

**OFFICE OF LEGISLATIVE LEGAL SERVICES**

**COLORADO GENERAL ASSEMBLY**

STATE CAPITOL BUILDING, ROOM 091  
200 EAST COLFAX AVENUE  
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045 FACSIMILE: 303-866-4157  
E-MAIL: OLLS.GA@STATE.CO.US

Attachment F

**MEMORANDUM**

**TO:** House Committee on Ethics

**FROM:** Office of Legislative Legal Services

**DATE:** January 7, 2009

**SUBJECT:** Open Meeting and Open Records in Ethics Investigations<sup>1</sup>

**I. Background**

On December 29, 2008, the Speaker of the House of Representatives appointed a Committee on Ethics following receipt of a complaint. Questions may arise on how the open meetings and open records laws apply to the actions of the Committee on Ethics.

**II. Issue Presented**

How do the Open Meetings Law, part 4 of article 6 of title 24, C.R.S., and the Open Records Law, part 2 of article 72 of title 24, C.R.S., apply to proceedings of the Committee on Ethics?

**III. Conclusion**

Pursuant to Rule 49 (e) of the Rules of the House of Representatives, both the Open Meetings and Open Records Laws apply to actions of the Committee on Ethics. Under the Open Meetings Law, the Committee on Ethics may meet in executive session under certain circumstances, but it is unlikely that any of these exceptions will apply to the Committee. Generally, documents relating to the Committee on Ethics are public documents unless they meet an exception under the Open Records Law.

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<sup>1</sup> This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

## IV. Analysis

### **Rule 49 of the Rules of the House of Representatives**

The Speaker of the House of Representatives received a complaint under Rule 49 of the Rules of the House of Representatives ("Rule 49"), alleging that a representative may have coordinated with a lobbyist to influence the vote of another representative in an upcoming leadership election. The Speaker appointed a Committee on Ethics pursuant to Rule 49 (b). Rule 49 (e) provides:

#### **49. Committee on Ethics**

(e) All proceedings of the committee shall be governed by the provisions of part 4 of article 6 and part 2 of article 72 of title 24, Colorado Revised Statutes.

Pursuant to the Rules of the House of Representatives, proceedings of the Committee on Ethics are subject to the Open Meetings Law and the Open Records Law.

### **Open Meetings**

Section 24-6-402 (2) (a), C.R.S., provides:

**24-6-402. Meetings - open to public.** (2) (a) All meetings of two or more members of any state public body 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.

Section 24-6-402 (1) (d), C.R.S., defines a "state public body" as follows:

**24-6-402. Meetings - open to public.** (1) For the purposes of this section:

(d) "State public body" means any board, **committee**, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted body **of any state agency**, state authority, governing board of a state institution of higher education including the regents of the university of Colorado, a nonprofit corporation incorporated pursuant to section 23-5-121 (2), C.R.S., **or the general assembly**, and any public or private entity to which the state, or an official thereof, has delegated a governmental decision-making function but does

not include persons on the administrative staff of the state public body. (emphasis added)

Therefore, the Committee on Ethics is a state public body, and meetings of its members are open to the public. Section 24-6-402 (3), C.R.S., establishes when a state public body may go into executive session. Section 24-6-402 (3) (b) (I), C.R.S., concerning investigations of charges or complaints against an employee or public official, authorizes an executive session if requested by the employee or public official. However, section 24-6-402 (3) (b) (II), C.R.S., provides that subparagraph (I) does not apply to discussions concerning an elected official. It does not appear that the meetings of the Committee on Ethics could be closed at the request of a representative.

Although section 24-6-402 (3), C.R.S., may authorize the Committee on Ethics to go into executive session if it meets an exception, we are currently unaware of any circumstances that would meet the exceptions of that section.

### **Open Records**

Pursuant to section 24-72-202 (6) (a) (I), C.R.S., the term "public records" generally includes correspondence of elected officials. "Correspondence" is defined in section 24-72-202 (1), C.R.S., as any communication sent to or received by a specified individual that can be produced in a written form. Correspondence of members of the Committee on Ethics is public unless it meets an exception under part 2 of article 72 of title 24, C.R.S.

Section 24-72-202 (6) (a) (II), C.R.S., excludes "work product" from the definition of "correspondence" of elected officials constituting public records. "Work product" is defined in part in section 24-72-202 (6.5) (a), C.R.S., as follows:

**24-72-202. Definitions.** As used in this part 2, unless the context otherwise requires:

(6.5)(a) "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. Such materials include, but are not limited to:

(I) Notes and memoranda that relate to or serve as background information for such decisions;

(II) Preliminary drafts and discussion copies of

documents that express a decision by an elected official.

Documents prepared for the Committee on Ethics by staff to assist the committee in reaching its decision would be considered work product and would not be public records.

Section 24-72-202 (6.5) (c) (IV), C.R.S., provides that material that would otherwise constitute work product is not work product if it "is produced and distributed to members of a public body for their use or consideration at 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." If documents prepared by staff for the Committee on Ethics are discussed at an open meeting, the documents may become public records.