

Points to Remember for Complying with the OML and the 2023 Consent Decree

The following information is intended to help members of the House comply with the OML and the 2023 Consent Decree. See the next page for information about what constitutes public business.

- The OML applies to the General Assembly, but the Consent Decree only applies to members of the House. In some situations, the Consent Decree expands the requirements of the OML.
- A meeting between one member and any number of non-legislators, whether in person or through any electronic means, is never subject to the OML or the Consent Decree no matter the topic of discussion.
- When two or more members from the House discuss public business in person, by telephone, or electronically, it is a public meeting and must be open to the public at all times.
- If a majority or quorum of the House, a committee, or a caucus is in attendance or expected to be in attendance at a meeting where there is a discussion of public business, members need to provide full and timely notice unless the meeting is staffed by a legislative service agency that will provide the notice. The notice requirement applies to any type of meeting, regardless of whether it occurs in person or by text message, email, Zoom, etc.
- The OML may apply even if a meeting is hosted by a third party. If members discuss public business at such a meeting and notice is required, it is the members' responsibility to provide the notice, not the non-legislative host. If a member knows beforehand that public business will be discussed at an event and that a number of other members are invited to the event, the member may want to determine whether notice will be required or provide notice of the event just in case.
- Notice of a meeting should include the meeting's date and time, location, expected attendees, and the agenda or items to be discussed.
- There is no standard for full and timely notice that applies to the General Assembly. For local governments, meetings must have 24 hours' advance notice. Notice given that far in advance would be sufficient, but less notice may also be acceptable. A member may post the notice on the member's own official website and publicly available social media. It is not necessary for all of the members to provide separate notices as long as one full and timely notice is provided. A central source for posting notices, such as a caucus's website or social media page, is also an option.
- Minutes must be kept for any meeting for which notice is required under the OML. Minutes should identify the date, time, and attendees of the meeting and include a summary of the discussion and any action taken. Under the Consent Decree, these minutes must be promptly taken and made publicly available, which could be done in the same manner in which the notice of the meeting was provided. It is unclear how long the minutes must remain publicly available.
- Under the Consent Decree, two or more House members are prohibited from discussing public business through any electronic means (email, text messages, direct messages, Zoom, FaceTime, etc.) unless minutes are kept and made publicly available upon request.
- In the case of an electronic meeting held via a video platform or application, such as Zoom, FaceTime, etc., if separate minutes are not promptly recorded, retaining the complete recording of the video meeting would seemingly satisfy the minutes requirement.
- Also under the Consent Decree, when two or more members of the House exchange electronic messages or communications (email, text messages, direct messages, etc.) about public business, they must retain copies of the messages or communications and produce them in response to any request under the CORA, regardless of the members' document retention policies for other records. These messages or communications may take the place of the minutes that summarize the meeting.
- The House Policy included in the Consent Decree prohibits discussions of public business by two or more members of the House through a platform or application that is set to automatically delete messages, but a member may use this feature for conversations with individuals who are not members of the House.
- Political party caucuses are a state public body subject to the OML because they are de facto policy-making bodies. Other caucuses, such as the Black Democratic Legislative Caucus of Colorado, Colorado Democratic Latino Caucus, LGBTQ Caucus, Colorado Legislative Sportsmen's Caucus, and Democratic Women's Caucus of Colorado, may be too, and as such, if they are considering public business, they should determine whether notice and minutes will be required for the caucus meeting. If not, then the meeting may only need to be open to the public.

Public Business

The requirements of the OML apply to discussions of "public business," which is a rather broad term. The Supreme Court has clarified the scope of the OML by holding that "a meeting must be part of the policy-making process to be subject to the requirements of the OML." *Bd. of County Cmm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1194 (Colo. 2004). A meeting is part of the policy-making process if there is "a meaningful connection between the meeting itself and the policy-making powers of the public body holding or attending the meeting." *Id.* "Such a link exists, for example, when the meeting is convened to discuss or undertake . . . a rule, regulation, ordinance, or a formal action" or if it "was held for the purpose of discussing a pending measure or action, which is subsequently 'rubber stamped' by the public body holding or attending the meeting." *Id.* (*internal citations omitted*).

For the House and its committees and caucuses, a discussion by its members of pending legislation (bills, resolutions, or memorials) or other formal actions (interim committee or committee bill drafts or budget setting) that are voted upon by the General Assembly or a committee thereof have a meaningful connection to the General Assembly's policy-making powers. In some circumstances, even discussions prior to a bill's introduction or other vote may be viewed as having a meaningful connection to the General Assembly's policy-making powers.

It is impossible to establish a bright-line rule when these pre-introduction discussions will have such a meaningful connection, but factors that seem relevant include: (1) The form of the bill (Is it just an idea not yet drafted or is it fully finalized and awaiting introduction?); (2) the nature of the discussions (Is it a general discussion about a topic or is a member soliciting support for the proposal or asking other members to vote in support or against it?); and (3) who is involved (Is it just the sponsors working on a bill they will introduce together or is it an entire committee or caucus considering it?). In each parenthetical, the first scenario is less likely to have a connection to policy-making powers, and the second scenario is more likely to have a connection. The closer a situation is to one or more of these examples, the more or less likely it will be considered public business. When in doubt, exercise caution and err on the side of treating the meeting as being subject to the OML and the Consent Decree.

Examples of a discussion of public business are:

- A discussion of pending legislation;
- A sponsor of a bill informally meeting with members of a committee of reference that will consider the bill to discuss the merits of the bill, potential amendments, or political strategy;
- Two members leaving the chamber during 2nd Reading to discuss a bill with lobbyists;
- Two members of an interim committee discussing a bill draft that has been made public and will be considered at the committee's next meeting; and
- Two members of a task force considering a policy recommendation that will be included in a report to the General Assembly.

Examples of discussions that likely do not involve public business:

- A district event focused on educating members and local government officials about an issue in the community and possible solutions;
- An event hosted by an advocacy organization honoring legislators for the prior session's work;
- Informal discussions by members about issues of interest, but not in the context of legislative changes;
- Fundraisers for political campaigns;
- An electronic communication to schedule or announce a schedule for a meeting or event;
- A group chat message wishing a member a happy birthday;
- Joint prime sponsors working on a bill draft together; and
- A chance meeting or social gathering where the discussion of public business is not the central purpose.