

# ***City Council***

## ***Study Session Agenda***

**Tuesday, January 12, 2016  
Library Meeting Room  
951 Spruce Street  
7:00 PM**

- 1. CALL TO ORDER**
- 2. ETHICS TRAINING**
  - Presentation by Scotty Krob, Special Counsel
  - Public Comments (Please limit to three minutes each)
  - Council Questions and Comments
- 3. ADJOURNMENT**

# LOUISVILLE ETHICS WORKSHOP

**JANUARY 12, 2016**

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## **I. GENERAL POLICIES UNDERLYING ETHICS FOR LOCAL GOVERNMENTAL OFFICIALS<sup>1</sup>**

- Open government and public participation (LCOE Section 5-4)
- Those entrusted with positions in the City government must commit to adhering to the letter and spirit of the Code of Ethics. (LCOE Section 5-6(b) and ( c))
- Those in positions of public responsibility should be committed to high levels of ethical and moral conduct. (LCOE Section 5-6(b))
- Promote the people’s faith that their government is acting for the good of the public. (LCOE Section 5-6(b))
- Promote a harmonious and trusting relationship between the City government and the people it serves. (LCOE Section 5-6(b))
- Strive to avoid situations that may create public perceptions of violations of the Code of Ethics. Perceptions of such violations can have the same negative impacts on public trust as actual violations. (LCOE Section 5-6( c))
- Promote honest government (LCOE Section 5-6(d))
- Prohibit use of public office for private gain (LCOE Section 5-6(e))
- Encourage quality individuals to serve in public office by not placing undue limitations on their ability to earn a living and pursue other interests

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<sup>1</sup>Throughout this outline “LCOE” refers to the Louisville Code of Ethics, Sections 5-6 through 5-17 of the Louisville Charter. References in this outline to the Colorado Revised Statutes are abbreviated as “C.R.S.” and discussion of state statutes appear inside brackets and are italicized.

## II. LOUISVILLE CODE OF ETHICS (LCOE) vs. COLORADO STATUTES - WHICH CONTROLS?

LCOE 5-6(e) provides that to the extent matters addressed in the Louisville Code of Ethics are also addressed in state or federal law, it is the intent of the Code of Ethics that the more restrictive provisions shall control. As a result, in some instances where both the LCOE and C.R.S. address a particular issue, both may need to be considered, to determine which is more restrictive. In other instances, if the conduct is not addressed by the LCOE, but is addressed in C.R.S., then the provisions of C.R.S. will apply. Likewise, if the LCOE addresses conduct that is not addressed by C.R.S., then LCOE applies.

## III. LOUISVILLE CODE OF ETHICS (LCOE)

### A. DEFINITIONS (LCOE Section 5-7)

1. “Interest” means a pecuniary, property, or commercial benefit, or any other benefit the primary significance of which is economic gain or the avoidance of economic loss, but does not include:
  - Matters in which a similar benefit is conferred on all persons or property similarly situated nor does it include ownership or control of shares of stock; or
  - Beneficial interest in shares of stock the aggregate amount of which constitutes 1% or less of the shares of the entity then outstanding.
2. “Interest of the following persons and entities shall be deemed to constitute an interest of the officer, public body member or employee for purposes of Sections 5-9 and 5-10:”
  - Relatives
  - Business in which the official/employee is an officer, director, employee, partner, principal, member, or owner (other than stockholder)
  - Business in which the official/employee controls more than 1% of the outstanding shares.
  - “Any business entity in which the officer (official/employee?) is an officer, director, employee, partner, principal member or owner (other than stockholder) where the business entity is seeking to advance its financial benefit through an official action of the City, if the officer would be directly or indirectly involved in making the decision.” (emphasis added)

- “Interest” is deemed to continue for 1 year after the officer/(employee’s) actual interest has ceased.

3. “Business entity” means:

- Any corporation whether for profit or nonprofit, governmental entity, business, trust, limited liability company, partnership, association, or other legal entity; and
- Any other form of business, sole proprietorship, firm, or venture, carried on for profit.

B. LCOE SECTION 5-9 - ETHICS STANDARDS (THE GUTS OF THE LCOE)

1. **Conduct relating to public contracts**

Section 5-9(b): No official/employee who has the power or duty to perform, or has any influence over, an official action related to a contract shall:

- a) Have an interest in a contract between a business entity and the City (unless the City’s procedures applicable to the solicitation and acceptance of such contract are followed and unless the official/employee has complied with Section 5-10)
- b) Have an interest in a business entity that has a contract with the City (unless the City’s procedures applicable to the solicitation and acceptance of such contract are followed and unless the official/employee has complied with Section 5-10)
- c) Appear before the City Council (or other public body) on behalf of any business entity that has a contract with the City (Note: No exception based on compliance with Section 5-10)
- d) Solicit or accept employment with any party to a contract with the City, “if the offer or acceptance is related to or results from official action performed by the official/employee with regard to the contract.”
- e) Solicit or accept a present or future gift, favor, discount, service or thing of value from a party involved in a contract with the City, except an occasional nonpecuniary gift of \$15 or less, unless the gift, no matter how small, may be associated with a contract that is or may be one for which the officer/employee has the power or duty to perform an official action

*[State statute relating to receipt of gifts: Official/employee shall not accept a gift of substantial value or a substantial economic benefit (1) which would tend to improperly influence a reasonable person in his position to depart from the faithful discharge of his public duties, or (2) which he knows or a reasonable person should know is primarily for the purpose of rewarding him for official action he has taken. C.R.S. 24-18-104(1)(b)]*

*Note objective standard included in statute. Therefore it is not a defense that the gift did not actually influence the decision.*

*Statute is also broader than Louisville provisions in that Louisville provisions relate only to parties contracting with the City, while the state statute covers any relationship - land application approvals, building permits, liquor licenses, etc.]*

*An “economic benefit tantamount o a gift of substantial value” includes: (1) a loan at an interest rate substantially lower than the prevalent commercial rate for similar loans, or (2) compensation received for private services at a rate substantially exceeding their fair market value of such services. C.R.S. 24-18-104(2)*

*Several items are specifically identified as not constituting gifts:*

- campaign contributions*
  - honoraria*
  - “items of perishable or nonpermanent value, including, but not limited to, meals, lodging, travel expenses, or tickets to sporting, recreational, education or cultural events.”*
- C.R.S. 24-18-104(3)]*

*[State statute relating to involvement with government contracts generally:*

**General rule:** *Officials/employees “shall not be interested in any contract made by them in their official capacity or by any body, agency or board of which they are members or employees.” C.R.S. 24-18-201(1)*

**Exceptions to general rule:** *C.R.S. 24-18-201(1)(b) specifically defines certain types of transactions as not constituting “contracts” for purposes of this section. Those exceptions include:*

*- Contracts awarded to the lowest responsible bidder based on competitive bidding procedures*

*- Merchandise sold to the highest bidder at public auction*

*- Investments or deposits in financial institutions which are in the business of loaning or receiving monies*

*- A contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract. It shall be presumed that a local government could not otherwise reasonably afford itself of the subject of a contract if the additional costs to the local government is greater than 10% of a contract with an interested party or if the contract is for services that must be performed within a limited time period and no other contractor can provide those services within that time period.*

*- A contract with respect to which any...official or employee has disclosed a personal interest and has not voted thereon or with respect to which any member of the governing body of a local government has voted thereon in accordance with Section 24-18-109(3)(b) or 31-40-404(3), C.R.S. Any such disclosure shall be made “to the governing body...”*

**2. Other conduct (not related to public contracts)**

- a) No nepotism - No official/employee shall be responsible for hiring, appointing, retaining or supervising any relative, nor attempt to influence such matters. (LCOE Section 5-9( c))
- b) More no nepotism - No official/employee shall influence or attempt to influence compensation paid to any relative (Section 5-9(d))
- c) Still more no nepotism - No relative of an official/employee shall be hired, unless the City’s personnel procedures have been followed. (LCOE Section 5-9(e))

- d) No use of non-public information - No official/employee shall use for personal or private gain any information, not available to the public, and which is obtained by reason of his or her position with the City, or disclose such information for any purpose except as for City purposes. (LCOE Section 5-9(f))

*[State statute: Official/employee shall not disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interest.,” C.R.S. 24-18-104(1)(a)*

*Note state statute is more narrow here in that it only applies to confidential information, not all information learned in the course of employment, but it is more stringent in that the state statute prohibits not only the use of such information, but also its disclosure - not only are you prohibited from benefitting from such information, you are prohibited from discussing it.*

*“Financial interest” is “a substantial interest that is (a) an ownership interest in a business; (b) a creditor interest in an insolvent business; ( c) an employment or prospective employment; (d) ownership interest in real or personal property; (e) a loan or other debtor interest; or (f) director or officer in a business. C.R.S. 24-18-102(4)*

- e) No outside employment that would tend to impair the employee’s independence of judgment in performing his/her duties. (LCOE Section 5-9(g))
- f) No appointment to public bodies, for the City Manager and department heads (LCOE Section 5-9(h))
- g) No use of employee’s time for personal or private purposes. (LCOE Section 5-9(I))
- h) No use of City vehicles or equipment, except in the same manner as available to any other person, or except in a manner that will substantially benefit the City. (LCOE Section 5-9(j))

*[State statute relating to use of government facilities and equipment: It is not a breach of fiduciary duty or the public trust for a local government official or employee to ...use local government facilities or equipment to communicate with constituents, family members or business associates...” C.R.S. 2418-109(4)]*

- i) No special consideration to official/employee (LCOE Section 5-9(k))

j) Limitations on activities for 2 years after termination with City:

- 1) No appearance before City Council on behalf of a business entity in connection with any matter relating to things done for the City prior to termination (LCOE Section 5-9)(1)(1)
- 2) No appearance before the City Council on behalf of a business entity on any matter (whether related to previous employment or not) without disclosing the prior relationship with the City (LCOE Section 5-9(1)(2))

*[State statute: Former employees may not within 6 months of the end of their employment contract or be employed by any employer that contracts with a local government involving matters with which the former employee was directly involved during his employment.]*

k) Limitations on activities during relationship with City: No appearance before City Council or public body on behalf of any business entity, except if the appearance does not concern a matter that has or may come before the body of which the person is a member. (LCOE Section 5-9(m) and (n))

l) Okay to appear before City Council or public entity on behalf of persons or other business entities, so long as it does not concern the official's/employee's interest. (LCOE Section 5-9(o))

m) No vote trading (LCOE Section 5-9(p))

n) No employment of officials by City for 2 years after leaving office (LCOE Section 5-9(q))

o) No acquisition of real estate interests in property the City is considering acquiring. (LCOE Section 5-9 ( r))

p) Gifts

1) AMENDMENT 41 and LCOE

This Colorado Constitutional amendment was approved by the voters in November 2006, establishing ethical standards and limiting gifts received by local officials from lobbyists and others. Amendment 41 allowed local governments to opt out of its provisions, if the municipality had a more restrictive ethical ordinance. Louisville's code of ethics is more restrictive and Louisville did, by resolution, opt out of Amendment 41.

For example, Amendment 41 limited the value of things an official could receive to \$50, while Louisville's code of ethics limits it to \$15.

2) Gift ban for certain independent contractors

By resolution, the City Council extended the limitations on gifts that can be accepted by officers, public body members and employees to certain independent contractors who have the power or duty to perform, or have any influence over an official action of the City.

C. LCOE SECTION 5-10 - DISCLOSURE/NONPARTICIPATION

1. Disclosure/nonparticipation requirements that apply to any officer who has an interest in a matter (1) before City Council, or (2) before the public body of which he/she is a member.
2. Disclosure/Nonparticipation process for such matters
  - a) Immediately and publicly disclose the nature and extent of the interest
  - b) Not participate in discussion or decision
  - c) Leave the room
3. Disclosure/nonparticipation requirements that apply to any matter in which an official/employee has an interest.
4. Disclosure/nonparticipation process for such matters
  - a) Don't participate in any discussion with City Council, other public body or any employee involved in the action.
  - b) Don't attempt to influence publicly or privately, City Council, the public body or any employee involved in the action.
5. Disclosure/nonparticipation requirements when the interest of a competitor of an official/employee is involved
6. Disclosure/nonparticipation process for such matters:
  - a) Don't participate in discussions with City Council, other public body or any employee involved in the action.
  - b) Don't attempt to influence publicly or privately, City Council,

the public body or any employee involved in the action. (LCOE Section 5-10(d))

*State statute regarding disclosure/nonparticipation:*

**General rule:** *A member of the governing body who has a personal or private interest in any matter proposed or pending before the governing body shall:*

- *Not vote, and*

- *Not attempt to influence the votes of other members of the governing body. C.R.S. 31-4-404(2)*

**Exception:** *A member of the governing body may vote notwithstanding his or her personal or private interest if: (1) such member's participation is necessary to achieve a quorum or otherwise enable the body to act, and (2) disclosure is made pursuant to Section 24-18-110, C.R.S. (Which requires disclosure in writing to the Secretary of State prior to taking official action. C.R.S. 31-4-404(3).*

*C.R.S. 24-18-110 provides for voluntary disclosure by a local government official or employee of the nature of his private interest prior to acting in a manner that may impinge upon his fiduciary duty and the public trust. Proper disclosure is an affirmative defense to "any civil or criminal action or any other sanction."*

*Proper disclosure under C.R.S. 24-18-110:*

- *Must be in writing, to the Secretary of State*

- *Must include:*

*Amount of financial interest, if any  
Purpose and duration of services rendered, if any,  
Compensation received for services, or  
Such other information as is necessary to  
describe" the interest*

**IV. ETHICAL RULES IN THE COLORADO REVISED STATUTES COVERING TOPICS NOT COVERED BY THE LCOE**

*A. Transactions with Those One Supervises or Inspects*

*Official/employee shall not “engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties.” C.R.S. 24-18-109(2)(a)*

*B. Acts Benefitting One’s Business or Client*

*Official shall not “perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.” C.R.S. 24-18-109(2)(b)*

*“Official act” includes any “vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” C.R.S. 24-18-102(7)*

**V. ETHICAL GUIDELINES IN THE COLORADO REVISED STATUTES**

*(Keep in mind, these are not rules, but are merely “intended as guides to conduct and do not constitute violations as such of the public trust of office or employment” C.R.S. 24-18-105(1)*

*An official/employee should not:*

- (1) “acquire or hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority.” (C.R.S. 24-18-105(2))*
- (2) “Within 6 months following termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term of employment. These matters include rules, other than rules of general application, which he actively helped to formulate and applications, claims or contested cases in the consideration of which he was an active participant. (C.R.S. 24-18-105(3))*
- (3) “Perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.” (C.R.S. 24-18-105(4))*

## **VI. QUASI - JUDICIAL PROCEEDINGS – SPECIAL ETHICAL CONSIDERATIONS**

### **A. Understanding the distinction between legislative and quasi-judicial matters**

1. Legislative matters are matters of general concern or applicability throughout a municipality or certain portions thereof. Examples of legislative acts include adoption of a master plan, imposition of a fire ban or watering limitations, adoption of a junk ordinance, enactment of a tap or impact fee, etc.
2. Quasi-judicial matters are somewhat more difficult to identify. They often relate to only a specific individual or a piece of property and usually involve applying specified standards to a particular circumstance. To be considered quasi-judicial, a matter must satisfy three criteria:
  - a) Notice is required before action may be taken
  - b) A hearing must be conducted before action may be taken
  - c) The body sitting as the quasi-judicial body must apply specified criteria to a particular person, property or circumstance.

*See Baldauf v. Roberts*, 37 P.3d 483 (Colo. App. 2001)

Examples of quasi-judicial matters include liquor license applications, rezonings, special or conditional use permits, variances, etc.

### **B. Constituent contacts regarding legislative matters**

For an elected official to be contacted by a constituent regarding a legislative matter is not only proper from an ethical standpoint, but it is one of the common and endearing characteristics of local government. Local government is often the only level citizens feel they are able to contact with any degree of effectiveness.

### **C. Constituent contacts regarding quasi-judicial matters**

The more problematic area from an ethics standpoint involves contacts by constituents regarding quasi-judicial matters. The source of limitations in this area comes not from local law or state statute, but rather from the case law relating to due process of law under the state and federal constitution. In general, a party appearing before a quasi-judicial body is entitled to a fair and impartial tribunal, just as a party before a court would expect to receive. It is this entitlement that limits what the “quasi-judges” can and cannot do.

An elected official should base his/her decision on matters presented during the hearing.

An elected official sitting in a quasi-judicial capacity should not discuss a pending quasi-judicial matter with any of the parties involved in the matter, outside the hearing.

An elected official sitting in a quasi-judicial capacity should not discuss a pending quasi-judicial matter with a member of the public outside the hearing.

An elected official sitting in a quasi-judicial capacity should not discuss a pending quasi-judicial matter with staff or other members of the quasi-judicial body outside the hearing.

To the extent an elected official sitting in a quasi-judicial capacity has discussions with parties or citizens prior to a quasi-judicial hearing, the official should fully disclose such discussions at the outset of the hearing. The official should give any of the parties to the application or opposing the application an opportunity to request that the official not participate in the hearing if they feel his or her ex parte discussions prejudiced their ability to be fair and impartial. The official is not required to refrain from participation based on such a request.

To the extent an elected official sitting in a quasi-judicial capacity receives written materials or documents relating to the application, the official should fully disclose such documents and, unless they are likely to prejudice the rest of the tribunal, should provide them with copies.

In cases, where the official's ex parte discussions or review of documents outside the hearing renders them unable to be fair and impartial, they should refrain from participating. Louisville's Code of Ethics suggests that such nonparticipation may be appropriate where there would be an appearance of unfairness or partiality if the official participated in the hearing.

**D. Constituent contacts in e-mail, electronic media times**

The explosion in recent years in e-mail communications and social media contacts have made it even more problematic to avoid ex parte communications. Many elected officials make their official e-mail address available to the public. Upon receiving an e-mail, it may be difficult to determine whether it relates to a legislative matter or a quasi-judicial matter pending before the Council or Commission until you open it. Such communications require added vigilance in considering whether to open the communication, whether and how to respond to it, and disclosures that may need to be made to the remainder of Council regarding information received.

**E. Applying evidence presented to relevant criteria**

The task of a Council member sitting as quasi-judge is to determine whether the relevant criteria that apply to a particular application or matter (liquor license, rezoning request, etc.) have been satisfied based on the evidence and documents presented.

Easy electronic access to information has again made a Council member's task more problematic. Council members are discouraged from seeking answers regarding factual issues they may see through their own efforts, rather than by inquiring of the parties. No matter how easy it might be to find information through the internet or otherwise, the fundamental rules governing conduct in quasi-judicial matters remain the same: You are to consider what the parties present to you. **YOU ARE THE JUDGE, NOT THE INVESTIGATOR.** Unilateral searches by Council members in a quasi-judicial setting may create due process and notice problems, as well as creating unnecessary grounds for judicial challenges to the Council's ultimate decision.

## VII. OPEN MEETINGS LAW (OML)

### A. OPEN MEETINGS LAW GENERALLY

1. It is the policy of the state of Colorado "that the formation of public policy is public business and may not be conducted in secret." C.R.S. § 24-6-401 et seq. (Open Meetings Law, "OML"). With this declaration in the OML, Colorado has recognized citizens' rights to attend government meetings. Under the OML, "[a]ll 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." C.R.S. § 24-6-402 (2)(b).

The LCOE reflects a similar sentiment. Section 5-1(a) provides:

"It is the policy of the City that the activities of City government should be conducted in public to the greatest extent feasible in order to assure public participation and enhance public accountability."

2. The OML imposes notice and minute-keeping requirements on "meetings" of "local public bodies."
3. The OML defines a "public body" to include any board, committee, commission or other policymaking, rulemaking, advisory or formally constituted body of a political subdivision of the state, such as a municipality. It does not include staff of the public body. However, it is important to recognize that it is not limited to City Council, but also includes advisory committees and other committees within the City if they are "formally constituted."
4. The OML defines a "meeting" as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." The Colorado Supreme Court has provided guidance on what types of gatherings are covered by the OML. For a gathering to be a "meeting" under OML, "there must be a demonstrated link between the meeting and the policy-making powers of the government entity holding or attending the meeting." *BOCC of Costilla County v. Costilla County Conservancy District*, 88 P.3d 1188 (Colo. 2004). The Court held that such a link exists when the meeting is "convened to discuss or undertake...a rule, regulation, ordinance, or formal action." The Court further explained that "merely discussing matters of public importance" does not trigger the requirements of the OML. This distinction between gatherings where matters of public importance are discussed (OML not applicable) and gatherings that are part of the policy-making process of the particular public body (OML applies), is a critical inquiry.

Therefore, it is important to recognize that not every gathering of 3 or more Council members or committee members (or 2 members of a 3 person committee) for example, is a meeting under OML, even if matters affecting the City are discussed. It is only when policy making gatherings occur that are convened to discuss or undertake a rule, regulation, ordinance, or formal action, that the gathering constitutes a meeting. Chance meetings and social gatherings where discussion of public business is not the central purpose are expressly exempted from the OML.

However, it is equally important to recognize that when [“policy-making] discussions do take place, they must do so during a proper public meeting, duly noticed and with minutes being taken. See *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Park and Outdoor Recreation*, 292 P.3d 1132 (Colo. App. 2012). Where policy making discussions are held before or after the formal meeting, whether in person, by phone, or e-mail exchange, the OML is violated, exposing the municipality to invalidation of any action it took and a possible award of attorneys fees. *Id.* Where policy discussions and decisions are made in a private meeting before the public meeting, and the public meeting is a mere rubber stamp, the acts of the public body are invalid. *Bagby v. School District No. 1*, 528 P.2d 1299 (Colo. 1974) (“when the majority of the public body’s work is done outside the public eye, the public is deprived of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Board.”)

It is also important to keep in mind that although there are substantial limitations and risks involved in discussions between or among Council members or committee members, those do not apply to discussions between a Council member or committee member and City staff. Staff communications generally do not implicate the OML, though they may still be subject to CORA requests in some circumstances.

**B. THE OPEN MEETINGS LAW AND DISCUSSION OF PUBLIC ISSUES AMONG COUNCIL MEMBERS OR COMMITTEE MEMBERS VIA E-MAIL**

1. The OML explicitly addresses the use of electronic mail, stating:

If elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail shall be subject to the requirements of this section. Electronic mail communication among elected officials that does not relate to pending legislation or other public business shall not be considered a “meeting” within the meaning of this section.

C.R.S. § 24-6-402(2)(d)(III) (emphasis added).

Therefore, if the e-mails involve 3 or more Council or committee members and “discuss pending legislation or other public business” or are part of the policy making process, then the entire panoply of requirements in § 402, including public notice, minutes, and open records requirements, will apply to such communications under the terms of the statute. As a reminder, e-mails should never be used to discuss the substantive aspects of a quasi-judicial matter, as those discussions should take place only during the quasi-judicial hearing.

2. The likelihood that e-mail communications will be deemed to be a “meeting” under the CML increase substantially if a mechanism such as instant messaging is used. The OML defines a "meeting" as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” C.R.S. § 24-6-402 (1)(b). This definition is likely to encompass instant messaging, particularly in light of its real time nature and back-and-forth discussion. Instant messaging falls under the definition of “electronic mail,” with all the attendant consequences noted above. Although the OML does not define “electronic mail,” the closely related Open Records Act does. "Electronic mail" is:

An electronic message that is transmitted between two or more computers or electronic terminals, whether or not the message is converted to hard copy format after receipt and whether or not the message is viewed upon transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network.

C.R.S. § 24-72-202 (1.2).

Some municipal attorneys have taken the position that because a meeting is described as a “gathering”, this implies that in the e-mail setting the communications must occur in a chat room format or otherwise be very contemporaneous in order to constitute a “meeting.” Although no appellate case has addressed this issue directly, one of the improper meetings in the *Colorado Off Highway Vehicle Coalition* case was an email exchange, suggesting that it may be deemed a meeting even if it does not occur in a chat room or similar setting. Accordingly, the more prudent course is to not use e-mails to discuss items that are part of the Council’s policy-making process.

These limitations and requirements of the OML should be kept in mind when discussing public matters via e-mail. Attached to this handout is a very useful memo from Sam Light summarizing the “do’s” and “don’ts” of using e-mail. Sam’s guidelines should be followed by elected, as well as appointed officials.

## C. EXECUTIVE SESSIONS

1. The OML provides for executive sessions during a regular or special meeting under certain specific circumstances, See C.R.S. Section 24-6-402.
2. However, executive sessions in Louisville are governed by the more restrictive provisions of the LCOE.

LCOE 5-1, as mentioned above, emphasizes that “the activities of City government should be conducted in public to the greatest extent feasible...”

LCOE is more restrictive than state statute in several aspects:

- It expressly prohibits not only formal action in executive session similar to the state statute, but it also bars informal or straw votes.
- More importantly, the LCOE provisions are more limited as to the reasons Council can go into executive session. For example, the state statute authorizes an executive session to address matters that are subject to negotiation and to obtain legal advice from the city attorney generally, not just on litigation matters or the purchase of property or water rights. As a result fewer matters may be considered in executive session under the LCOE than under the state statute.
- Only City Council, not other public bodies within the City such as planning commission or advisory committees, is authorized under the Charter to conduct an executive session.

## D. E-MAILS THAT MAY BE SUBJECT TO REQUESTS UNDER THE OPEN RECORDS ACT

1. The Open Records Act states "All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law." C.R.S. § 24-72-203 (1)(a). The presumption in Colorado is that government meetings are open and that public records are accessible. See *Cole v. State*, 673 P.2d 345 (Colo. 1983); *Sargent School Dist. v. Western Services*, 751 P.2d 56 (Colo. 1988). The Open Records Act defines “Public Records” as including:

[T]he correspondence of elected officials, except to the extent that such correspondence is:

- (A) Work product;

(B) Without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds;

(C) A communication from a constituent to an elected official that clearly implies by its nature or content that the constituent expects that it is confidential or a communication from the elected official in response to such a communication from a constituent; or

(D) Subject to nondisclosure as required in section 24-72-204 (1).

2. C.R.S. § 24-72-202 (6)(a)(II). "Correspondence" is defined under the Open Records Act as "a communication that is sent to or received by one or more specifically identified individuals and that is or can be produced in written form, including, without limitation . . . [c]ommunications sent via electronic mail." C.R.S. § 24-72-202 (1). The statute goes on to define "Electronic mail" as "an electronic message that is transmitted between two or more computers or electronic terminals, whether or not the message is converted to hard copy format after receipt and whether or not the message is viewed upon transmission or stored for later retrieval." C.R.S. § 24-72-202 (1).
3. Exceptions to Open Records

The Open Records Act and the public's right of inspection reaches all of an elected official's e-mails if they are "public documents," subject only to the exceptions listed in subsection 24-72-202 (6)(a)(II). Those exceptions are as follows:

a) Work product:

E-mail or correspondence comprising "work product" is exempt from the public inspection requirements of the Open Records Act. See C.R.S. § 24-72-202 (6)(a)(II)(A). Under the Open Records Act "Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority." C.R.S. § 24-72-202 (6.5). The statute also very carefully defines what is "not" work product. "Work product" does not include:

(I) Any final version of a document that expresses a final

decision by an elected official;

(II) Any final version of a fiscal or performance audit report or similar document the purpose of which is to investigate, track, or account for the operation or management of a public entity or the expenditure of public money, together with the final version of any supporting material attached to such final report or document;

(III) Any final accounting or final financial record or report;

(IV) Any materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official.

C.R.S. § 24-72-202 (6.5)( c). Additionally, the statute states that “‘work product’ also does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record.” C.R.S. § 24-72-202 (6.5)(d)(I).

b) Without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds:

To be a "public record" as defined by subsection (6)(a)(II), an e-mail message must be for use in the performance of public functions or involve the receipt of public funds. If e-mails are merely personal correspondences they are not considered to be public records open to inspection. The Colorado Supreme Court, in applying the Open Records Act held that a message sent in furtherance of a personal relationship does not fall within the definition of a public record and the fact that a public employee or public official sent or received a message while compensated by public funds or using publicly owned computer equipment is insufficient to make the message a "public record". *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190 (Colo. 2005).

However, just because an e-mail contains correspondence of a personal nature does not mean it is shielded from public inspection if it also discusses the performance of a “public

function or the receipt of public funds.” See *id.* at 205. A mixed message that addresses both the performance of public functions and private matters must be redacted to exclude from disclosure the information that does not address the performance of public functions. See *id.* The open records law does not mandate that e-mail records be disclosed in complete form or not at all. See *id.*

Therefore, e-mails of a personal nature received or sent by the elected officials are not susceptible to Open Records Act requests, unless they are mixed messages, in which case they must be disclosed, with the personal communications redacted.

- c) A communication from a constituent to an elected official that clearly implies by its nature or content that the constituent expects that it is confidential or a communication from the elected official in response to such a communication from a constituent:
- d) Subject to nondisclosure as required in section 24-72-204 (1).

Section 24-72-204, C.R.S., describes the grounds for allowance or denial of inspection of public documents and the procedures to be used by the custodian of the “public records.” The custodian “shall” allow inspection of public records, unless the inspection would be a violation of state law, a federal statute, a federal regulation, the rules of the supreme court, or the order of any court. See C.R.S. § 24-72-204 (1). Additional grounds for refusal to allow inspection are provided in subsections (2) and (3) of section 24-72-204.

Subsection (3) provides a plethora of grounds for refusal, most of which are concerned with the legitimate privacy interests of individuals. Most relevant to the e-mails of the local elected officials is the grounds based on the “deliberative process” privilege. The statute states that “[t]he custodian shall deny the right of inspection of . . . records protected under the common law governmental or “deliberative process” privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government, unless the privilege has been waived.” C.R.S. §24-72-204(3)(a)(XIII). The statute goes on to describe the specific procedures that must be followed in claiming the

privilege.<sup>2</sup>

4. Lessons from the Tracy Baker case

*Denver Publishing Co v. BOCC of Arapahoe County*, 121 P.3d 190 (Colo. 2005)

a) Court balanced the public interest in the disclosure of information relevant to alleged official misconduct and the privacy rights of individuals.

b) Two step test for e-mails:

Step 1: Look at by whom and where the records are kept and maintained. Do not consider the content in this step. If it is not kept by a public entity it is not a public record. If it is kept or maintained by a public entity, then go to step 2:

Step 2: Is it kept by the government for use in exercise of functions required or authorized by law or administrative rule or involve the receipt or expenditure of public funds? This inquiry is content driven.

Based on this analysis, place the e-mail in one of three (3) categories and treat as indicated:

Category 1. Those dealing with Baker's performance as a public office or expenditure of public funds must be provided.

Category 2. Those dealing with private communications need not be provided.

Category 3. Those that are mixed, containing both public and private communications, are to be redacted by the D. Ct. And provided.

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<sup>2</sup>If any public record is withheld pursuant to this subparagraph (XIII), the custodian shall provide the applicant with a sworn statement specifically describing each document withheld, explaining why each such document is privileged, and why disclosure would cause substantial injury to the public interest. If the applicant so requests, the custodian shall apply to the district court for an order permitting him or her to restrict disclosure. The application shall be subject to the procedures and burden of proof provided for in subsection (6) of this section. All persons entitled to claim the privilege with respect to the records in issue shall be given notice of the proceedings and shall have the right to appear and be heard. In determining whether disclosure of the records would cause substantial injury to the public interest, the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.  
C.R.S. §24-72-204(3)(a)(XIII)

Moral: Author and recipient beware - don't e-mail anything you don't want a district court judge to read.

5. Other related cases:

A. The council member's private diary

*Wick Communs. Co. v. Montrose County Board of County Commissioners*, 121 P.3d 190 (Colo. 2005)

Colorado Supreme Court held that a public official's private diary, though he relied on it to prepare an outline used in a termination review hearing, was not a "public record" subject to CORA.

B. The Governor's cell phone bill

*Denver Post Corp. V. Ritter*, 255 P.3d 1083 (Colo. 2011)

Denver Post filed CORA request for phone bills for Governor Ritter's cell phone. Governor had a Blackberry issued by the state he used primarily to check his e-mails and keep his calendar. He had another cell phone that he paid for and did not seek reimbursement for that he used to make most of his telephone calls, those relating to the State's business as well as purely personal calls.

Colorado Court held the bills were not subject to CORA request as the bills were not records the Governor kept in his official capacity

## **VIII. COUNCIL MEMBERS ATTENDING MEETINGS OF OTHER ENTITIES OR ORGANIZATIONS**

The Open Meetings Law (“OML”) requires that whenever three or more Council members are gathered or convene to discuss public business, they must comply with the OML, including posting. There are no criminal sanctions for non-compliance of the OML. However, any action taken in violation of the OML is void. For several years (if not decades, there was concern that anytime three or more members of a council were in the same place at the same time, posting was required. That concern was reduced somewhat by the Colorado Supreme Court’s decision in 2004 in *BOCC of Costilla County v. Costilla County Conservancy District*, 88 P.3d 1188 (Colo. 2004). There the Court held that in order for a gathering to be subject to OML requirements there must be a demonstrated link between the meeting and the policy-making powers of the government entity holding or attending the meeting. Such a link exists when the meeting is convened to discuss or undertake a rule, regulation, ordinance or formal action. Merely discussing matters of public importance, does not trigger the requirements of the OML.

Although the *Costilla County* case reduced the need for posting anytime three Council members were in the same place at the same time, the case still requires posting and compliance with the OML whenever a meeting is convened to discuss a rule or regulation or ordinance or a formal action, which could include matters such as an award of a contract by the City. Therefore, Council members should exercise caution in discussing such matters at meetings other than Council meetings if three or more of them are present.

## **IX. ROLE OF COUNCIL MEMBERS AND COMMISSIONERS IN EMPLOYMENT MATTERS**

### **A. CHARTER PROVISIONS REGARDING THE ROLE OF THE MANAGER IN RELATION TO EMPLOYEES**

Article 8 of the Louisville Charter addresses the authority and duties of the city manager. As they relate to supervision and control over employees, it provides, in part:

#### Section 8-3. Powers and Duties of Manager.

(b) Subject to the Council’s oversight, the City Manager shall have the following powers and duties:

...

(2) Establish and implement personnel rules and regulations for City employees.

(6) Exercise supervision and control over all City personnel and departments, ...

Section 8-4. City Clerk; City Treasurer.

- (a) The City Manager shall appoint...the City Clerk
- (c) The City Manager shall appoint ...the City Treasurer

These charter provisions make it clear that the City Manager is to have control over City employees.

**B. CHARTER PROVISIONS REGARDING THE ROLE OF CITY COUNCIL IN RELATION TO EMPLOYEES**

Section 8 of the Charter also addresses the role of City Council in relation to City employees , providing, in part:

Section 8-5. Council's Relationship to Employees

- (a) The City Manager shall be responsible to the City Council for the proper administration of all matters placed in the Manager's charge by this Charter or by ordinance not inconsistent with this Charter.
- (b) Neither the Council nor any member of the Council shall dictate or interfere with the appointment of, or the duties or, any City employee subordinate to the City Manager, the City Attorney, or the Municipal Judge, or prevent or interfere with the exercise of judgment in the performance of the employee's City responsibilities.
- (c) A member of the Council may discuss any matter pertaining to the City operations with any employee, including the City Manager, but shall not give any direct orders to any such employee.

These charter provisions indicate limitations on interactions between Council members and employees. Those limitations work in both directions. That is, they limit the ability of a Council member to direct a City employee and they also limit the ability of a City employee to bring issues directly to Council members.

**C. CITY COUNCIL CONTACTS WITH EMPLOYEES**

Under the Charter, hiring, directing, supervising and evaluating City employees is the responsibility of the City Manager (and his subordinate supervisors). City Council direct contact with City employees should be limited. City Council members should avoid any input into hiring City employees, should not attempt to direct the activities of City employees, should not supervise City employees, and should not be involved in evaluating City employees. The Charter does, however, expressly authorize Council members to discuss any matter pertaining to City operations with a City employee.

D. CITY EMPLOYEE CONTACTS WITH CITY COUNCIL MEMBERS

Since the hiring, directing, supervising and evaluating of employees is to be overseen by the Manager with very limited involvement by Council members, likewise Council members should have little or no direct involvement when an employee has an issue or concern. Generally, employee issues and complaints should be handled through the City's established procedures, which I assume direct the employee to bring the issue to the attention of their immediate supervisor or, if it involves the supervisor, then to someone higher up in the chain of command or the human resources officer. In any event, Council members should be discouraged from serving as a sounding board for or otherwise becoming involved with city employee matters.

The limits on interrelationships between Council members and employees are particularly strict if the Council member and employee are related. Section 5-9 (c) and (d) expressly prohibit Council members and employees from hiring, supervising, or impacting the compensation of relatives, or even attempting to do so.

## E-MAIL GUIDELINES FOR APPOINTED OFFICIALS

The use of e-mail by elected or appointed officials to discuss City business raises issues under both the Colorado Open Meetings Law (“OML”), C.R.S. § 24-6-401 et seq., and the Colorado Open Records Law (“CORA”), C.R.S. § 24-72-201 et seq. The OML recognizes that discussions by e-mail can trigger notice and openness requirements. Specifically, the OML and City Charter provide that any meeting of three or more members of Council or a City public body at which public business is discussed or at which formal action may occur must be preceded by proper notice and be open to the public. A meeting can include a discussion that occurs by phone or e-mail.

Additionally, CORA recognizes that public records can include e-mails of elected and appointed officials where the communications involve City business or City funds and are made, maintained or kept by the City as part of its operations. Under CORA e-mails may be public records even if they do not trigger open meetings rules.

Based on these rules, the following are e-mail “dos and don’ts:”

### E-mail – Okay to Do

- Have a one-on-one discussion with another board member.
- Respond directly to an e-mail from a constituent on non-quasi judicial matters.
- Correspond directly with City staff.
- Copy other board members or City staff on an e-mail as long as it is “fyi” and not “morphed” into a platform for Board policy discussions.
- E-mail to other board members “fyi” information, such as updates on carrying out decisions made a prior public meetings, or on topics of current interest.
- If applicable, use City-assigned e-mail address and device whenever possible.

### E-mail – Don’ts

- Do not use e-mail (or similar technology) to discuss policy with more than two other members, whether simultaneous and/or serial or not.
- Do not use e-mail as a substitute for open public meeting discourse.
- Do not use e-mail as a substitute for taking any official action.
- Do not use e-mail to discuss or disseminate information on any pending quasi-judicial matter.
- Do not “reply to all” on e-mails sent to more than two board members, excepting only e-mails that clearly have no policy purpose (e.g., “fyi” e-mails).
- Do not send messages that discuss both personal matter and public business.