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(1942 - 2008)

**MEMORANDUM**

**TO:** Mayor and City Council, City of Golden

**FROM:** Dave Williamson & Mary Lynn Macsalka

**DATE:** January 17, 2008

**RE:** **E-MAIL COMMUNICATIONS/OPEN MEETINGS  
AND OPEN RECORDS**

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In response to your recent inquiries for an update regarding open meetings and e-mail communications among Councilors, please be advised as follows:

*OPEN MEETINGS*

The Open Meetings Law, C.R.S. 24-6-401 et seq., which should be treated as applicable to home rule municipalities, defines “meetings” as “any kind of gathering convened to discuss public business, in person, by telephone, *electronically*, or by other means of communication.” All meetings of *three or more* members of City Council at which *any public business is discussed or formal action taken* are declared public meetings for which notice must be provided and, except for executive sessions authorized by law, the public is permitted to attend. Case law holds that public meetings may occur even at impromptu gatherings and events other than regularly scheduled Council sessions. The Open Meetings Law specifically provides that if Councilors use electronic mail to “discuss pending legislation or other public business amongst themselves,” the electronic mail be treated as a public meeting.

Minutes must be kept of any public meeting at which adoption of any proposed policy, rule, regulation or formal action occurs or could occur (i.e., Council business meetings, but not study sessions) and the minutes must be available for public inspection.

Any citizen who believes Council has not complied with the Open Meetings Law may seek injunctive relief from the Jefferson County District Court for an order requiring compliance. If the Court finds a violation the citizen shall be awarded costs and reasonable attorneys’ fees.

## OPEN RECORDS

It is the public policy of the state that all public records shall be open for inspection, Colorado Open Records Act (CORA), C.R.S. 24-72-201 et seq. Public records include “all writings made, maintained or kept by the City for the use in the exercise of its lawful functions or involving the receipt or expenditure of public funds”. Public records also include the “correspondence” (including electronic mail even if the message is not viewed upon receipt, but stored for later retrieval) of Councilors. Public records do not include: correspondence without a demonstrable connection to public business; communication from a citizen or Councilor’s response that clearly implies by its content the citizen expects confidentiality; work product (drafts of documents) or other records such as contents of real estate appraisals, details of security operations and personal financial information of public utility users otherwise protected by CORA.

Any person may request to inspect public records; and, if denied access, may petition the Jefferson County District Court for release of the records. If the court finds denial of inspection improper, it shall award the person who has filed the action court costs and attorney’s fees.

## ANALYSIS/LEGAL OPINIONS/RECOMMENDATIONS

City Council’s procedure/practice requires that when one Councilor communicates by e-mail with another regarding City business that all other Councilors be copied. As an initial point, absent one of the exceptions stated above, such communications, regardless of whether sent and received via a City or personal e-mail address are public records.

When two or more Councilors respond to an e-mail from a Councilor, a public meeting has occurred and the requirements of the Open Meetings Law (i.e., notice, opportunity for public attendance, etc.) are applicable. Minutes may or may not be required. If there is no response by Councilmembers to a Councilor’s e-mail, there is no public meeting, although the initial e-mail is a public record. Although neither state statute nor case law addresses the issue of whether the e-mail communications must be contemporaneous, as with instant messaging, it is our opinion that Council should broadly interpret these legal requirements. Courts hold that the Open Meetings Law is to be interpreted to favor public participation and the state law specifically recognizes that meetings may occur by e-mail.<sup>1</sup> (On the other hand, the law specifically excludes from the open meeting requirements e-mails exchanged among elected officials that do not relate to public business.<sup>2</sup>)

It does not appear that proximity of *time* with respect to the exchange of e-mail messages is necessarily determinative to whether a public meeting has taken place. The determinative factor is simply whether three or more public officials are participating in the e-mail exchange and that public business is *discussed* in the e-mail messages. In other words, it would be difficult to successfully argue that e-mail exchanges among three or more Councilors are outside of the open

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<sup>1</sup> C.R.S. § 24-6-402(2)(d)(III) specifically provides as follows: “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.”

<sup>2</sup> *Id.*

meeting requirements simply because the e-mails were exchanged over an extended period of time.

While there is no Colorado case law addressing the issue directly, courts in other states have considered e-mail communications as open meetings. For example, the Nevada Supreme Court held that a “public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law.” *Del Papa v. Board of Regents of [University and Community College System of Nevada](#)*, 956 P.2d 770, 778 (Nev. 1998). And, in Washington, the court of appeals made a distinction between the “passive receipt of information by e-mail” and the “active discussion of issues” by e-mail. *Wood v. Battle Ground School Dist.*, 27 P.3d 1208, 1217 (Wash. App. 2001). If Colorado follows the holding in the Washington case, a distribution by e-mail of information regarding public business to public officials from another public official is not a public meeting so long as it is only passively received. However, once there is a responsive e-mail sent to the other public officials, the communication becomes a public meeting subject to the notice, citizen attendance, and minutes requirements of the Open Meetings Law.

This leads to the conclusion that if three or more Councilors exchange e-mails concerning a common topic of public business, such exchanges should be deemed a public meeting. Given the practical difficulties in providing the required notice, allowing for citizen participation, and keeping minutes in such situations, we recommend that Council reconsider this practice.

Instead, perhaps Councilors who desire to respond should either wait until the next meeting or just telephone the Councilor and speak with him/her one on one. Please note that if a conference call ensues involving three or more Councilmembers, such call would be a public meeting subject to the Open Meetings Law notice, participation and minutes requirements.

In conclusion, to ensure compliance with the Open Meetings Law and CORA, we recommend that Council consider amendment of its policies/procedures to comply with the laws as described above.

DSW:MLM

cc: Mike Bestor  
Susan Brooks