

**STATE OF OREGON
DEPARTMENT OF JUSTICE**

**ATTORNEY GENERAL'S
PUBLIC RECORDS
AND
MEETINGS MANUAL**



“Knowledge will forever govern ignorance.
And a people who mean to be their own governors, must arm
themselves with the power knowledge gives. A popular government
without popular information or the means of acquiring it, is but
a prologue to a farce or a tragedy, or perhaps both.”
James Madison (1822)

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4. Media Representation at Executive Session

For many years, the common practice of many public bodies was to permit members of the media to attend executive sessions, subject to the understanding that the media representatives would not report certain sensitive matters. The principal purpose of this practice was to provide news representatives the opportunity to obtain, from their attendance at executive sessions, background information that would improve their understanding of final decisions, and consequently, their ability to keep the public better informed.

The Public Meetings Law now expressly provides that representatives of the news media *shall be allowed* to attend all executive sessions except in two situations: executive sessions involving deliberations with persons designated to carry on labor negotiations,⁶³ and closed sessions held under ORS 332.061(2) to consider expulsion of an elementary or secondary school student or matters pertaining to a student's confidential medical records. ORS 192.660(4).

When an executive session is held for the purpose of conferring with counsel about current litigation or litigation likely to be filed, the governing body must exclude any member of the news media from attending the executive session if the member of the news media is a party to the litigation to be discussed or is an employee, agent or contractor of a news media organization that is a party to the litigation. ORS 192.660(5).

The governing body may require that specified information *not* be disclosed. ORS 192.660(4). See Sample Script at p. B-9. The presiding officer should make the specification, or the governing body could do so (or overrule the presiding officer) by motion. *Absent any such specification, the entire proceeding may be reported and the purpose for having an executive session may be frustrated.* Except in the rarest instances, the governing body at least should allow the general subject of the discussion to be disclosed, and it cannot prevent discussion of the statutory grounds justifying the session. The nondisclosure requirement should be no broader than the public interest requires.

Although we explain above that members of the public may tape record or video record public meetings, we do not believe this is the case with

⁶³ *Barker v. City of Portland*, 67 Or App 23, 676 P2d 1391 (1984) (see App D).

respect to members of the media who attend executive sessions. We believe the presiding officer may require that members of the media not tape record executive session proceedings, in order to decrease the likelihood that information discussed in the executive session will be inadvertently disclosed.

The term “representatives of the news media” is not defined. We have interpreted that term to include *news-gathering* representatives of institutionalized news media that ordinarily report activities of the body.⁶⁴ This interpretation should be expanded to include representatives of media that ordinarily report matters of the nature under consideration by the body.

The advertising manager of a newspaper is not a representative of the newspaper for purposes of this statute, and a periodical containing only hunting and fishing news is not a medium of news about a meeting of a school board. The hunting and fishing periodical presumably would be a news medium, under the statute, for purposes of a meeting of the Fish and Wildlife Commission.

Current technologies make it easy to disseminate information to a potentially broad audience. Bloggers and others using these technologies sometimes seek to attend executive sessions, asserting that they are “representatives of the news media.” A decision whether such an individual should be permitted to attend an executive session must be made on a case-by-case basis as no clear definition of “news media” exists. Public bodies should consult with their legal counsel when faced with this type of request.

The Public Meetings Law provides no sanction to enforce the requirement that specified information not be disclosed by a news representative. Any penalty for publication would raise freedom of press and speech questions.⁶⁵ The experience of more than three decades has been that the media, by and large, honor the nondisclosure requirement. Ultimately, “enforcement” of the nondisclosure requirement depends upon cooperation between public officials and the media. This cooperation advances the purposes of both government and the news media.

A news reporter has no obligation to refrain from disclosing information gathered at an executive session if the governing body fails to

⁶⁴ 39 Op Atty Gen 600 (1979) (see App F).

⁶⁵ 38 Op Atty Gen 2122 (1989) (see App F).

specify that certain information is not for publication.⁶⁶ Media representatives may wish, in a spirit of cooperation, to inquire whether a governing body's failure to specify was an oversight. A reporter is under no obligation to keep confidential any information the reporter independently gathers as the result of leads obtained in an executive session. A news reporter has a clear right to disclose any matter covered in an executive session that is not properly within the scope of the announced statutory authorization of the executive session. Indeed, the presence of news media representatives at executive sessions probably encourages compliance with statutory restrictions on the holding of closed sessions.

It is questionable whether a news media representative can be barred from future executive sessions for improperly revealing information obtained at a prior closed session. In a case called to our attention, a reporter and all other representatives of the employing newspaper were threatened with exclusion from future executive sessions for reporting deliberations on a matter that was probably not a proper subject of an executive session. Exclusion or the threat of exclusion in such a case is clearly impermissible.

It is certainly reasonable for a governing body to request a news medium not to assign a particular representative to cover meetings of the body if the representative has irresponsibly violated a clearly valid nondisclosure requirement. An outright ban on a particular individual may be enforceable in such a case, because the statutory purposes will be met by allowing another representative (and representatives of other news media) to attend. However, we can say no more than it is possible that a ban would be enforced in these circumstances. We see no other basis for a governing body to dictate the assignments of a news medium representative. A particular representative certainly could not be banned from meetings simply because the governing body disliked the reports made by the representative.

⁶⁶ But a public body does not waive any evidentiary privilege conferred under ORS 40.225 to 40.295, such as the attorney-client privilege, when "representatives of the news media are allowed to attend execution sessions *** as provided in ORS 192.660(4), or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660(4)." ORS 40.280.