

ATTORNEY/PROJECT MANAGER MEMORANDUM



To: Citywide Transportation Advisory Committee
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Subject: Open Meetings Law/Email Exchanges, Public Records and Minority Reports
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As we start the transportation advisory committee process, we want to give you legal and policy background for your role as a citizen advisory committee to the City Council. Some of you may know the basics already, but to be sure we are all on the same page, please review the discussion below.

Open Meetings Law and Advisory Committees:

You are now a member of a public body, tasked with providing recommendations to City Council on certain aspects of the City's transportation plans. Whenever a quorum (13 or more of you) gathers, it is a meeting subject to the open meetings laws. If a subcommittee is formed, the open meetings rules then apply to the subcommittee. A meeting includes social media messaging, text messaging, and emailing a quorum of the committee to discuss the business of the committee. All substantive communication should be with staff.

The policy behind Oregon Public Meetings Law (ORS 192.610 to 192.690) is:

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 be arrived at openly. ORS 192.620.

The term "governing body" is important in understanding the scope of Oregon Public Meetings Law. As defined under the Oregon Public Meetings Law, "governing body" includes not only the City Council, but every other board, committee, commission, task force or subcommittee that makes a decision for the City or makes a recommendation to any other "governing body". Since the Citywide Transportation Advisory Committee is charged with making recommendations to the City Council, it is considered a "governing body" subject to the Oregon Public Meetings Law. As long as an advisory body is itself a governing body, the fact that its members may be private citizens is irrelevant. The Oregon Public Meetings Law extends to private citizens without any decision-making

authority when they serve on a group that is authorized to furnish advice to a public body.

Whenever a quorum gathers, it is a meeting. If a subcommittee is formed, the quorum rules then apply to the subcommittee.

Successive Conversations and Electronic Communications as “Meetings”.

The main point of the Oregon Public Meetings Law is to require that all decisions and deliberations toward a decision by a “governing body” are made in a public meeting. The terms “deliberate” or “deliberation” are not defined, but are broadly applied. Any discussion or communication regarding a subject that is before (or could be before) the committee constitutes deliberation. See Attorney General’s Public Meetings Manual at 139-40. Not only that, information may not be conveyed to a quorum of the board at a meeting unless the meeting complies with public meeting law.¹ *Oregonian Publishing Co. v. Oregon State Board of Parole*, 95 Or App 501 (1988); see also ORS 192.620 (policy that the public has the right to know the “information” that a body is basing its deliberations or actions on).

While some personal discussion between members of less than a quorum of a “governing body” is allowed, any communications between two members of a committee regarding a substantive matter before the committee creates some risk of an Oregon Public Meetings Law violation. There are two main ways this can happen. The first is a series of conversations that eventually involves a quorum of the body. If one member suggests a course of action to two other members of a seven-member committee, and then each of those has a follow-up conversation with another member, the conversation has now included a quorum of the committee and is an Oregon Public Meetings Law violation if the conversations constitute deliberation. If a decision is made in this manner, that decision is void.

The other common way that the Oregon Public Meetings Law can easily be violated is by electronic communication. A substantive email sent by one member of a committee to all or a quorum of the committee may constitute deliberation or conveying of information that can only be done in a public meeting. A “reply all” message on the same substantive subject could likely be found to be a violation. A series of emails, even if none of them involve a quorum, may constitute a meeting. See *Dumdi v. Handi*, Findings of Fact and Conclusions of Law, Lane County Circuit Court No 16-02760 (Jan. 14, 2011) (series of meetings and emails among or at the direction of certain Lane County Commissioners constituted a meeting that should have been public). The Oregon Court of Appeals recently held that a series of communications, some by email and some by phone or in-person conversations, among members of a governing body could constitute a violation of the Oregon Public Meetings Law, even if no

¹ This does not mean that there can be no written communications to a governing body by staff or outside sources; however, if there are, those communications need to be made available to the public and included as part of the record of the proceeding. Any discussion or comment on those communications by members of the governing body must be in a public meeting.

communication involved a quorum of the body. *Handy v. Lane County*, 274 Or App 644 (2015). If the communications constituted deliberation, then they violated public meeting law.

In addressing the issue of whether a quorum needs to be in simultaneous contact, the court stated:

The legislative objective could be easily defeated if the statute rigidly applied only to contemporaneous gatherings of a quorum. For example, officials could be polled through an intermediary. In group email messages, officials could deliberate and declare their positions on upcoming issues. The same could be done through rapid, serial, group text messages in the moments before convening for an official meeting. In those examples, a quorum would have “deliberated” or “decided” the matter in “private” just as effectively as if all of the members had gathered secretly in a room and reached agreement before the public meeting. Given the purpose of the statute, we see no reason to treat those situations differently. *Oregonian Publishing Co.*, 95 Or App at 506.

The safest approach to compliance with the Oregon Public Meetings Law by committee members is to simply not have any substantive communication with other members of the committee outside of public meetings. Communication with staff is normally not a violation of public meeting law,² so all substantive communication should be with staff.

Finally, emails are not the only potential means of violating the Oregon Public Meetings Law – texts and social media posts may also constitute deliberation if related to the recommendation to council. Discussions via social media between members of the committee is also best avoided.

Information for Advisory Committees and Public Records

Documents, reports, etc., shared by committee members either directly or through staff are public records since they contain information related to the conduct of the public’s business. ORS 192.410(4)(a) and 192.420. If you have information you want shared with the committee, please provide it to staff, who will distribute it to the committee if appropriate, so that copies can be retained to comply with public records law.

Minority Reports

Other advisory committees have had discussed minority reports—when they are appropriate, how they should be used, what constitutes a minority, etc. Therefore, we thought it might be appropriate to address it with this committee in case the issue arises. As you all know, the committee was formed to represent a wide variety of community views as well as individual expertise. The idea is to encourage compromise, with the understanding that individuals can always testify as to their own views separately as citizens or part of other groups. Minority reports, while at times useful, to a

² Committee members cannot use staff to communicate with other members of the committee – the communications have to be directed solely to staff.

certain extent undermine the value of the advisory committee process as a whole IF they distract members from reaching compromise. They also should not be a substitute for elevating the position of a small number of individual views simply because they are committee members. Members will have every right to individually testify, write letters and make their views known if they choose during later public processes.

With a committee of 25 members, a minority position, if any, should be on a key substantive topic that has been debated and discussed, where it would aid the review of the Steering Committee to be formally informed of the minority view. To meet this end, at least one-third of the committee (7-8 people) should be in the minority. As with the majority view, any minority position should be drafted or reviewed by staff (consultant and/or city staff) for accuracy and fact-checking.

Procedurally, if a minority becomes a subcommittee with the authority to make a recommendation to the governing body, it becomes a “governing body” itself, subject to the Oregon Public Meetings Law. Thus, for example, a three-member committee of a seven-member board is a “governing body” if it is authorized to make decisions for or to advise the full board or another public body. If the subcommittee is only gathering and reporting information for the full committee it is not a governing body. Therefore, if a group of advisory committee members meet to formulate a minority report or recommendation, it is likely forming a subcommittee subject to the Oregon Public Meetings Law, so the gathering should occur subject to the public meeting and notice requirements. No public participation is required, but the discussion cannot be held in a location that pre-empts the right of the public to attend and listen (i.e., by phone, email, or at a coffee shop or pub--sorry).

Our recommendation: To the extent a strong minority position exists on a key issue, and there is time for the drafting of a minority position by the person or persons creating the minority position (staff will not draft a minority position), the discussion should occur at the time of the vote on the topic. Thus, no separate process (scheduling/notice) of a meeting is then required and the minority position can become part of any written report to Council. For the reasons discussed at the beginning of this section, this approach should be used sparingly and wisely by the advisory committee.