litigation based on a potential exposure that the public body has discovered for itself but which is not the subject of an actual notice of potential claim by an outside third party, then it is likely that the public body would **not** be required to identify the specific nature of the potential legal exposure.
 - (These discussions need not be recorded on audio tape.)
- “Matters required to be kept confidential by federal or state law or rules and regulations.” § 24-6-402(4)(c), C.R.S.
 - The public body **must** announce the particular state or federal statutory provision that requires the closure of the discussion (*e.g.*, TANF or HIPAA).
- “Specialized details of security arrangements or investigations.” § 24-6-402(4)(d), C.R.S.
 - This exemption only applies when “disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law.”
 - The public body will **not** be required to announce what particular security arrangements are under discussion.
 - However, the public body probably will be required to announce the general nature of the discussion, *e.g.*, a discussion of “the specialized details of the city’s investigation into the

misappropriation of funds from the recreation department,” or a discussion of “the specialized details of the city’s security arrangements for the international G-8 conference.”

- “Determining positions relative to matters that may be subject to negotiations; developing strategy for negotiations; and instructing negotiators.” § 24-6-402(4)(e), C.R.S.
 - The public body **must** announce the particular collective bargaining unit with whom its negotiators will be negotiating or the particular dispute that is to be resolved through negotiations.
 - This exemption may not be used to conduct actual face-to-face negotiations by the public body itself.

- “Personnel matters except if the employee who is the subject of the session has requested an open meeting.” § 24-6-402(4)(f)(I), C.R.S.
 - The public body **must** give advance notice to the employee(s) who is/are the subject of the meeting so that the employee(s) can elect to have the meeting open to the public. If so, the public body cannot vote to conduct an executive session; the discussion of the employee(s) must be conducted in a public meeting.
 - The public body likely will be required to announce the office or agency whose employee(s) is the subject of the personnel matter discussion, but is **not** required to announce the identity of the particular employee under discussion if the employee is not a high-level government official.
 - The public body likely would be required to announce the fact that it was discussing the chief executive officer of a governmental entity because such officials do not have as great an expectation of privacy as do lower-level employees.
 - This exemption may **not** be used to discuss appointments to fill vacancies on the public body’s board or to any elected office.
 - This exemption may not be used to discuss appointments to non-*employee* positions, such as an advisory board for the public body.

- “Consideration of any documents protected by the mandatory nondisclosure provisions of [the Colorado Open Records Act].” § 24-6-402(4)(g), C.R.S.
 - The public body **must** announce the specific CORA exemption that requires nondisclosure.
 - The public body may **not** hold a closed discussion under this exemption for “work product” documents – which are outside of CORA’s definition of a public record – or for “deliberative process” documents, unless some other exemption applies.

- “Discussion of individual students where public disclosure would adversely affect the person or persons involved.” § 24-6-402(4)(h), C.R.S.
 - The public body is **not** required to identify either the student involved nor any other person involved in the discussion, if the person would be “adversely affected” by the disclosure that he or she is the subject of the executive session discussion.

Executive session exemptions for **state** public bodies

- “Purchase of property for public purposes” or “sale of property at competitive bidding.” § 24-6-402(3)(a)(I), C.R.S.
 - The public body **must** announce whether it is discussing a “purchase” versus a “sale.”
 - [See discussion above of real property exemption for local public bodies.]

- “Conferences with an attorney representing the state public body concerning disputes involving the public body that are the subject of pending or imminent court action, . . . or for purposes of receiving advice on specific legal questions.” § 24-6-402(3)(a)(II), C.R.S.
 - The public body **must** actually be meeting with its lawyer, and not just with themselves.
 - The public body **must** announce the particular matter that is the subject of the discussion, including the particular dispute or controversy that is discussed, if any.
 - (*Note:* These discussions must be recorded on audio tape, except for governing bodies of institutions of higher learning.)
- “Matters required to be kept confidential by federal law or rules, state statutes, or in accordance with the requirements of any joint rule of the senate and the house of representatives pertaining to lobbying practices.” § 24-6-402(3)(a)(III), C.R.S.
 - The public body **must** announce the particular federal or state law that requires closure.
- “Specialized details of security arrangements or investigations, including defenses against terrorism, both domestic and foreign, and including where disclosure of the matter discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law.” § 24-6-402(3)(a)(IV), C.R.S.
 - The public body will **not** be required to announce which particular security arrangements are under discussion.
 - The public body may be required to identify the subject of an investigation if such a limited disclosure would not undermine the investigation itself.
- “Determining positions relative to matters that may be subject to negotiations with employees or employee organizations; developing strategy for and receiving reports on the progress of such negotiations; and instructing negotiators.” § 24-6-402(3)(a)(V), C.R.S.
 - The public body **must** announce the particular employee group that is the subject of the negotiations.
 - The public body may use this exemption **only** for discussions related to negotiations with employee groups. There is no basis under this exemption for discussing negotiations with anyone other than employees.
 - This exemption may not be used to conduct direct negotiations behind closed doors by the public body itself.
- “Matters concerning the modification, initiation, or cessation of patient care programs.” § 24-6-402(3)(a)(VI), C.R.S.
 - This exemption applies only to the state’s universities and university hospitals.
 - The university governing board is **not** required to identify any particular patient involved, but it may be required to identify the general program under discussion if the discussion does not pertain to a specific patient.
- “Matters concerning trade secrets, privilege information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person.” § 24-6-402(3)(a)(VII), C.R.S.
 - This exemption applies only to nonprofit technology transfer corporations created by state universities.
 - The nonprofit corporation’s board is likely to be required to announce the general nature of the topic, such as “trade secret information provided by XYZ Corp.”

- “Consideration of nominations for the awarding of honorary degrees, medals, and other honorary awards” and “consideration of proposals for the naming of a building or a portion of a building for a person or persons.” § 24-6-402(3)(a)(VIII), C.R.S.
 - This exemption applies only to the governing boards of state institutions of higher education.
 - Under this exemption, the governing board **must** identify whether the issue is the consideration of an honorary award or degree versus the naming of a building or a portion of a building.
 - The public body might also be required to identify the particular building for which the naming rights are being considered.

- “All meetings . . . to consider the appointment or employment of a public official or employee or the dismissal, discipline, promotion, demotion, or compensation of, or the investigation of charges or complaints against, a public officer or employee.” § 24-6-402(3)(b)(I), C.R.S.
 - Under the statute, these personnel meetings **must** be *open* to the public unless the official, employee, or applicant involved *requests* a closed meeting.
 - This exemption is written into a different section of the COML, and as a result, it does not literally fall within the requirement for a specific topic announcement. As a result, a state public body could argue that it is not required to make a specific topic announcement, other than a citation to this statutory provision, and it could contend that it is not required to identify the particular state official involved. This argument, however, is in conflict with the legislative intent behind the 2001 executive session reforms.
 - This exemption may **not** be invoked for discussions of any member of the state public body or any elected official, or for appointments to fill a vacancy in the public body or an elected office.

- “Matters connected with any parole proceedings.” § 24-6-402(3)(c), C.R.S.
 - This exemption applies only to the state parole board.
 - The parole board is not required to identify the particular matter under discussion.

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