PUBLIC RECORDS & MEETINGS

CITY OF GLADSTONE

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PUBLIC RECORD LAW

1. Introduction

The Public Records Law (ORS 192.311 to 192.478) and the Public Meetings Law (ORS 192.610 to 192.695) were originally enacted in 1973. They established state policy that the public is entitled to know how governments operate. The written record of public business is available, with some important exceptions, to any person. Almost all deliberations and decisions of public bodies are open to attendance by interested persons. The laws have been amended many times at subsequent legislative sessions.

2. Right to Inspect

Under ORS 192.314 "every person" has a right to inspect any non-exempt public record.[1] Any natural person or any corporation, partnership, firm or association has this right. The identity, motive and need of persons requesting access to public records are irrelevant unless an exemption from disclosure allows consideration of those factors. Interested persons, news media representatives, people seeking access for personal gain, busybodies on fishing expeditions, persons seeking to embarrass government agencies, and scientific researchers all have equal footing. *See MacEwan v. Holm,* 226 Or 27 (1961). The identity and motive of the person seeking a specific public record may be relevant in determining if a record is exempt from disclosure under a conditional exemption

ORS 192.314(2) places an additional requirement on a person who is a party to civil litigation or has filed notice under ORS 30.275(5)(a). When such a person makes a request for a public record the person knows relates to the litigation or notice, the person must submit the request to the custodian and the attorney for the public body at the same time.

3. Bodies Subject to the Law

A. Public Bodies

The Public Records Law applies to any public body in the state. ORS 192.311(4) defines "public body" to include every state officer, agency, department, division, bureau, board and commission; every county and county governing body, school district, special district, municipal corporation, and any board, department, commission, council, or agency thereof; and any other public agency of this state. Thus, all state and local government bodies are subject to the records law, including "public corporations" such as the Oregon State Bar, the SAIF Corporation, and the Oregon Health Sciences University. *State ex rel Frohnmayer v. Oregon State Bar,* 307 Or 304 (1989), and *Frohnmayer v. SAIF,* 294 Or 570 (1983).

B. Private Bodies

[1] . See Section 6.B discussing conditional and unconditional exemptions.

In *Marks v. McKenzie High School Fact-Finding Team*, 319 Or 451 (1994), the Oregon Supreme Court determined that a group selected by a private association of school administrators and charged by a public school district board with investigating and making recommendations about high school operations was not a "public body" within the meaning of public records law. However, in that case the Oregon Supreme Court held that if a private entity is the "functional equivalent" of a public body, the Public Records Law could apply to it. The court set forth several factors to assist with determining whether a private entity is the functional equivalent of a public body, which included:

- the entity's origin (was it created by government or was it created independently?);
- the nature of the function(s) assigned and performed by the entity (are these functions traditionally performed by government or are they commonly performed by a private entity?);
- the scope of the authority granted to and exercised by the entity (does it have the authority to make binding decisions or only to make recommendations to a public body?);
- the nature and level of any governmental financial and nonfinancial support;
- the scope of governmental control over the entity;
- the status of the entity's officers and employees (are they public employees?).

4. Records Covered

The definition of "public records" and the policy statement in ORS 192.314 make it clear that the records law applies to all government records of any kind. The 2011 legislature (HB 2244) expanded the ORS 192.005(5) definition of "public record" to include "any information" prepared, owned, used or retained by a city, relating to an activity, transaction or function of the city, or necessary to satisfy fiscal, legal, administrative or historical policies, requirements or needs of the city. Public records are no longer limited to "documents" and need not be prepared by the city. Records prepared outside government "owned, used or retained" by the city, are within the scope of the records law. For example, letters written to the city, retained and used by the city are public records. However, a document prepared by a private entity does not become a public record merely because a public official reviews the document in the course of official business, such as for the purpose of conducting a preliminary review. The 2011 amendments confirm that unrecorded spoken communications are not public records.

Public records include any "writing" containing information relating to the conduct of public business. ORS 192.311(5)(a). "Writing" is broadly defined by ORS 192.311(7) to include handwriting, typewriting, printing, photographing and every means of recording, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, files, facsimiles or electronic recordings. "Writing" thus includes information stored on computer tape, microfiche, photographs, films, tape or videotape recordings and virtually any other method of recording information. The city uses electronic mail (e-mail) for communications. E-mail is a public record. Even after e-mail messages are "deleted" from individual computer accounts, they generally continue to exist on computer back-up tapes that are also public records. The city must make non-exempt e-mail available for inspection and copying.

Text messages sent and received from personal cell phones, e-mails sent and received from personal accounts and social media messages and posts may also be public records if involving a public official and if the message "relat[es] to an activity, transaction or function of the city, or necessary to satisfy fiscal, legal, administrative or historical policies, requirements or needs of the city." For this reason, public officials are encouraged to forward all city-related e-mails received on personal e-mail addresses to the official's city e-mail account.

Note that the Public Records Law does not require the city to *create* public records. This is especially important for computer-stored data. Although the data in computer programs and printouts generated for use by the city are public records, the city is not obligated to perform specific computer runs or manipulate computer data in a requested manner.

5. Inspecting and Obtaining Public Records

Under the records law, the "custodian" of the public records has the duty to make non-exempt public records available for inspection and copying. The legislature has defined "custodian" as a public body mandated to create, maintain, care for or control the records. ORS 192.311(2). However, the public body that has custody of a public record as an agent for another public body is not the custodian, unless the record is not otherwise available. When the city is a custodian of public records received from another public body, it should consult with the other public body to determine whether the records may be exempt from disclosure. *See* ORS 192.355(10). The 2007 legislature amended what is now ORS 192.324 to assure more timely disclosure to interested parties by requiring a response to requests as soon as possible and without unreasonable delay. The statute was amended again by the legislature again in 2017 to require requests to be acknowledged within 5 business days, and to be complete (or provide an estimated completion date for the request) within an additional 10 business days (15 days total after receipt of the request).

All public bodies must make available to the public a written procedure for submitting the requests, including at least one person and address to which it can be delivered along with the methods that will be used to calculate the fees charged.

The city may delay action on a public record disclosure request to consult with the city attorney. It is reasonable for a record custodian to obtain legal advice before responding to an extensive public record disclosure request when compliance could disrupt operations. It is also reasonable for a records custodian to consult with the city attorney about disclosure of documents that appear to be exempt, in whole or in part, from disclosure requirements under law. Consultation with the city attorney should not be used to merely delay or frustrate the inspection process, and the 5 day acknowledgment and 15 day completion or estimate requirements above continue to apply.

6. Public Records Exempt from Disclosure

A. <u>Nature of Exemptions</u>

The records law is primarily a *disclosure* law not a confidentiality law. Exemptions are limited in nature and scope because state policy favors public access to government records. When the city denies a records inspection request, it has the burden of proving that the record information is exempt from disclosure. Oregon courts interpret the records law exemptions *narrowly*, and the courts "presume" that exemptions do not apply.

Even though information may meet the test to qualify for exemption from disclosure, it does not necessarily mean that the city is prohibited from disclosing the information. In most cases, exemptions do not prohibit disclosure, and the city has discretion to disclose record information that qualifies for exemption under the law. In only rare cases may the city say, "This record is exempt from disclosure under the records law, and therefore we may not disclose it."

There are a few instances where a government is barred from disclosing information that is exempt from inspection under the records law. ORS 192.368 *prohibits* a public body from disclosing a home address or personal telephone number if the requirements of that section are met. The "catch-all" exemption in ORS 192.355(9) incorporates into the records law some other statutes that prohibit public release of certain types of information such as income tax information. In addition, the federal law exemption in ORS 192.355(8) incorporates some federal laws that bar public dissemination of certain types of records, such as student record information under 20 USC 1232. Release of personal privacy information exempt under ORS 192.355(2) is likely to result in claims against the city. The city attorney should be consulted before such information is disclosed.

B. Conditional and Unconditional Exemptions

Exemptions are generally found in ORS 192.345 and 192.355. There are two types of exemptions under Oregon law: conditional and unconditional exemptions. Conditional exemptions require the city to balance carefully confidentiality interests against public disclosure interests. All of the exemptions under ORS 192.345 are *conditional*; they exempt certain types of information from disclosure "unless the public interest requires disclosure in the particular instance." In addition, many of the so-called "unconditional" exemptions in ORS 192.355 are conditioned on the extent to which governmental and private interests in confidentiality outweigh the public interest in disclosure. But some of the exemptions in ORS 192.355 are *unconditional*, meaning that no balancing is required. The legislature has already balanced the competing interests and concluded that confidentiality interests outweigh public disclosure interests as a matter of law.

In determining whether an exemption applies, the identity of the requester and the circumstances surrounding the request are irrelevant. The circumstances of a particular request become relevant only if the requested information comes under exemption that requires a balancing of interests. In that context, the requester's purpose in seeking disclosure may be relevant to determining whether the public interest requires disclosure.

The 2011 legislature (SB 437) amended ORS 192.355(17)(a) to make records, communications and information submitted to the cities by applicants for investment funds,

grants, loans, services or economic development moneys, support or assistance exempt from disclosure.

C. "Public Interest in Disclosure"

The public record law does not define "public interest in disclosure." However, the Oregon Court of Appeals has stated, "[t]he Public Records Law expresses the legislature's view that members of the public are entitled to information that will facilitate their understanding of how public business is conducted." *Guard Publishing Co. v. Lane County School District,* 96 Or App at 468-69. It previously characterized the public interest in disclosure as "the right of the citizens to monitor what elected and appointed officials are doing on the job." *Jensen v. Schiffman,* 24 Or App 11, 17 (1976). The public's right to monitor public employees includes the right to inspect records of alleged misuse and theft of public property by public employees. *Oregonian Publishing Co. v. Portland School District*, 329 Or 393 (1999). The term "public" means that the "focus is on the effect of the disclosure in general, not disclosure to a particular person at a particular time." *Morrison v. School District No. 48*, 53 Or App 148, 156 (1981).

7. Destruction of Public Records

State laws and regulations govern the retention and destruction of public records. ORS 192.001 to 192.170. In order to comply with these laws, public employees and officials are required to identify public records and determine their retention period; retain records in compliance with records retention schedules promulgated by the State Archivist; and destroy those records that are non-public records and those that have reached their retention period. For purposes of the record retention and destruction laws, "public record" includes correspondence, including email, text messages and social media communications, but excludes extra copies of a document preserved only for convenience. ORS 192.005(5)(d). Even public records exempt from disclosure are subject to the retention schedules.

It is important to follow these requirements as state law makes it a crime to knowingly destroy, conceal, remove or falsely alter a public record. ORS 162.305.

PUBLIC MEETINGS LAW

1. Public Meetings Policy

The Oregon policy of open decision-making is established by ORS 192.620:

> The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies are arrived at openly.

The Public Meetings Law applies to not only the state, but also the cities, counties and special districts despite any conflicts with their charters, ordinances or other rules. Cities, counties and other public bodies may impose greater requirements than those of the law by their charters, ordinances, administrative rules or bylaws.

The Public Meetings Law applies to meetings of the "governing body of a public body." ORS 192.630(1). A "public body" is the state, any regional council, county, city or district, or any municipal or public corporation or any board, department, commission, council, bureau, committee, subcommittee or advisory group or any other agency thereof. ORS 192.610(4). If two or more members of any public body have "the authority to make decisions for or recommendations to a public body on policy or administration," they are a "governing body" for purposes of the meetings law. ORS 192.610(3).

Thus, the city council (council), and citizen advisory commissions and committees are "governing bodies." A subcommittee of a commission or committee can also be a "governing body" if it is authorized to make decisions for or to advise the council.

A. Public Body Decisions

A committee or commission that has authority to make decisions for the city on "policy or administration" is a governing body. ORS 192.610(3).

B. Recommendations to a Public Body

An advisory committee, subcommittee, task force or other official group that has authority to make recommendations to the public body on policy or administration also is a governing body. ORS 192.610(3).

"Public body" does not include the city manager or other individual city officials. For example, an advisory committee appointed by the city manager is *not* a governing body subject to the law if the advisory committee reports only to the appointing official. However, if the individual official lacks authority to act on the advisory group's recommendations, and must pass those recommendations unchanged to the council, then the meetings law applies to the advisory group.

If an advisory body is created by a public body to advise it, the fact that its members are all private citizens is irrelevant. The meetings law applies to private citizens, employees and others without decision-making authority when they serve on a group that is authorized to advise the public body.

2. Meetings Subject to the Law

The Public Meetings Law defines a meeting as the convening of any of the "governing bodies" described above "for which a quorum is required in order to make a decision or to deliberate toward a decision *on any matter.*" ORS 192.610(5) (emphasis added).

A. Quorum Requirements

The Public Meetings Law does not define "Quorum." For the City's purposes, a majority of the council constitutes a quorum.

A gathering of less than a quorum is not a meeting under the meetings law. The law applies to committees, subcommittees and other advisory groups that are charged by the public body with making recommendations. The recommendations must be the result of formal votes taken at meetings at which a quorum was present.

Staff meetings are not subject to the meetings law because they are not "governing bodies" and quorums are not required. ORS 192.610(3). Similarly, the law does not apply to individuals who are authorized to make recommendations. However, if staff meets with a quorum of the council or a city commission, committee or subcommittee to discuss matters of "policy or administration," or to clarify a decision or direction for staff, the meeting is within the scope of the law. ORS 192.610(5).

B. Meetings and Social Gatherings

The Public Meetings Law applies to all public body meetings for which a quorum is required to make a decision or deliberate toward a decision on any matter. Even meetings for the sole purpose of gathering information upon which to base a future decision or recommendation are covered. Hence, information gathering and investigative activities of a city body are subject to the law.

If a quorum of the governing body gathers to discuss matters outside its jurisdiction, the "meeting" is not legal under the meetings law. Governing bodies sometimes want to have retreats or goal-setting sessions. These types of meetings are nearly always subject to the Public Meetings Law because the governing body is deliberating toward a decision on official business or gathering information for making a decision. Council "retreats" and other gatherings must be held within the jurisdiction.

The law does not cover purely social meetings of council or committee members. In *Harris v. Nordquist*, 96 Or 19 (1989), the court concluded that social gatherings at which school board members sometimes discussed "what's going on at the school" did not violate the meetings law. The *purpose* of the meeting determines if the law applies. However, a purpose to deliberate on any matter of policy may arise *during* a social gathering and lead to a violation. When a quorum is present, members should avoid any discussions of official business during social gatherings. Some citizens may see social gatherings as a subterfuge for avoiding the law.

C. Electronic Communication

The Public Meetings Law expressly applies to telephonic conference calls and "other electronic communication" meetings of governing bodies. ORS 192.670(1). Notice and an opportunity for public access must be provided when meetings are conducted by electronic means. For non-executive session meetings, the public must be provided at least one place to

listen to the meeting by speakers or other devices. ORS 192.670(2). Special accommodations may be necessary to provide accessibility for persons with disabilities. The media must be provided such access for electronic executive sessions, unless the executive session is held under a statutory provision permitting its exclusion.

Communications between and among members of a public body on electronically linked personal computers, including email, text messaging and social media may be subject to the meetings law.

D. Serial Communications

Members of a governing body may violate the Oregon Public Meeting Law's prohibition on meeting in private even if a quorum never gather contemporaneously.

ORS 192.630(2) provides that a "quorum of a governing body may not meet in private for the purpose of deciding on or deliberating towards a decision on any matter." A decision is "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present. ORS 192.610(1). In other words, a quorum of a governing body may violate the prohibition against private meetings by (1) communicating in private, (2) for the purpose of deciding or deliberating on (3) any topic that may require a vote.

A recent Oregon Court of Appeals case held that the prohibition against meeting in private includes both when a quorum meets contemporaneously *and* when a series of non-contemporaneous communications between members of the governing body, in the aggregate, include a quorum and the purpose of the communications is to decide or deliberate on a matter that may come before the governing body. *Handy v. Lane Cnty.,* 274 Or. App. 644, 689, 362 P.3d 867, 894 (2015).[2]

To illustrate this point, the following communications between members of a five person governing body may violate the state's public meeting laws:

- A councilor forwards an email discussion she had with another member of the Council regarding a matter that may come before the governing body to a third member of the Council. Because the email messages, in the aggregate, include a quorum of the Council (3 Councilors), and the purposes of the communications was to discuss a matter that will require a vote before the Council, the email exchanges in the aggregate could violate state law under the Court of Appeals decision.

[2] On November 25, 2016, the Oregon Supreme Court overruled the Court of Appeals decision in part, but it did not directly address the issue of whether serial communications could violate the state's public meeting laws. Thus, although the Court of Appeals decision is no longer binding, it is still persuasive to trial courts and instructive to public officials regarding the limitations on their ability to communicate with each other outside the scope of a public meeting.

- A staff person individually calls members of a governing body to discuss a matter that will require a vote. When the staff person talks to each member, she shares with the member the opinions and comments of the other members. Although the members never speak directly, the staff person is acting as a conduit and allowing the members of the governing body to deliberate through her. These conversations, in the aggregate, could likewise violate state law.

- A citizen posts a comment on the city's Facebook page about an upcoming land use hearing and the comment generates a discussion. Two members of the governing body make comments and share opinion on the Facebook "thread." A third member reads the comments and also makes a comment. Because a quorum (3 members) have communicated opinions on the social media site on a matter that will require a vote before their body, the members may have violated state law.

As explained by the Court of Appeals, the prohibition against meeting in private does not include communications that are purely "information gathering." Members of a governing body should be aware, however, that the parameters of "information gathering" are not clear, and questions regarding whether and to what extent serial communications may occur should be directed to staff and/or the City Attorney's Office.

3. Legal Requirements

A. Notice

The Public Meetings Law requires public notice of the time and place of meetings. This requirement applies to regular, special and emergency meetings. ORS 192.640. The public notice requirements apply to *any* "meetings" of the governing body, and committees, subcommittees and advisory committees. Regular meeting notice must be *reasonably calculated* to give actual notice of the time and place of the meeting "to interested persons including news media that have requested notice." ORS 192.640(1). Notice must be given to persons and media that have stated in writing that they wish to be notified of every meeting.

If the meeting will consist of only an executive session, notice still must be given to members of the public body, the general public and news media that have requested notice. The notice must also state the specific legal section authorizing the executive session. ORS 192.640(2).

To help satisfy the accessibility requirements of ORS 192.630(5) and the Americans with Disabilities Act, the notice may provide the name of a person and telephone number (including TDD number) at the city to contact to request an interpreter for the hearing impaired or for other communication aids.

The notice for each meeting must "include a list of the principal subjects anticipated to be considered at the meeting." ORS 192.640(1). The list should be specific enough to permit members of the public to recognize the matters in which they are interested; ordinarily this can be met by distribution of an agenda. The agenda need not go into detail about subjects scheduled

for discussion or action, but should be sufficiently descriptive so interested persons can understand agenda topics.

The meetings law does not require the description of every proposed item of business in the notice. The law requires a reasonable effort to inform the public and interested persons of the nature of the more important matters ("principal subjects") coming before the body. The public body may consider additional "principal subjects" arising too late to be included in the notice. The listing of principal subjects "shall not limit the ability of the governing body to consider additional subjects." ORS 192.640(1).

The purpose of meeting notice is two-fold: general notice to the public at large and *actual* notice to specifically interested persons.

i. Regularly Scheduled Meetings: News media requesting notice *must* be given notice. Paid advertising is *not* required. If the city is aware of persons having a special interest in a particular action, those persons generally should be notified. This is not required if such notification would be unduly cumbersome or expensive.

ii. Special Meetings: At least 24 hours' notice is required for special meetings. This may be accomplished by press releases or phone calls to the media. The city should make reasonable attempts to notify interested persons either by mail or telephone. News media requesting notice must be notified.

iii. Emergency Meetings: An emergency meeting is a special meeting called on less than 24 hours' notice. An "actual emergency" must exist, and the minutes must describe the emergency justifying less than 24 hours' notice. ORS 192.640(3). The public body must identify and describe in the minutes the reason the meeting could not be delayed to allow at least 24 hours' notice. The law requires that "such notice as is appropriate to the circumstances" be given for emergency meetings. The city must attempt to contact the media and other interested persons to inform them of the meeting. Generally, such contacts are made by telephone.

The Oregon Court of Appeals stated in *Oregon Association of Classified Employees v. Salem-Keizer*, 95 Or App 28 (1989), that it will closely scrutinize any claim of an "actual emergency." The "emergency" must relate to the matter to be discussed at the emergency meeting. An actual emergency on one matter does not "justify a public body's emergency treatment of all business coming before it at approximately the same time." 95 Or App at 32. Nor does the convenience or inconvenience of members of the public body provide justification for an emergency meeting.

iv. Space and Location: Public bodies should consider the probable public attendance and meet where there is sufficient room for the expected attendance. If the regular meeting room is adequate for usual attendance, the public body is not required to seek larger quarters for a meeting that unexpectedly attracts an overflow crowd.

v. Geographic Location: Meetings of the council and other city bodies must be held within the city boundaries. ORS 192.630(4). A joint meeting with two or more governing bodies must be held within the geographic boundaries of the area over which one of those bodies has jurisdiction, or at the nearest practical location. This does not apply in the case of an actual emergency requiring immediate action. Additionally, the law permits public bodies to hold "training sessions" outside their jurisdiction, so long as no deliberation toward a decision is involved.

vi. Nondiscriminatory Site: Public bodies may hold public meetings in private places such as restaurants or residences, if *fully* adequate notice is given of the location so interested persons may attend, and if *fully* adequate arrangements are made for their convenient attendance. Municipal bodies may not meet at a place where discrimination based on race, creed, color, sex, age, national origin or disability is practiced. ORS 192.630(3). The Americans with Disabilities Act, 42 USC 12131 *et seq.,* prohibits discrimination against persons with disabilities by public entities, and by places of public accommodation for meeting sites owned by private entities.

B. Accessibility to Persons with Disabilities

ORS 192.630(5)(a) states:

> It is discrimination on the basis of disability for a governing body of a public body to meet in a place inaccessible to persons with disabilities, or, upon request of a person who is deaf or hard of hearing, to fail to make a good faith effort to have an interpreter for persons who are deaf or hard of hearing provided at a regularly scheduled meeting.

This statute imposes two requirements. First, public meetings must be held in places accessible to individuals with mobility and other impairments. Second, there must be a good faith effort to provide an interpreter for hearing impaired persons.

C. Public Attendance

The meetings law is a public attendance law, not a public participation law. Meetings are open to the public except for closed meetings specifically authorized. ORS 192.630. *The right of public attendance guaranteed by the Public Meetings Law does not include the right to participate by public testimony or comment.*

Other statutes, rules, charters, ordinances, resolutions, and bylaws outside the meetings law may require the council and other city bodies to hear public testimony or comment on certain matters. In circumstances where such requirements do not apply, the public body may conduct a meeting without public participation.

D. Control of Meetings

The presiding officer of any meeting has inherent authority to keep order and to impose any reasonable restrictions necessary for the efficient and orderly conduct of a meeting. If public participation is part of the meeting, the presiding officer may regulate the order and length of appearances and limit appearances to presentations of relevant points. Presiding officers need to ensure consistency in the application of whatever rules are imposed.

This authority extends to control over equipment such as cameras, tape recorders and microphones, but only to the extent of reasonable regulation. Members of the public may not be prohibited from unobtrusively recording the proceedings of a public meeting. The criminal law prohibition against electronically recording conversations without the consent of a participant does not apply to recording "public or semipublic meetings such as hearing before government or quasi-government bodies." ORS 165.540(6)(a).

Any person who fails to comply with reasonable rules of conduct and actually causes a disturbance may be asked or required to leave and upon failure to do so becomes a trespasser. *State v. Marbet,* 32 Or App 67 (1978). Cities should not eject an individual from a council meeting or otherwise prohibit free speech related activities, however, unless those actions actually disrupt the meeting. *See Norse v. City of Santa Cruz*, 629 F3d 966, 976 (9th Cir. 2010); *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013).

E. Voting

All official actions by a public body must be taken by public vote. The vote of each member must be recorded. ORS 192.650(1)(c). Written ballots may be used, but each ballot must identify the member voting and the vote must be announced. *Secret ballots are prohibited.*

The failure to record a vote is not itself a ground for reversing a decision. Without a showing that the failure to record a vote was related to a manipulation of the vote, a court will presume that public officials lawfully performed their duties. *Gilmore v. Board of Psychologist Examiners,* 81 Or App 321, 324 (1986).

F. Minutes and Recordkeeping

ORS 192.650 requires that a sound, video or digital recording or the taking of written minutes be taken at all meetings, except for executive sessions. Meeting minutes shall include at least the following:

i. Members of the governing body present;
ii. Motions, proposals, ordinances, resolutions, orders and measures proposed and their disposition;
iii. Results of all votes and the vote of each member by name;
iv. The substance of any discussion on any matter; and
v. Subject to the Public Records Law (ORS 192.311 to 192.478), a reference to any document discussed at the meeting. This reference does not change the status of the document under the Public Records Law.

Minutes need not be a verbatim transcript, and the meeting does not have to be recorded unless otherwise required by law. The minutes must be a true reflection of the matters discussed at the meeting and the views of the participants. ORS 192.650(1).

The public body must prepare minutes and have them available within a "reasonable time after the meeting." ORS 192.650(1). After minutes are prepared, they are public records subject to disclosure under the Public Records Law. They may not be withheld from the public merely because they have not yet been approved. If minutes have not been approved, they may be so identified.

Executive session minutes may be kept in the form of a tape recording rather than written minutes. ORS 192.650(2). No transcription of executive session minutes must be made unless otherwise required by law. If disclosure of material in the minutes would be inconsistent with the purpose of the executive session that was held under ORS 192.660, the material may be withheld from disclosure. ORS 192.650(2).

The media has no right to the minutes or tapes of executive sessions greater than that of the general public.

4. Executive (Closed) Sessions

A. Permissible Purposes

Public bodies may meet in executive sessions only in specified situations. ORS 192.660. An "executive session" is defined as "any meeting or part of a meeting of governing body that is *closed* to certain persons for deliberation on certain matters." ORS 192.610(2) (emphasis added).

The public body may hold an open session even when the law permits it to hold an executive session. A public body is authorized to hold closed sessions regarding the following subjects:

- Real Property Transactions;
- Exempt Public Records;
- Legal Counsel;
- City Employees; and
- Labor Negotiations.

B. Final Decision Prohibition

ORS 192.660(6) states: "No executive session may be held for the purpose of taking any final action or making any final decision." The public body may reach a consensus in executive session. The purpose of the "final decision" requirement is to allow the public to know the *results* of the discussions. Taking a formal vote in open session satisfies that requirement, even if the public vote merely confirms a decision made informally in closed session.

C. Method of Convening

An executive session may be called during a regular, special or emergency meeting for which notice has already been given in accordance with ORS 192.640. The person presiding at the meeting must announce the statutory authority for the executive session before going into closed session. ORS 192.660(1). When a meeting that will be solely an executive session is called, the statutory authority for the executive session must be set forth in addition to notice requirements for any other meeting.

D. Media Representation

The Public Meeting Law expressly provides that representatives of the news media *shall be allowed* to attend all executive sessions except for sessions involving deliberations with persons designated to carry on labor negotiations, *Barker v. City of Portland*, 67 Or App 23 (1984).

As stated above, the public bodies may consult with their attorney about pending litigation or litigation likely to be filed. The public body may exclude any member of the media from such a meeting if the member is a party to the litigation to be discussed or is an employee, agent or contractor of a new media organization that is a party to the litigation. ORS 192.660(5).

The public body may require the non-disclosure of specified information that is the subject of the executive session. ORS 192.660(4). The presiding officer should make the specification. Absent a specification, the entire proceedings may be reported and the purpose of the executive session may be frustrated. The media may discuss the statutory grounds justifying the executive session.

The meetings law contains no sanction to enforce the requirement that a news representative not disclose specified information. Penalties may raise freedom of press and speech questions. The Attorney General has concluded, "'enforcement'... depends upon cooperation between public officials and the media." AGM 146.

Reporters have no obligation to refrain from disclosing information obtained at an executive session if the public body fails to specify that certain information is not for publication. Reporters may, but are not required to, inquire whether a public body's failure to specify was an oversight. Reporters are under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in executive session. Reporters may disclose matters discussed in executive session that are not properly within the scope of announced statutory authorization of executive sessions.

The public body may request a news medium not to assign a particular representative to cover its meetings if the representative has irresponsibly violated a clearly valid nondisclosure requirement. That representative may be barred from future executive sessions because the meeting law purposes will be met by allowing attendance of another representative, and representatives from other news media.

E. Other Persons Attendance

The public body may permit others to attend executive sessions. Generally, executive sessions are closed to all except members of the public body, their staff, their attorney, persons reporting on the subject of the executive session or otherwise involved, and news media representatives. However, the law does not prohibit the public body from permitting other persons to attend.