



EXECUTIVE SESSION—Basic Legal Requirements

Under Colorado’s Open Meetings Law (OML), a board of education, upon the affirmative vote of two-thirds of the quorum present, may convene in executive session at any regular or special meeting.¹ Only those persons invited by the board may be present during any executive session regardless of the topic of the session, including personnel matters, and the board may not make final decisions while in executive session.² This memo is intended to provide an overview of the requirements surrounding executive sessions. *This memo is for informational purposes only and does not constitute legal advice. Specific questions should be referred to the school district’s legal counsel.*

Discussions occurring during an executive session are confidential. To safeguard this confidentiality, the law requires each school board member to sign an affidavit stating that the board member is aware of and will comply with the confidentiality requirements and restrictions applicable to executive sessions of the board.³ Board members sign these affidavits during the board’s biennial organizational meeting, and the school district then maintains such affidavits with the minutes of board meetings and other board documents.⁴ CASB recommends that newly appointed board members that were not on the board at the time of the organizational meeting should sign the confidentiality affidavit upon appointment by the board.

Due to Colorado court decisions, it has become increasingly important for boards to strictly comply with the law’s requirements before convening in executive session. Otherwise, a court may invalidate the board’s actions and the school district could be liable for attorney fees and court costs resulting from a successful legal challenge of the board.⁵

If the board does not strictly comply with the requirements to convene in executive session, the executive session may be considered an open meeting subject to public disclosure requirements.⁶ In addition, state law requires local public bodies—including school boards—to electronically record executive sessions, as discussed in more detail below.⁷ Accordingly, violations of the law’s requirements with regard to executive sessions could also result in the recording being made public.⁸

Steps to Convene in Executive Session

The steps a board must take to convene in executive session are provided in C.R.S. 24-6-402(4) and outlined as follows:

¹ C.R.S. 22-32-108(5)(a), 24-6-402(4).

² C.R.S. 22-32-108(5).

³ C.R.S. 22-32-108(5)(a).

⁴ *Id.*

⁵ C.R.S. 24-6-402(8), (9).

⁶ *Gumina v. City of Sterling*, 119 P.3d 527 (Colo. App. 2004).

⁷ C.R.S. 24-6-402(2)(d.5)(II)(A).

⁸ C.R.S. 24-6-402(2)(d.5)(C).

1. The board president announces the topic of the executive session and the specific citation to the statute, C.R.S. 24-6-402(4), authorizing the board to meet in executive session.
2. The board president identifies the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized. In crafting this announcement, the board president may factor in how much the public already knows about the particular matter and provide additional detail when describing the topic to be discussed consistent with this public knowledge.
 - A 2020 Colorado Court of Appeals ruling held that when announcing an intent to enter executive session to receive legal advice, a local government must identify at least the subject matter of the legal matter(s) to be discussed⁹ and, when announcing an intent to enter executive session to discuss a personnel matter, at least identify the subject employee.¹⁰
3. The board votes whether to convene in executive session. Upon the affirmative vote of two-thirds of the quorum present, the board then goes into executive session.
4. The discussion during executive session cannot stray from the matter(s) stated at the onset of the executive session.
5. The board is not allowed to adopt any proposed policy, resolution, regulation, or take any formal action in an executive session.

If the board wishes to confer with its attorney during an executive session and it did not specifically announce its intent to do so prior to convening the executive session, the board should return to public session, make an additional topic announcement citing the statutory authority for conferring with its attorney, and vote on whether to convene in executive session for this purpose.

Matters that may be Considered in Executive Session

Executive sessions may be conducted for the sole purpose of considering any of the following matters:

- The purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest. However, no executive session shall be held to conceal the fact that a member of the local public body has a personal interest in such property transaction.¹¹
- Conferences with an attorney for the purpose of receiving legal advice on specific legal questions. The mere presence or participation of an attorney at an executive session is not sufficient to satisfy this requirement.¹²

⁹ *Guy v. Whitsitt*, 2020 COA 93, ¶ 27.

¹⁰ *Id.* at ¶ 32.

¹¹ C.R.S. 24-6-402(4)(a).

¹² C.R.S. 24-6-402(4)(b).

- Matters required to be kept confidential by federal or state law or rules and regulations. The board must announce the specific citation of the statute or rules that are the basis for such confidentiality before holding the executive session.¹³
- Specialized details of security arrangements or investigations.¹⁴
- Determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, including strategy for negotiations relating to collective bargaining or employment contracts, and instruction of negotiators. Discussion of negotiations relating to collective bargaining or employment contracts (other than negotiations for an individual employee’s contract) must occur in a public meeting, unless an executive session is otherwise allowed.¹⁵
- Personnel matters; except if the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting. If the employee(s) does not request an open meeting, the board will hold the discussion in executive session. The board may, at its discretion, invite the employee(s) into the session. Discussion of personnel policies that do not require discussion of matters specific to a particular employee are not considered “personnel matters.” Discussions concerning a member of the board, any elected official, or the appointment of a board member are not considered personnel matters.¹⁶
- Consideration of any documents protected under the mandatory nondisclosure provision of the Colorado Open Records Act, except that consideration of work product documents and documents subject to the governmental or deliberative process privilege must occur in a public meeting, unless an executive session is otherwise allowed.¹⁷
- Discussion of individual students where public disclosure would adversely affect the person or persons involved.¹⁸
- Negotiations concerning the terms of an employment contract with one or more superintendent finalists if the board has named more than one finalist and holds a forum open to the public to conduct interviews with each of the finalists.¹⁹ The board may also, in addition to interviewing finalists in a public forum, interview finalists in executive session.²⁰

¹³ C.R.S. 24-6-402(4)(c).

¹⁴ C.R.S. 24-6-402(4)(d).

¹⁵ C.R.S. 24-6-402(4)(e). Proposition 104, passed by voters in 2014, limits this statutory ground for convening in executive session. However, in 2019, HB19-1201 amended this limitation to permit school boards to “develop strategy” relating to collective bargaining or employment contracts in executive session. Proposition 104 continues to require a meeting between an employee representative and school district administrators, school board members, or a combination of administrators/board members during which a collective bargaining agreement, master agreement, or an employees’ contract are discussed to be noticed and open to the public.

¹⁶ C.R.S. 24-6-402(4)(f).

¹⁷ C.R.S. 24-6-402(4)(g).

¹⁸ C.R.S. 24-6-402(4)(h).

¹⁹ C.R.S. § 24-6-402(4)(i). This clarification that boards may conditionally interview superintendent finalists and discuss finalist negotiations in executive session was provided through HB22-1110.

²⁰ *Id.*

ELECTRONIC RECORD OF EXECUTIVE SESSION

School boards must make an *electronic* record of the discussion that occurs in executive session unless the discussion falls within two limited exceptions, as discussed below.²¹ The electronic record must include the specific statutory citation that allows the board to meet in executive session.²²

The law does not specify the form of electronic recording that must be used. Thus, the board may use a simple tape recorder or more advanced equipment to electronically record the executive session.

The electronic record must be retained for at least 90 days following the executive session.²³ The board should put a procedure in place to ensure the electronic record of any executive session is destroyed once the 90-day deadline expires and ensure the procedure is implemented consistently.

Exceptions to the Electronic Recording Requirement

If the executive session is held to discuss an individual student matter, the OML does not require the board to make *any* record of the executive session.²⁴ If the executive session is held to receive legal advice from an attorney on a particular matter, an electronic record must be made of the statutory citation to the executive session law permitting the board to meet in executive session to receive legal advice, but the board is not required to make an electronic or written record of the discussion that occurs in executive session, on the basis that it constitutes privileged attorney-client communication.²⁵ If no electronic recording is made because the discussion constitutes privileged attorney-client communication, this must be stated on the electronic recording, or the attorney representing the board must provide a signed statement attesting that the portion of the executive session that was not recorded constituted a privileged attorney-client communication.²⁶ Following this procedure will protect the privileged portions of communications with an attorney from being released in any litigation challenging the board's compliance with the OML.

Access to the Electronic Record

No portion of the record of an executive session is open for public inspection or subject to discovery in any administrative or judicial proceeding, unless the board consents or unless a district court judge makes a portion of the record public.²⁷ For this to happen, the person seeking access to the record of the executive session would have to convince the judge that the board engaged in substantial discussion of matters that were not permissible topics for executive session or that the board took action while in executive session.²⁸ If a judge determines that the board strayed from the stated topic in executive session or took formal action, the entire record or a portion of the record reflecting the discussion of "open" matters will be subject to public inspection.²⁹

²¹ C.R.S. 24-6-402(2)(d.5)(II)(A).

²² *Id.*

²³ C.R.S. 24-6-402(2)(d.5)(II)(E) and C.R.S. 22-32-108(5)(e).

²⁴ C.R.S. 24-6-402(2)(d.5)(II)(A).

²⁵ C.R.S. 24-6-402(2)(d.5)(II)(B).

²⁶ *Id.*

²⁷ C.R.S. 24-6-402(2)(d.5)(II)(D).

²⁸ C.R.S. 24-6-402(2)(d.5)(II)(C).

²⁹ *Id.*

Minutes

The minutes of any board meeting at which the board convenes in executive session must indicate the amount of time spent on each topic discussed during the board’s executive session.³⁰ In addition, districts must publish the minutes of any board meeting at which the board convenes in executive session on the board’s website not later than 10 business days after the minutes are approved by the board. If the board does not maintain a website, the minutes “must be published in the same manner as the board regularly provides public notice.”³¹ While the law does not specify the length of time such minutes must remain published, CASB suggests a publication window of at least 90 days following the meeting at which the executive session occurred, aligning this practice with the statutory timeline for retaining electronic recordings of executive sessions, as discussed above.

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³⁰ C.R.S. 22-32-108(5)(d).

³¹ C.R.S. 22-32-108(5)(d).