



CITY OF BEND

M E M O R A N D U M

To: Juniper Ridge Management Advisory Board

From: Mary Alice Winters, City Attorney

Subject: Open Meetings Law/Email Exchanges, Public Records and Minority Reports

Date: June 17, 2019

This memo is to give you legal and policy background for your role as a citizen advisory committee to the City Council and/or the Bend Urban Renewal Agency (BURA) on the Open Meetings and Records law. 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:

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

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 by the 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 a recommendation to any other “governing body”. Since the Juniper Ridge Management Advisory Board (JRMAB) is charged with making recommendations to the City Council and/or BURA, 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 (majority) gathers in order to make a decision or deliberate toward a decision on any matter, it is a meeting. If a subcommittee of the JRMAB is formed to make a group recommendation to the JRMAB (as opposed to simply fact-finding), the notice and quorum rules then apply to the subcommittee. However, purely social gatherings of the members of a governing body are not covered by the law. The *purpose* of the meeting triggers the requirements of the law.

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” be 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. Therefore, even a meeting for the purpose of gathering information to serve as the basis for a subsequent decision or recommendation of the governing body must comply with public meetings 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.

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

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. However, any discussion or comment on those communications by members of the governing body must be in a public meeting.

could constitute a violation of the Oregon Public Meetings Law, even if no 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 Meetings 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 avoid substantive communication about committee business 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 about matters before the committee is also best avoided.

Decisions made in violation of the public meetings law are voidable (meaning a court can invalidate the decision, depending on findings of intent or willful misconduct) and can award attorney’s fees against the public body or even the members of the governing body for egregious violations.

Information for Advisory Committees and Public Records

Information. 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. All email related to the committee work should be copied to City staff. Staff will maintain copies of all communications and documents between the City and the committee, and respond in the event of a public records request.

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

However, if any committee members use personal email for committee business that is *not* copied to staff, it could be subject to a public records request and the committee member would be responsible for searching their email. Therefore, any such personal email exchanges between committee members or with the citizens is strongly discouraged. The same is true for texting (substantive text, not texts about meeting times, etc.) or social media.

Public records must be maintained. Destruction of public records is a misdemeanor. If you do communicate about committee business, you must keep copies of all communications. By copying staff on all communications, we can ensure the records are properly maintained.