

SDAO SUMMER ROAD SHOW 2023

Authorities, Duties, and Liabilities of Special District Board Members and Staff

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- Powers and Protections of the District
- Roles and Responsibilities of the Board
- Finances
- Public Contracting
- Public Meetings
- Public Records
- Ethics
- Risk Management and Loss Prevention

Powers and Authorities of the District

“Dillon’s Rule.”

A local government may exercise powers that are expressly provided for by law or are necessarily implied.

Expressly provided authority.

- ORS Chapter 198
- “Principal Act” of District
- Other statutes, e.g.:
 - Elections (ORS Ch. 255)
 - Bonds (ORS Ch. 280)
 - Contracts (ORS Ch. 279A, B, C)
- Administrative Rules
- Ordinances

Necessarily implied authority, e.g.:

- Purchasing supplies
- Employing staff
- Entering into contracts
- Incidental tasks relating to exercise of authority

Sovereign Immunity.

- Protects a government body from being sued unless the “sovereign” (e.g., the state of Oregon) grants permission to do so through legislation
- The legislation may dictate the method and terms of the suit

Legal actions against public bodies [ORS 30.320].

- Contracts: Treated like any private party.
- Quiet title: Treated like any private party.
- Tort: Only as provided in ORS 30.260 to 30.300 [Oregon Tort Claims Act]

Oregon Tort Claims Act.

“Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties.... The sole cause of action for any tort of officers, employees or agents of a public body acting within the scope of their employment or duties ... shall be an action against the public body only... No other form of civil action or suit shall be permitted.”

Acting within “course and scope”:

- Exercising only authority granted by law or board policy
- Engaging in activities permitted:
 - Directly by statute
 - Within the role of a member of the governing body
 - Delegated by the rest of the governing body

Acting outside “course and scope”:

- Engaging in activities:
 - Not authorized by law or board policy
 - Outside the role of the governing body
 - Not expressly delegated by the rest of the Board
 - That interfere with the Port’s contractual relationships

Oregon Tort Claims Act Damage Caps

(July 1, 2023 – June 30, 2024)

Personal injury or death:

-State, single claimant:	\$2,490,600
-State, aggregate claims:	\$4,981,300
-Local government, single claimant:	\$ 830,300
-Local government, aggregate claims:	\$1,660,400

Property damage:

-State and local, single claimant:	\$ 136,200
-State and local, aggregate claims:	\$ 680,900

Board of Directors

Duties of the Board.

- Ensure the District operates in a legal and fiscally responsible manner
- Enter into legal agreements on behalf of the District
- Oversee financial operations
- Establish legislation by ordinance when appropriate
- Establish district-wide policies
- Delegate authority when appropriate
- Supervise the chief executive officer, if there is one

Board Members.

- Must be qualified to serve in the District (usually “elector” or resident)
- Can be “compensated” up to \$50/day or portion thereof, and be reimbursed for expenses

- Are entitled to indemnity under OTCA for claims of negligence against Board
- Are not entitled to indemnity if acting outside “course and scope”
- Can be found personally liable for repayment of unlawful expenditure of public funds (ORS 294.100)

- Elected board members can be recalled, but usually can't otherwise be removed.
- However, elected officials can become ineligible for office if:

- Is “a member of, or affiliated with, any organization which teaches the doctrine of, or advocates, the overthrow of the Government of the United States by force or violence” (ORS 236.030)
- Is convicted of an infamous crime, or any offense involving the violation of the oath of the incumbent while in office
- Refuses or neglects to take the oath of office, or to give or renew the official bond of the incumbent, or to deposit such oath or bond within the time prescribed by law

- Has their election or appointment declared void by a competent tribunal
- Is found to be a mentally diseased person by a competent tribunal

- Ceases to possess any other qualification required for election or appointment to such office (ORS 236.010) or
- Agrees to engage in, or does engage in, a duel, or “curry a challenge” to a duel to another person (Or. Const. Art. II, Section 9)

Individual Board members have the power to engage in the following tasks without the consent of the rest of the Board (choose all that apply):

- A. Attend board meetings by telephone.
- B. Establish policies.
- C. Review personnel records.
- D. Direct staff.
- E. Sign contracts.

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Five Essentials for Managing Risk Exposure

1. All decisions of the Board must be made by majority vote at a properly noticed public meeting.
2. No individual board member is authorized to speak for, or represent, the Board without the express (formal) approval of a majority of the Board.

Five Essentials for Managing Risk Exposure

3. The Board (acting collectively) must clearly understand its role as a legislative and policy-making body and remain within this scope at all times.

4. Neither the Board nor any individual Board member should engage in processes or decision-making that A) is delegated elsewhere; or B) is outside the scope of duties of the governing body.

Five Essentials for Managing Risk Exposure

5. If the Board intends to delegate any of its administrative authority – by contract or by vote – it should clearly understand what authority it is delegating and specifically describe the limitations of the authority.

If the authority is delegated by contract, the Board must adhere to the contract.

Board Decision-Making

Board action.

- Must be at a properly called public meeting
- Requires a quorum to be present
- Generally requires approval by a majority of the board
- All votes must be taken publicly (no secret ballots)

Regular voting procedures.

- Affect day-to-day operations
- Recorded in the minutes
- No other documentation necessary

Resolutions.

- Establish formal policy of the District or the board.
- Govern internal operations
- Simple adoption procedures

- Create a written record of important board decisions and district policy
- May be required by statute
- Simple adoption requirements
- Include in published meeting agenda
- Must be approved by majority of board

Ordinances.

- Create local law.
- Require statutory authority
- Formal adoption procedures

Non-emergency ordinance.

- Notice published in a newspaper of general circulation 4-10 days before the meeting, stating time, date and place of the meeting, giving a brief description of the ordinance to be considered, and stating that copies are available at the district office.
- May also be posted in three public places within the district at least 10 days before the meeting; or published by radio and television stations broadcasting in the district [see ORS 193.310 and 193.320].

- Must be read during regular meetings of the district board on two different days at least six days apart.
- Reading must be full and distinct unless, at the meeting:
 - ✓ A copy of the ordinance is available for each person who desires a copy; and
 - ✓ The board directs that the reading be by title only.
- Requires affirmative vote of a majority of the members of the district board.

- Within seven days after adoption:
 - Signed by the presiding officer;
 - Attested by the recording secretary of the district board at the session at which the board adopted the ordinance; and
 - Filed in the records of the district.
- A certified copy filed with the county clerk, available for public inspection.
- Unless referred to electors, takes effect on the 30th day after it is adopted, unless a later date given in the ordinance.

Emergency ordinance:

- May be adopted after a single reading
- Takes effect immediately upon adoption
- Must state nature of emergency
- Requires unanimous approval, a quorum being present
- Notice must be published within fifteen (15) days of adoption

Ethics for Public Officials



Harvard Business Review, September 2010

- Oregon Government Ethics Commission (OGEC) is the administrative agency that enforces Oregon's ethics laws.
- Created in 1974 by a state-wide ballot measure following the Watergate scandal.
- Ethics laws for public officials were enacted at the same time (ORS chapter 244).

Scope of Ethics Laws

- Economic conflicts of interest.
- Undue influence.
- Use of political office for financial gain.
- Public disclosure.

Ethics laws apply to public officials, their businesses, and their relatives.

Includes, but is not limited to:

- Current board members
- Former board members
- Employees
- Volunteers
- Candidates for public office

“Relative” includes:

- Spouse, parent, stepparent, child, sibling, stepsibling, son-in-law, daughter-in-law of the public official, or of the public official’s spouse. (Now also includes “First Person,” to include the spouse or partner of the Governor).
- Any individual for whom the public official has a legal support obligation; or who benefits financially from the public official’s employment with the public entity.

Public officials may not:

- Participate in employment decisions regarding relatives or household members.
 - Does not apply to unpaid volunteers or if the decision affects a large class of people.
- Directly supervise a relative employed with the public entity.
- Use their official position to obtain financial gain or avoid financial detriment that would not otherwise be available *but for* the public official's position. ORS 244.040.
 - Applies to the official, a relative, or a business owned by the official or the official's relative.
- Accept gifts valued at \$50 or more from a source with a "legislative or administrative interest" in the public official's role.

Public officials may not:

- Solicit or accept the offer, pledge or promise of **future employment** based on any understanding that a vote, official action or judgment would be influenced by the offer.
- Use or attempt to use **confidential information** gained through their positions as public officials for financial gain. *[Also applies to former public officials.]*
- Directly receive a beneficial interest in a contract which they authorized for the two years following the contract's authorization.
- Make official decisions without declaring potential or actual conflicts of interest.

What is NOT unlawful financial gain?

- Official salary and benefits.
- Unsolicited honoraria under \$50 or related to private employment.
- Reimbursement of expenses.
- Unsolicited awards for professional achievement.
- Meals, beverages, and entertainment as part of an official event.

Permissible gifts include:

- Gifts of any value if the giver does not have a legislative/administrative interest in the public entity.
- Gifts of \$50 or less from a single source with a legislative/administrative interest in the public entity.
- Gifts that bear no relationship to the person's public position.
- Informational or program material, publications or subscriptions related to the recipient's performance of official duties.

- Unsolicited awards of appreciation with a resale value of less than \$25 dollars (e.g., engraved plaques).
- Unsolicited honoraria of less than \$50.
- Reasonable expenses provided to the public official, relatives, or staff when the public official is representing the public entity or speaking in an official capacity. Includes meals, beverages, and entertainment.
- Contributions to the public official's legal expense trust fund established under ORS 244.209.

Potential conflict of interest.

Could result in financial gain or avoidance of financial detriment.

- Disclose for the record.
- You may still discuss.
- You may still vote.

Actual conflict of interest.

Will result in financial gain or avoidance of financial detriment.

- Disclose for the record.
- Abstain from discussion.
- Do not vote (unless action cannot be taken without member's vote).

Penalties:

- Maximum penalty for most ethics violations is \$5,000.
- Penalty for violation of executive session law \$1,000. Excused if decision made in reliance on advice of public body's legal counsel.
- In addition, if a public official financially benefited, the OGEC can impose a civil penalty in an amount equal to twice the amount the public official realized as a result of the violation.
- No penalty if official or candidate relied in good faith on Ethics Manual or Ethics Commission opinion.
- Prevailing party may file a petition in Marion County Circuit Court seeking attorney fees, which the court may award if the award was not "substantially justified" or other circumstances make the award "unjust," and provided the funds are "available to the Commission."

Recent Law Changes:

HB 2805 and SB 207 (2023). The Oregon Ethics Commission now has oversight authority over violations of public meetings laws generally, not just executive sessions. See legislative updates to public meetings law section.

Finances

Methods of District Financing.

Permanent tax rate

- Tax on real property
- Property values frozen at 1995 rates, less 10 percent
- Values and PTR may increase no more than 3 percent/year
- Requires double-majority approval
- Subject to compression

Local option tax

- Tax on real property
- May exceed permanent tax rate limitations
- Five-year limit for operating revenues
- Capital improvements no more than 10 years
- Requires double-majority approval
- Subject to compression

Fees for service

- Must be authorized by law
- Must be “reasonable”
- Check principal act for specific procedures

Grants

Investments (ORS 294.035)

Loans and financing (ORS Ch. 297)

System Development Charges (water, wastewater, parks, transportation, drainage)

- Requires capital improvement plan (CIP)
- If revision of CIP will result in increase in SDC, 30 days' notice to those on list required; hearing if requested in writing
- Requires an adopted methodology
- Requires SDC ordinance or resolution

- Can be financed through Bancroft Bonds
- Must be accounted for separately
- May only be spent on “capacity-increasing” capital improvements named in plan
- Creation or modification of SDC or SDC methodology requires 90 days’ notice to list of those who have requested notification

Assessments for local improvements.

- Affects only those properties that benefit
- Notice and hearing requirements apply
- Assessment ordinance required

General obligation (GO) bonds

- Authority must be granted in statute
- Used for capital construction
- Paid back with property taxes
- Double-majority approval required
- Not subject to compression

Revenue bonds

- Paid back with any revenue of District
- Election only required if sufficient requests
- Election requires double-majority approval

Local Budget Law.

- Budget committee is formed.
- Budget officer prepares a proposed budget.
- Notice of the budget committee meeting is published.
- Budget document is made available at or before the budget committee meeting at which the budget is presented.

- Budget committee holds at least one public meeting for receiving the budget message and budget document and providing opportunity for public questions or comments.
- Budget committee approves the budget.
- Notice of the public hearing and a summary of the approved budget is published.
- Notice of budget meetings to be published either twice in a newspaper, or once in the newspaper and once on the District website.

- Governing body (board) conducts a public hearing on the approved budget.
- After public comment and deliberations, governing body adopts the budget and enacts resolutions or ordinances accordingly by June 30.
- Governing body certifies the district's tax, if any, to the county assessor by July 15.

Municipal Audit Law.

- All local governments must file certain reports/certificates with the Secretary of State. [ORS 297.435.]
- Full audit required if total expenditures for all purposes, including moneys expended for debt retirement, exceed \$1,000,000* for the year.
- Less stringent “review” available if expenditures are between \$250,000 and \$1,000,000* and proper filings are made.

** Amounts increase January 1, 2024 (HB 2110).*

Public Contracting

Public Contracting Code: Oregon's laws governing public contracting, specifically [ORS 279A, 279B, and 279C]

Oregon Attorney General's Model Public Contracting Rules ("Model Rules"): OAR Chapter 137, Divisions 46 through 49.

Local Contracting Rules. Internal rules for contracting that apply to the District. Adopted by resolution of the board. May expressly adopt some or all of the Model Rules, and/or establish specific local rules

Public Contract.

A sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

Does not include:

- Grants
- Contracts for the purchase or sale of real estate
- Intergovernmental agreements (IGAs)
- Contracts for which no district funds are used

Local Contract Review Board (“LCRB”).

The District’s board of directors, exercising specific contracting authority granted under the Public Contract Code. The Board of Directors must specifically delegate this authority elsewhere.

Authority to Approve Contracts.

- The Board of Directors must approve all contracts, unless they have delegated this authority elsewhere, such as to the Executive Director, Fire Chief, or General Manager.
- The Local Rules may describe the scope of delegation for approval of contracts, including assigning dollar limits to this authority.

Competitive Bidding.

Required for all public contracts unless exempted:

- By statute
- By Local Rule
- By resolution of the board (“special procurement”)

Exempted by Statute:

- Sole-Source, Fixed Price. Sole-source expenditures where the rate or price is established by law or ordinance for source selection [ORS 279A.025(2)(f)].
- Investments. The investment of funds as authorized by law, and other financial transactions that by their character cannot practically be established under the competitive contractor selection procedures of ORS 2798.050 to 2798.085 [ORS 279A.025(2)(q)(C)].

- Certain Contracts with Non-Profits. Contracts made with qualified non-profit agencies providing employment opportunities for disabled individuals under ORS 279.835 to ORS 279.855. [ORS 279A.025(4)].
- “Piggyback” Contracts. Contracts for purchase or lease of personal property entered into by another public agency that allows for “piggybacking” onto the contract terms, according to ORS 279A.205 through 279A.215 (“Cooperative Procurements”).

Exempted by Resolution of the LCRB (“Special Procurement”):

- The Local Contract Review Board may exempt certain contracts or classes of contracts from competitive bidding requirements after adopting written “findings” to support the exemption, holding a public hearing (for construction contracts), and adopting a resolution declaring the exemption.

Exempted By Local Rule: E.g., emergency contracts:

- Local Rules define “emergency,” e.g.:

“Emergency” shall be defined as: “Circumstances that (a) could not have reasonably been foreseen; (b) create a substantial risk of loss, damage, or interruption of services or a substantial threat to property, public health, welfare or safety; and (c) require prompt execution of a contract to remedy the condition.”
- Establish process for awarding contract.

Methods for Awarding Contracts.

- Direct Award (no bidding): “Any manner deemed practical and convenient.”
- Informal Bidding (three quotes): “Best serves the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor.”
- Formal Bidding: Lowest responsive, responsible bidder.
 - Responsive: Substantially complies with requirements for submission.
 - Responsible: Has all necessary qualifications and resources to do the job.

Types of Contracts.

Public contracts in Oregon fall into one of the following categories:

- Personal services (professional services)
- Procurements (purchase of goods, or services that are not personal services)
- Public improvements (construction)
- Surplus property (disposing of things you don't need)

The contracting process varies, depending on the type of contract.

Personal Services Contracts.

Local Rules define this. For example:

“Personal Services” include those services that require specialized technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment, and for which the quality of the service depends on attributes that are unique to the service provider. Such services include, but are not limited to: Architect, engineer; surveyor; photogrammetrist; attorney; accountant; auditor; computer programmer; artist; designer; performer; consultant; outreach educator; and workshop facilitator.

Contract for an architect, engineer, surveyor, or photogrammetrist:

- If \$100,000 or more, must be formally bid and qualification-based selection (QBS) will apply.
- If under \$100,000, award like other personal services contracts.

Personal services contract NOT for architectural, engineering, surveying, or photogrammetry services over \$100,000:

- Local Rules prescribe how the contract may be awarded. Follow those rules.

Procurements.

Any purchase of goods, or of services that are not personal services contracts, is a “procurement.”

- Under \$10,000*, no competitive process is required. Get the best deal you can for the District.
- Between \$10,000 and \$150,000*, get at least three competitive quotes from qualified vendors. Written quotes are always recommended; required if bids will exceed \$75,000.
- More than \$150,000*, contract must be advertised and competitively bid unless the LCRB grants an exemption by resolution. May use an invitation to bid or a request for proposals. Consult applicable statutes in ORS chapter 279B.

***LEGISLATIVE UPDATE: SB 1047 (2023).**

Beginning on September 25, 2023, the amounts for small and intermediate procurements will increase.

- Small procurements are now any procurement **under \$25,000.**
- Intermediate procurements are between **\$25,000 and \$250,000.**

Public Improvements.

Construction performed “by or for” a public agency is a public improvement.

A public improvement for \$50,000 or more is called a “public work.” Prevailing wages must be paid.

- Under \$10,000, no competitive process is required. Get the best deal you can for the District.
- Between \$10,000 and \$100,000, obtain at least three competitive quotes from qualified vendors. Written quotes are always recommended; required if bids will exceed \$75,000.
- More than \$100,000, contract must be advertised and competitively bid unless the LCRB grants an exemption by resolution. Consult applicable statutes in ORS chapter 279C.

A.

- If more than \$50,000, prevailing wages must be paid, regardless of the method of making the award. The advertisement or request for bids, and the contract itself, must state this requirement. Consult applicable statutes in ORS chapter 279C.
- If more than \$100,000, a bid bond, performance bond, and payment bond are required.

Surplus Property.

Selling publicly owned property is a “public contract” under the Contracting Code. It must be competitively bid and sold to the highest bidder unless the Local Rules provide for a different process.

Local Rules should define “surplus property.” For example:

“Surplus Property” is defined as any personal property of the District that has been determined by the Board as being of no use or value to the District.

QUICK REFERENCE GUIDE TO PUBLIC CONTRACTING IN OREGON

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START HERE: Is it a “public contract”?

YES:

NO: Award contract

What type of public contract is it?

PERSONAL SERVICES (Professionals)	PROCUREMENT (Goods & Non-professional Services)	PUBLIC IMPROVEMENT (Construction)
<p>Architect, engineer, surveyor?</p> <p>YES NO</p> <p>More than \$100,000? QBS Applies</p> <p>Follow District Rules or competitively bid</p>	<p>What is the dollar amount?</p> <p><\$10K \$10K-\$150K >\$150K</p> <p>[Direct award] [3 informal bids] [Formal bids]</p> <p>ITB or RFP Advertisement</p>	<p>What is the dollar amount?</p> <p><\$10K \$10K-\$100K >\$100K</p> <p>[Direct award] [3 informal bids] [Formal bids]</p> <p><u>\$50K+Prevailing Wage Contract</u></p> <ul style="list-style-type: none"> Include in solicitation, advertisement, and contract Notify BOLI prior to adopting budget and when contract entered into Check certified payroll <p><u>\$100K+Security Required</u></p> <ul style="list-style-type: none"> Bid bond (10%) Performance bond (100%) Payment bond (100%)

Public Meetings

Oregon statutory policy.

“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 [the public meetings law] that decisions of governing bodies be arrived at openly.”

ORS 192.620 [1973]

- To open meetings of governing bodies to the public;
- To give notice of the time and place of meetings; and
- To make meetings accessible to those wishing to attend.
- No requirement to let the public talk.
- “Public meeting” vs “public hearing.”

“What is a ‘public meeting’?”

Any meeting where a quorum of the decision-making body is present and is discussing or “deliberating toward” a matter of business is a public meeting.

Any meeting of a body formed to advise a public body is a public meeting.

LEGISLATIVE UPDATE:

HB 2805 (2023): “Deliberations” do not include:

Communications between or among members of a governing body that are:

- (A) Purely factual or educational in nature and that convey no deliberation or decision on any matter that might reasonably come before the governing body;
- (B) Not related to any matter that, at any time, could reasonably be foreseen to come before the governing body for deliberation and decision; or
- (C) Nonsubstantive in nature, such as communication relating to scheduling, leaves of absence and other similar matters.

Which of the following is allowed at a public meeting? (Choose all that apply.)

- A. Shouting at each other.
- B. Meeting outside the district.
- C. Meeting on the second floor of a building with no elevator.
- D. Holding the meeting when no notice was given.
- E. Smoking

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For a seven-member board, which is NOT a public meeting?

A. Three members call a fourth one on the phone, to discuss firing the manager.

B. Four members go fishing together.

C. The chair sends a group email to the rest of the board to ask how they plan to vote at next week's board meeting.

D. Five members attend a work session at the home of the chair, to hammer out some personnel policies.

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D. Five members attend a work session at the home of the chair, to hammer out some personnel policies.

What is the difference between a legal public meeting and an illegal public meeting?

True or false:

There are certain public meetings that don't require providing notice beforehand.

False

“How much notice is required?”

Provide *general* notice to the public at large, and *actual* notice to specifically interested persons:

- Executive session only: Same as for any other meeting.
- Special meeting: At least 24 hours’ notice to public and media.
- Emergency meeting: As much notice as possible under the circumstances.

“Can’t we just post a running notice somewhere, giving the time and date of the meetings?”

Yes, if the notice includes an agenda.

But if possible, you should publish notice for each general meeting, along with a proposed agenda.

“What if we don’t give proper notice?”

Any member of the media or anyone affected by a decision of the public body may sue.

- A successful suit makes the meeting illegal.
- Decisions may be voidable or void.
- Successful plaintiff can receive attorney fees.
- Board members can be held *personally* liable for abusing the executive session privilege; civil penalties up to \$1,000 per violation and attorney’s fees under Oregon’s Government Standards and Practices (ethics) laws.

True or false:

Meeting minutes are required for all public meetings, including executive sessions.

True

“Can we tape record the meeting instead?”

Yes. Minutes may be taken in writing, or by sound, video, or digital recording.

Final transcript or recording must “give true reflection of matters discussed and views of the participants.” The public may be charged for the cost of a written transcript made from a recording.

“What should be in the minutes?”

At minimum:

- Names of every board member present.
- A general summary of each topic discussed.
- How each topic was resolved.
- The outcome of any votes taken, including who voted, and how.
- Reference to any document discussed at the meeting.

True or false:

The board chair has the discretion to decide the topics that will be discussed in executive session.

False

Executive Sessions.

“Executive session” means any meeting or part of a meeting of a governing body which is closed to certain persons for deliberation on certain matters. ORS 192.610(2)

No final votes – discussion only.

“No executive session may be held for the purpose of taking any final action or making any final decision.” ORS 192.660(6).

“Who may attend an executive session?”

- Board members.
- Anyone authorized by the board.
- Member(s) of the media*.

** Unless the executive session is to discuss litigation in which the news medium is a party.*

ORS 192.630:

- (1) All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.
- (2) A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690.

Notice required.

- Notice must be given for executive sessions as with any other public meeting.
- Notice should state the statutory authority for the executive session.
- The board chair also should state the statutory authority when convening the executive session so it is recorded in the minutes.

Minutes required.

- Minutes of executive session minutes are usually exempt from public records disclosure. But they can be reviewed by a court of law.
- Information discussed in executive session is confidential to the Board and anyone else who attends.
- Disclosure by one waives the right to confidentiality for everyone.

Permissible reasons to call an executive session.

To consider the employment of a public officer, employee, staff member or individual agent, IF:

- Vacancy advertised;
- Regular hiring procedures adopted;
- If officer (i.e., management), public has had opportunity to comment;
- If CEO, hiring criteria and procedures were adopted in public meetings with opportunity for public comment.

Does NOT apply to:

- The filling of a vacancy in an elective office.
- The filling of a vacancy on any public committee, commission or other advisory group.
- Consideration of general employment policies.
- Employment decisions if prior requirements are not met.

- To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent who does not request an open hearing.
- To review and evaluate the employment-related performance of the chief executive officer of any public body, a public officer, employee or staff member who does not request an open hearing.

- To conduct deliberations with persons designated by the governing body to carry on labor negotiations.
- To conduct deliberations with persons designated by the governing body to negotiate real property transactions.
- To carry on negotiations under ORS ch. 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

- To consider information or records that are exempt by law from public inspection.
- To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

- To discuss information about review or approval of programs relating to the security of ... generation, storage or conveyance of:
 - Electricity;
 - Gas in liquefied or gaseous form;
 - Hazardous substances;
 - Petroleum products;
 - Sewage;
 - Water;
 - Telecommunication systems (cellular, wireless, radio);
 - Data transmissions by whatever means.

Penalties for Violation.

- Failure to comply with executive session laws is punishable under Oregon's Ethics Laws for Public Officials.
- It is personal to the elected official.
- The maximum fine is \$1,000 per violation but excused if decision made in reliance on advice of public body's legal counsel.

Recent Law Changes.

HB 2560 (2021) – Governing body must provide remote or telephone access to public meetings (not exec. sessions) “to the extent reasonably possible,” and allow testimony to be given orally or in writing.

HB 2805 (2023). “Convening” a public meeting means:
(a) Gathering in a physical location; (b) Using electronic, video or telephonic technology to be able to communicate contemporaneously among participants; (c) Using serial electronic written communication among participants; or (d) Using an intermediary to communicate among participants.

HB 2805 (2023). The Oregon Ethics Commission is required to conduct training on public meetings laws.

Every board member of a district with total expenditures for a fiscal year of \$1 million or more is required to attend or view training prepared provided by the Oregon Ethics Commission at least once during the member's term of office and verify the member's attendance. Members of smaller governing bodies are encouraged, but not required, to attend.

HB 2805 (2023). Anyone who believes a governing body has violated public meetings laws may, within 30 days of the alleged violation, file a written grievance with the board, setting forth the specific facts and circumstances of the alleged violation. The board must provide a written response within 21 days acknowledging receipt, denying the claim and setting out corrected facts and circumstances; admitting to them and explaining why they are not a violation; or admitting the violation happened and setting out a plan to address it. The written grievance and the response must be filed with the Oregon Ethics Commission.

The Ethics Commission will investigate the claim and may assess penalties if a violation is found.

SB 207 (2023). The Ethics Commission may investigate claims of violations of executive session laws on its own without necessarily receiving a complaint.

Public Records

“What is a ‘public record’”?

“Any information in any form capable of retention by a custodian that: (a) Relates to an activity, transaction or function of a public body; and (b) is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the public body.”

Public's rights.

Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.

True or false:

The records custodian may deny a request for public records when he or she knows the requester has a bad motive.

False

Public records custodian.

- Keep records safe
- Furnish proper and reasonable opportunities for inspection and examination of the records in the office of the custodian, and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours

- If the public record is maintained in machine readable or electronic form, furnish proper and reasonable opportunity to assure access.
- May adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of duties of the Custodian.

Responding to Requests.

Must acknowledge request within five (5) business days, and complete request “as soon as possible and without unreasonable delay, but no later than ten (10) business days after acknowledgement.”

- Acknowledge receipt of the request.
- Ask for more clarification if necessary.
- Provide information as follows....

- You do not possess, or are not the custodian of, the record;
- You have at some of the requested records, and give an estimate of time and fees, or when such an estimate will be given;
- You're uncertain whether you possess the public record and that you will search for it and respond as soon as practicable;
- State or federal law prohibits you from acknowledging whether the record exists or that acknowledging whether the record exists would result in the loss of federal benefits or other sanction. Cite the applicable law.

- Response time can be extended while public body seeks clarification or additional information.
- Request is complied with if the public body explains where the records are publicly available.
- Public body is not liable for any damages if a record is disclosed that is not expressly required to be kept confidential.
- Failure to respond within time frame is considered no response and will allow the requester to seek enforcement.

Provide a copy in the form requested, if available. If it is not available in the form requested, make it available in the form in which it is maintained.

A citizen asks for written minutes of a meeting to be transcribed onto an audiotape.

Is the district required to do this?

Written Public Records Policy required.

The Board must adopt written procedures for making public record requests that include:

- (a) The name of one or more persons to whom public record requests may be sent, with addresses; and
- (b) The amounts of and the manner of calculating fees that the public body charges for responding to requests for public records.

Additional recommendations.

- Require requests to be in writing.
- Include times/days when inspection is permitted.
- List considerations for waiving or reducing fees.
- Post the policy.
- Apply it uniformly to everyone.
- If in doubt, don't respond without a lawyer's advice.

Fees.

- Must be authorized in Public Records Policy.
- If the fee will be greater than \$25, the District first must provide the requestor with a written notification of the estimated amount of the fee and wait for the requestor to confirm that he/she wants to proceed.
- The Custodian may furnish copies without charge or at a substantially reduced fee if the custodian determines that the waiver or reduction of fees is in the public interest because making the record available primarily benefits the general public.

Records Exempt from Disclosure (common examples).

- If requested in writing, address, home telephone number and email address if the individual demonstrates to the satisfaction of the public body that doing so could endanger the personal safety of the individual or a family member residing with them.
- Employee photo ID badges.
- Email addresses in possession of local government (e.g., for employees, clients, stakeholders, newsletter subscribers, vendors), except those assigned for official use by public employee.

- Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy.
- Personally identifiable information (e.g., home address, SSN, driver's license number, etc.) **of an employee or volunteer**, absent a showing of clear and convincing evidence from the requester that the public interest requires disclosure. [Subject must be given at least seven (7) days' notice before their information is released.]

- Information submitted in confidence and not otherwise required by law to be submitted (limited).
- Nonfinancial membership records and employee financial records maintained by PERS.
- Library circulation records.

- Personally identifiable information about customers of a people's utility district or **the names, dates of birth, driver license numbers, telephone numbers, email addresses or Social Security numbers of customers who receive water, sewer or storm drain services from a public body**, unless the customer consents, or if doing so is necessary to provide services or to establish and manage customer accounts.

Unless the public interest requires disclosure:

- Records pertaining to ongoing or likely litigation or mediation to which the public body is a party.
- Trade secrets.
- Criminal investigatory information.
- Investigatory information for worker's comp claims and OSHA violations, until the final order is issued.

- Personnel discipline records.
- Test questions, scoring keys, etc.
- Real estate appraisal information prior to acquisition.
- Names and signatures of employees relating to some union activities.

- Certain information relating to archaeological sites or threatened or endangered species.
- Information about review or approval of programs relating to the security of systems that provide electricity, sewer, water, or other public services.
- Operational plans relating to anticipated threats to public safety, security measures, or records that would allow unauthorized access to, or interference with, property or disrupt services.

Storage Requirements.

- Secure, fire-resistant structures
- Temperature and humidity to ensure optimum longevity
- Adequate light and access to permit retrieval
- Adequate ventilation and protection against insect or mold invasion.
- Protected from water damage
- Not placed on the floor

Retention Requirements.

- Agencies shall, with the advice and assistance of the State Archivist, identify their essential records, regardless of medium or physical format.
- Agencies shall store security copies of essential electronic records systems off the premises where the system is used, along with any system documentation necessary to enable recovery of the system in the event of an emergency.

- Oregon State Archivist establishes rules and schedules.
- General schedules for special districts located in Oregon Administrative Rules (OAR) ch. 166, Division 150.
- Local agencies are required to report to the Archivist which documents have been destroyed, per the schedules.
- Upon request, the State Archivist may perform, and charge for, microfilm services for the public body.

LEGISLATIVE UPDATE (2023)

HB 2004 (2023). Requires ranked choice voting for federal and major statewide elective offices. Optional for local governments. Referred to voters for November 2023 ballot.

HB 3073 (2023). Requires Secretary of State to establish provision to be included in each nominating petition or declaration of candidacy that allows candidate to check box indicating that candidate does not want candidate's residence address to be publicly disclosed except in response to written public records request.

SB 442 (2023). When soliciting for a contract for a procurement, the contracting agency may give preference to procuring goods that are fabricated or processed, or services that are performed, entirely within Oregon if: (A) The goods or services cost not more than five percent more than goods or services that are not fabricated or processed, or services that are not performed, entirely within this state and the contracting agency can reasonably and credibly determine that procuring the goods or services at the higher price offsets environmental costs that are attributable to transporting the goods or the service providers from outside this state; or (B) The goods or services otherwise cost not more than 10 percent more than goods that are not fabricated or processed, or services that are not performed, entirely within Oregon.

SB 168 (2023). Expressly prohibits public employees, while on job during working hours or while otherwise working in official capacity, from promoting or opposing appointment, nomination or election of public officials.

SB 728 (2023). Grants a tax credit to volunteer firefighters who engage in certain activities.

SB 775 (2023). Clarifies qualification requirements for SWCD directors representing specific zones.

SB 812 (2023). A local government may enact an ordinance or resolution prohibiting or regulating the takeoff and landing of unmanned aircraft systems in parks owned by the local government.

SB 814 (2023). Expands port's authority to enter into agreements for public cargo and passenger ports.

SB 871 (2023). Expands public agency's ability to participate in energy savings performance contracts.

SB 1068 (2023). Authorizes fire district to annex lands within seven miles of fire station and charge fee to properties that don't consent to annexation.

SCR 3 (2023). Designates potato as official vegetable of Oregon.

Risk Management and Loss Prevention

- Known claim served.
- You think you may have a claim.
- You are considering personnel action.
- Something unfortunate happens.
- SDIS Pre-Loss Legal Program

Resource List

Public Records and Meetings Manual •Oregon Attorney General	\$25 hard copy, free on-line http://www.doj.state.or.us/pdf/publications_orderform.pdf
Public Contracting Manual •Oregon Attorney General	\$65 http://www.doj.state.or.us/pdf/publications_orderform.pdf
Public records retention schedules •Oregon State Archivist	Free, on-line Oregon Administrative Rules (OAR) Chapter 166
Basic Budgeting Book Local Budgeting in Oregon Local Budget Law Local Budgeting Manual •Oregon Department of Revenue	Free, on-line Oregon Department of Revenue : Local budget law : Property Tax : State of Oregon

<p>A Guide for Public Officials</p> <ul style="list-style-type: none"> •Oregon Ethics Commission 	<p>Free, on-line</p> <p><i>http://www.oregon.gov/OGEC/docs/PO_Guide_2008.doc</i></p>
<p>District Elections Manual</p> <ul style="list-style-type: none"> •Oregon Secretary of State, Elections Division 	<p>Free, on-line</p> <p><i>http://www.sos.state.or.us/elections/publications/district.html</i></p>
<p>Restrictions on Political Campaigning for Public Employees</p> <ul style="list-style-type: none"> •Oregon Secretary of State, Elections Division 	<p>Free, on-line</p> <p><i>http://www.sos.state.or.us/elections/publications/260.432_quickref.pdf</i></p>

Thank You.

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