

Memo

Date: January 7, 2016

To: DRCOG Board of Directors

From: Jennifer Schaufele, Executive Director (303) 480-6701 or jschaufele@drcog.org

Re: Clarification on Open Meetings

In December, I was asked by a member of the Board about initiating meetings to discuss DRCOG business outside of regular meetings of the Board and its established committees. I checked with DRCOG's legal counsel, Sam Light, who based his opinion (below) on Colorado's Open Meeting Law (OML):

"The OML states "all meetings of a quorum or three or more members of a local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to public at all times." Colorado Revised Statutes (C.R.S.) § 24-6-402(2)(b). In my opinion the DRCOG Board is a "local public body" because it has been delegated governmental decision-making functions (see full definition below). A "meeting" means "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." *Id.* at -402(1)(b). The phrase "public business" is not further defined in the COML. However, in construing these provisions of the OML, the Colorado Supreme Court has held that if the meeting is rationally connected to the policy-making responsibilities of the public body holding or attending the meeting, then the meeting is subject to the OML. Bd. of Cnty. Comm'rs, Costilla Cnty. v. Costilla Cnty. Conservancy Dist., 88 P.3d 1188 (Colo. 2004).

Based on the above, I think a pre-Board meeting of a few Board members to discuss the upcoming agenda items must be open to public. This assumes at least three Board members are participating. It would be difficult if not impossible to successfully argue that discussion of agenda items scheduled for full Board consideration a few days later is not a discussion of public business. Further, I don't think the Board member could argue successfully that their participation is in some other capacity—though the discussion may relate to a policy-making role of another office held, the person remains a DRCOG Board member. Note that the above-quoted provision requires the meeting be open if any public business is discussed or any formal action will be taken. Thus, a pre-Board discussion of the type described would still be a public meeting even if that small group has no power or intent to take any action. While the meeting must be open to the public, the discussion of the type described may not trigger the specific notice/agenda requirement of the OML. That additional requirement, contained in C.R.S. § 24-6-402(2)(c), states a notice/agenda shall be posted for any meetings at which the

adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or at which a majority or quorum of the body is in attendance, or is expended to be in attendance. However, even if it could be argued this language is not triggered, there are cases in other context holding the government has an implied duty to give some notice that a meeting is to be held.

Regarding enforcement, the OML is construed liberally to further its policy declaration that “the formation of public policy is public business and may not be conducted in secret.” C.R.S. § 24-6-401. Further successful plaintiffs in an OML case are entitled to an award of costs and reasonable attorney fees. C.R.S. § 24-6-402(9)(b). Given these risks, as DRCOG counsel I recommend against “pre-meetings” of three or Board members unless notice is given and meetings are open to the public.”

If you have any questions or concerns about the information above, please let me know ASAP and I'll forward to Sam for his response.

Thank you.