



# E-mail Correspondence Under The Colorado Open Meetings Law

Guest article by Colin B. Mielke, Esq.

Colorado's Open Meetings Law ("OML") was enacted in the 1970s with the purpose of affording the public access to a broad range of meetings at which public business is considered.<sup>1</sup> Since its enactment, the OML has undergone multiple revisions by the Colorado legislature and been the object of numerous interpretations by Colorado's courts. One of the most recent interpretations came from the Colorado Court of Appeals in the case *Intermountain Rural Electric Assoc. v. Colorado Public Utilities Comm.*, No. 11CA1398, 2012 WL 2927999 (Colo. App. 2012) (the "IREA case"). Because that case analyzed government communications conducted by e-mail, it provides important insights into the impact that the OML can have on the e-mail communications of local public officials, such as special district board members. This article examines the OML's applicability to e-mail correspondence by local public bodies such as special district boards of directors in light of the recent court ruling in the IREA case.

## Overview of OML

The OML is codified in the Colorado Revised Statutes under Section 24-6-401 through 402 and applies, in part, to local public bodies. Boards of directors for special districts and other similar public bodies are included within the statute's definition of a "local public body,"<sup>2</sup> and therefore, must comply with the OML's rules concerning public meetings. OML rules include providing full and timely public notice and the taking and recording of meeting min-

utes.<sup>3</sup> Additional requirements under the OML, Special District Act, and other laws may apply as well.

The statute requires that "public meetings" must be open to the public at all times. Public meetings are meetings where a quorum or three members of a local public body (whichever is fewer) discuss any public business or at which formal action may be taken by the local public body.<sup>4</sup> In addition, a "meeting" is "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." It does not include chance meetings or social gatherings at which public business is not the main topic of conversation.

Determining whether a particular meeting is a "public meeting" and subject to the OML can be accomplished in a three-step process: (1) determine whether a quorum or three board members (whichever is fewer) will be holding a "gathering"; (2) determine whether any public business will be discussed at the gathering; and (3) determine whether any formal action may be taken at the gathering.

## Step 1: What Constitutes a Gathering?

The first step in determining whether a local public body's communication will be subject to the OML is to determine whether the anticipated communication will occur during a gathering by a quorum or three board members (whichever is fewer).

In some instances, a gathering may be obvious, such as in-person board meetings or telephone conferences, where conversation is happening in real time. However, gatherings under the OML extend well

beyond the traditional idea of regular and special meetings scheduled by a board of directors, and may include e-mail exchanges. Colorado statutes expressly state that if elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail is subject to the OML.<sup>5</sup> Essentially, even though the e-mail conversation is not happening in real time, it is still considered an ongoing conversation and therefore a gathering under the OML.

District board members must be particularly careful in the context of e-mail gatherings. What may start out as two board members e-mailing each other about a district matter may turn into a meeting if a third board member is copied on the e-mails or enters into the e-mail conversation. If that e-mail conversation involves the discussion of public business, it could constitute a public meeting subject to the OML.

## Step 2: What Constitutes "Public Business"?

If it is determined that the anticipated communication will occur during a "gathering," the second step is to determine whether public business will be discussed. A gathering does not constitute a "public meeting" unless it is a gathering at which (1) public business is discussed, or (2) formal action may be taken.<sup>6</sup>

Discussion of public business refers to a public body's public policy-making function. If a 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.<sup>7</sup> A meeting is part of the public body's policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordi-

1 *Bd. of County Comm'rs v. Costilla County Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004).

2 The statute's full definition of "local public body" is as follows: "any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body."

3 Section 24-6-402(2)(c), (d)(II), C.R.S.

4 The statute's full definition is as follows: "all meetings of a quorum or three or more members of any 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 the public at all times." Section 24-6-402(2)(b), C.R.S.

5 Section 24-6-402(2)(d)(III), C.R.S.

6 Section 24-6-402(2)(b), C.R.S.

7 *Intermountain Rural Elec. Ass'n v. Colorado Public Utilities Comm'n*, No. 11CA1398, 2012 WL 2927999, ¶ 17 (Colo. App. July 19, 2012).

nance, or formal action.<sup>8</sup>

In the context of e-mails, board members must understand the extent of their policy-making powers and ensure they are not exercising those powers through an e-mail conversation. If a discussion by a quorum or three board members (whichever is fewer) occurs through e-mail with regard to a rule, regulation, or formal action by the board, board members should be aware that the e-mails may be considered meetings and be subject to OML requirements.

### Step 3: What Constitutes “Formal Action”?

The third step in analyzing the OML requires determining whether the gathering is one at which formal action may be taken. To be a formal action, the action must fall within the public body’s ability to make public policy.<sup>9</sup> There is a difference between the “policy-making” powers of a board and the board’s other duties and actions, and only actions related to the board’s policy-making powers will be considered a formal action subject to OML requirements.

In the context of a special district board of directors, this is an important distinction. E-mails in which the board is solely offering advice or discussing administrative matters would not be subject to the OML. However, e-mail discussions between board members that are for the purpose of helping the board determine how to vote on a certain issue within the board’s power, would be within the parameters of the OML.

### Requirements for Meetings under the OML

Two main public meeting requirements under the OML are (1) providing full and timely public notice, and (2) taking and recording public meeting minutes.

#### Notice

When a meeting is subject to the OML, notice of the meeting (including specific agenda information where possible) must be posted at a designated place within the boundaries of the local public body no later than twenty-four hours prior to holding the meeting.<sup>10</sup> For special districts, this requirement is in addition to the seventy-two hour notice requirement under the Special District Act.<sup>11</sup>

The Court of Appeals in *IREA* did not address the issue of how notice should be provided in the context of e-mail exchanges. Does a local public body need to provide notice prior to sending out the first e-mail? Should correspondence stop and notice be provided once it becomes apparent that the e-mails have turned into a public meeting under the OML? These questions remain unanswered, and until local public bodies receive clarification from the courts or legislature, local public bodies may want to formulate a policy that can be consistently applied in the event that such e-mail meetings occur in the future.

#### Meeting Minutes

The OML requires a local public body to take and record meeting minutes and make the minutes available for public inspection for any meeting at which the adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or could occur.<sup>12</sup> E-mail correspondence that is considered a public meeting is subject to recording and public inspection as well.

Once it becomes apparent that an e-mail chain or correspondence has become a public meeting under the above-mentioned standard, board members of a special district should take care to stop the meeting if it is not being held properly and preserve the e-mails or summarize them in a manner similar to that of regular meeting minutes. In addition, early communication to other participants in the e-mail chain concerning the potential for the e-mails to become public meetings will reduce the potential for an e-mail chain to unintentionally become a public meeting under the OML.

#### IREA v. PUC Case Summary

The *IREA* case concerned whether a string of e-mail exchanges between the Colorado Public Utilities Commission and the governor’s office constituted meetings that should have been open to the public under the OML.

The e-mail exchanges were in relation to the proposed Clean Air-Clean Jobs Act, and were initiated by a member of the governor’s staff. The governor’s staff member e-mailed the PUC Board Chairman to seek input on proposed language for an early version of the bill. An e-mail chain ensued between them and multiple individuals within the PUC. In total, the



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<sup>8</sup> *Costilla County*, 88 P.3d at 1189.

<sup>9</sup> *IREA*, at ¶ 26.

<sup>10</sup> Section 24-6-402(2)(c), C.R.S.

<sup>11</sup> See Section 32-1-903(2), C.R.S.

<sup>12</sup> Section 24-6-402(2)(d)(II), C.R.S.

governor's staff member was copied on fifteen of eighteen e-mails, which consisted mainly of edits to the draft language of the bill and discussion about various topics concerning the bill.

IREA, a cooperative electric utility subject to regulation by the PUC, brought suit against the PUC, its Director, and its Commissioners, and argued that (1) the e-mails were meetings subject to the OML; (2) the PUC violated the OML when it failed to provide notice of the meetings, make the meetings public, or properly enter an executive session; and (3) any formal action arising out of the e-mails was invalid.

The Court of Appeals affirmed the ruling of the trial court that the e-mail exchanges were not meetings under the OML and did not need to be open to the public. Importantly, the trial court held that the e-mail exchanges were "gatherings" under the OML. Both parties conceded this fact on appeal and the Court of Appeals focused instead on whether those gatherings discussed public business. The Court of Appeals, in affirming the trial court's ruling, ruled that the e-mails were not "convened to discuss public business" and were not held for the purpose of discussing or undertaking a formal action, and therefore, were not meetings subject to the OML.

The Court stated that "discussion of public business" essentially involves a public body's exercise of its policy-making functions. The PUC does not have the policy-making power to pass legislation (that power is reserved for the General Assembly and the Governor). As such, the Court determined that the PUC was not exercising any policy-making responsibility when it provided input on the proposed legislation to the governor's office, and therefore, the PUC's e-mail correspondence did not constitute the discussion of public business under the OML.

In addition, the Court of Appeals determined that the e-mails were not written for the purpose of discussing or undertaking a formal action of the PUC. When determining whether "formal action" was discussed or undertaken by the PUC, the Court specifically distinguished between the policy-making powers and the other duties and actions of the PUC. In essence, by offering input on the proposed legislation, the PUC was acting as an advisor to the governor's office, but in no way was the PUC exercising its policy-making powers. The governor's office was free to disregard the

PUC's advice in the e-mails, and if it did so, the PUC had no power to affect the policy. Therefore, there was no formal action taken by the PUC in the e-mails.

### Ability to Cure OML Violations

Soon after the *IREA* case, the Court of Appeals issued another opinion concerning the OML and a public body's ability to cure a violation of the OML's notice requirement. In *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*,<sup>13</sup> the Colorado Off-Highway Vehicle Coalition ("Coalition") brought suit against the Colorado Board of Parks and Outdoor Recreation ("Board") for conducting certain meetings, including e-mail meetings and telephone conferences, which were not properly noticed nor open to the public pursuant to the OML. The Board admitted that the meetings occurred and that the meetings violated the OML. However, the Board contended that it cured the violations by holding a subsequent meeting that complied with the OML. At that meeting, the Board was briefed on the OML violations, heard extensive comments from the public and other interested parties, and publicly discussed and ratified the actions discussed at the previous meetings.

The Court held that a public body can cure a prior violation of the OML by holding a subsequent meeting that complies with the OML, so long as the decisions made at the subsequent meeting are not a mere "rubber stamping" of earlier decisions by the public body. While this case is helpful to boards who later realize a meeting violated the OML, it should not be the practice of a board to rely on the case. Violations of the OML may still create a risk of litigation or bad public relations, even in the wake of the *Off-Highway Vehicle Coalition* case.

### District Considerations

The Court of Appeal's ruling in the *IREA* case provided insight into the ways in which the e-mails of public bodies may and may not fit under the umbrella of the OML. However, there are still uncertainties with regard to the OML and e-mails, and the *IREA* case has made it clear that local public bodies must be diligent in monitoring their electronic communications. While open communication amongst board members is a positive

goal for local public bodies, the unintentional creation of "public meetings" through e-mail chains creates numerous pitfalls. Even in light of the *Off-Highway Vehicle Coalition* case, such meetings, if not properly noticed or recorded, have the potential to invite litigation or raise the specter of invalidation of actions by the local public body. Particular issues to keep in mind include:

1. E-mails may be considered public meetings under the OML, and therefore subject to the notice requirements and record keeping requirements of the OML. Failing to provide proper notice or the unauthorized destruction of such communication may increase a local public body's risk for litigation or claims by an opposing party of a local public body's bad faith.
2. The Board should have a thorough understanding of the policy-making authority it possesses in order to avoid violation of the OML by inadvertent discussion of topics covered under the OML.
3. The Board should be aware of discussions or e-mail correspondence that is for the purpose of discussing or undertaking a formal action by the local public body. The ease with which e-mail allows for communication among board members offers a convenient way in which to discuss issues, but it also provides an easy way in which a board can unintentionally enter into a public meeting that must comply with the requirements of the OML. If an e-mail chain begins to take the tone of a board discussion of a formal action, take a step back, inform other participants of the potential OML implications, and determine whether the e-mail chain is the appropriate venue for discussing the issue.
4. If a board member or other participant feels an OML violation has occurred, the district's legal counsel should be consulted concerning what to do about the potential violation and the possibility of a cure.
5. To ensure compliance with all applicable laws, it is recommended to consult the district's legal counsel earlier rather than later.

<sup>13</sup> *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks and Outdoor Recreation*, No. 11CA1988 (Colo. App. Aug. 30, 2012).