

No. 48182-1-II

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IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION II

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ARTHUR WEST,  
Appellants,  
v.

PIERCE COUNTY COUNCIL, et al  
Respondents

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On appeal from the rulings of Thurston  
County Superior Court Judge Erik Price

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APPELLANT WEST'S  
OPENING BRIEF

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## I. SUMMARY OF ARGUMENT

This is an action under the Washington State Open Public Meetings Act concerning electronic deliberations of the Pierce County Council on the issue of whether to maintain a court action against a citizen who was sponsoring a referendum in opposition to a proposed ¼ of a Billion Dollar new building to house all of the government offices of Pierce County.

The record is clear that the entire Council received numerous emails on the subject from the Pierce County Prosecutor and the Executive, as well as several of their fellow council members, and that a majority of the 7 member council actively participated in deliberative email and/or telephone communications on the issue.

It is also undisputed that the same issue came up for a vote of the Council on March 10, 2015, when the previous determination was ratified.

There is also no dispute that the Pierce County Council is the only county authority authorized by law to approve the filing of a such a lawsuit by the County.

Further, there is no dispute as to whether the entire council received multiple emails concerning the prospect of the County filing suit against Mr. Gibbs or that more than a quorum (5) of the Pierce County Council actively participated in serial deliberations and/or telephone conversations that resulted in a determination to file a suit in Pierce County v. Gibbs, Cause No. 15-2-06419-9.

Nor is there any dispute that the determination made in secret was ratified and approved in a formal resolution on March 10<sup>th</sup>. Under these circumstances, there was simply no evidentiary basis for the Court to conclude that there was not an evident violation of the Open Public Meetings Act.

The circumstances of this case present a textbook case of serial communications of the exact type discussed in Wood v. Battleground and the cases from California, Nevada, and Florida cited by the Court in Wood to support its decision. In addition, the Council, by subsequently formally ratifying the action and decision in Resolution R2015-31 on March 10<sup>th</sup>, is estopped from contesting their final action taken outside of an Open Public Meeting.

In addition to failing to find a violation of the OPMA based upon the above undisputed facts, the Trial Court in this case also improperly relied upon unpublished “precedent” to deny standing under the OPMA and to interpret the Law in such a manner that the term “any person” in the OPMA did not mean “any person”.

Such an interpretation violated the separation of powers and transcended the procedural “Petracha” authority of the Court as it was simply in conflict with the both the clear letter and manifest substantive intent of the OPMA as it was adopted by the Legislature of the State of Washington when it enacted the provisions of House Bill 526 into law.

**ASSIGNMENTS OF ERROR**

**I** The Court erred in failing to find a violation of the OPMA when it was undisputed that a majority of the Pierce County Council actively participated in covert serial email and telephone conversations to make a decision and take an action, which action later came before the council for a vote and was ratified in a formal public meeting.....

**II** The Court erred in failing to interpret the OPMA liberally to effectuate the intent of the legislature that the public have access to all stages of the decision-making processes of our elected officials.....

**III** The Court erred and violated the doctrine of separation of powers in finding that the express language of RCW 42.30.130 stating that “any person may maintain an action” did not provide that any person may maintain an action.....

**IV** The Court erred in ruling that West lacked standing based upon unpublished “precedent” when he asserted, at least, “an identifiable scintilla of interest”.....

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I** Did the Court err in failing to find a violation of the OPMA when it was undisputed that a majority of the Pierce County Council actively participated in covert serial email and telephone conversations to make a decision and take an action, which action later came before the council for a vote and was ratified in a formal public meeting.....? Yes.

**II** Did the Court err in failing to interpret the OPMA liberally to effectuate the intent of the legislature that the public have access to all stages of the decision-making processes of our elected officials.....? Yes.

**III** Did the Court err and violate the doctrine of separation of powers in finding that the express language of RCW 42.30.130 stating that “any person may maintain an action” did not provide that any person may maintain an action? Yes.

**IV Did the Court err in ruling that West lacked standing based upon unpublished “precedent” when he asserted, at least, “an identifiable scintilla of interest”.....? Yes.**

**STATEMENT OF THE CASE**

This case involves serial email communications between the entire Pierce County Council and active participation in email and telephone exchanges of a quorum of the Council members. (CP 103-214)

On February 24, 2015, the Pierce County Executive communicated with all of the Pierce County Commissioners concerning filing a lawsuit to challenge a referendum filed by Pierce County activist Jeffrey Gibbs. (CP 9-14)

Following this communication the Pierce County Prosecutor's office sent a number of Email to all of the Council asking for their position on the suit. (CP 9-14 )

Between February 25 and March 2<sup>nd</sup>, a quorum of the Council actively participated in the email “deliberation” exchanges and deliberative telephone calls to the prosecutor's office concerning the council's position on the suit. (See Transcript page 14-15, CP 9-68)

The Prosecutor's office, after securing approval from a majority of the Council, and hearing individually from several members of the Council, did file the lawsuit that the council had deliberated upon on

Friday afternoon, February 27, in Pierce County v. Gibbs, Case No. 15-2-06419-9. (CP 85)

On March 10, 2015, the Pierce County Council, in a public meeting, formally ratified their previous action in approving the filing of the lawsuit by the Pierce County Prosecutor on their behalf. Then, after taking public testimony, they recanted. (See Transcript at page 14 )

On 03/05/2015, the instant action was filed. (CP 2-3)

On 04/21/2015, the County moved for Summary Judgment (CP 44-63)

On 09/18/2015, a hearing was scheduled on defendant's motion for summary judgment. (Transcript of 09/18/2015)

On 09/ 18/ 2015 the Superior Court held a hearing and issued an Order granting defendant's Motion for summary judgment, dismissing the case. (CP 226-229). (See also the Transcript of the 09/18/2015 hearing)

On 10/19/2015, plaintiff filed a motion for reconsideration. (CP 230-243)

On 10/21/2015 the Court entered an order denying reconsideration. (CP 260)

On 10/19/2015, a timely notice of appeal was filed. (CP 263-267)

**ORDERS ON APPEAL**

Appellant seeks review of the Order of Dismissal with Prejudice of September 18, 2015 (CP 226-229), and the Order Denying Reconsideration of October 21 2015. (CP 260)

**STANDARD OF REVIEW**

De Novo

**ARGUMENT**

I The Court erred in failing to find a violation of the OPMA when it was undisputed that a majority of the Pierce County Council participated in covert serial email and telephone conversations to make a decision and take an action, which action later came before the council for a vote and was ratified in a formal public meeting.....

This is an action under the Washington State Open Public Meetings Act concerning a series of secret meetings conducted by serial email and electronic communications by the Pierce County Prosecutor and Council for the purpose of expressing the approval of the council for the prosecutor to file a lawsuit against activist Jeffrey Gibbs in regard to a referendum he proposed opposing a proposed quarter of a Billion Dollar county office building.

The approval of the county's suit against Gibbs was the result of a series of Email communications involving a quorum of the Piece County

Council and additional telephone conversations taken for the purpose of approving a formal action on behalf of the Council.

There is no dispute that the Pierce County Council is the only authority authorized by law to approve the filing of a lawsuit by the County, or that at least a quorum of the Pierce County Council participated in these serial deliberations and/or telephone conversations that resulted in a determination to file a suit in *Pierce County v. Gibbs*, Cause No. 15-2-06419-9.

Nor is there any dispute that the determination made in secret was ratified and approved in a formal resolution of the Council on March 10<sup>th</sup>. Under these circumstances, there was simply no evidence or reasonable inference therefrom to support the Court's conclusion that there was not an evident violation of the Open Public Meetings Act.

The circumstances of this case present a textbook case of serial communications between a quorum of the exact type discussed in *Wood v. Battleground School District*, 107 Wn. App 550, 27 P.3d 1208 (2001) and the cases from California, Nevada, and Florida cited by the Court in *Wood* to support its decision.

In addition, this case presents the additional elements of a clandestine approval of a "final action" by the Council, and a waiver of the ability to deny such action by the council's subsequent formal ratification of such action and decision in Resolution R2015-31 on March 10<sup>th</sup>.

In the present case, not only did the council deliberate, they authorized a final action on the part of the county, an action that only they could authorize, and should be equitably estopped from contesting that final action taken outside of an Open Public Meeting by their subsequent action on March 10, 2015, ratifying their previous secret decision.

This case involves a series of Email communications involving a quorum of the Pierce County Council and additional telephone conversations taken for the purpose of approving a formal action on behalf of the Council. There is no dispute that the Pierce County Council is the only authority authorized by law to approve the filing of a lawsuit by the County, or that at least a quorum of the Pierce County Council participated in these serial deliberations and/or telephone conversations that resulted in a determination to file a suit in Pierce County v. Gibbs, Cause No. 15-2-06419-9.

Nor is there any dispute that the determination made in secret was ratified and approved in a formal resolution of the Council on March 10<sup>th</sup>. Under these circumstances, there is simply no basis for the Court to conclude that there was not an evident violation of the Open Public Meetings Act.

Subsequent to the plaintiff filing a PRA suit for disclosure of records relating to the Council's action, Pierce County waived the

attorney-client privilege and disclosed a key piece of evidence, the March 2, 2015 Email of Doug Vanscoy to the County Council.

This Email stated that...

“the County Commissioners are the body that exercises county powers, RCW 36.01.030, and adopts the official position on county issues RCW 36.01.120(6) Osborne v. Grant County 130 Wn.2d 615, 627 (1996)

The Pierce County Prosecutor's analysis concludes..

(I)t is crystal clear under state law that the councils of charter counties have control over county litigation.

More significantly, in the final paragraph of this previously withheld document, County Deputy Prosecutor Vanscoy states...

(W)e believed it was proper and prudent to check in with the council before proceeding...After hearing individually from several members of the Council, we did file the lawsuit Friday afternoon, February 27: Pierce County v. Gibbs, Case No. 15-2-06419-9. The Prosecutor's office has acted properly, lawfully, and in the County's best interest throughout the process...

As a subsequent statement prepared for Pierce County Council Chair Dan Roach noted...

Now the prosecutor's office is saying they contacted some of the members of the council prior to filing and proceeded with the suit...  
**(H)how does that not violate the Open Public Meetings Act?** (emphasis added)

If all of the above was not enough, there is the additional circumstance that, subsequently, on March 10, 2015, the Council adopted Resolution R2015-31, which, in section 2, resolved that...

**For the purposes of this lawsuit only, the Council hereby retroactively ratifies and confirms the filing of Pierce County v. Gibbs, Cause No. 15-2-06419-9. (emphasis added)**

This express action by the Pierce Council ratifying and confirming the filing of the lawsuit should be seen to estopp the County from disputing that the Council approved the filing of the lawsuit, which, in the absence of such action, would have been an illegal ultra vires action of the County Executive and Prosecutor<sup>1</sup>. Finding estoppel under these circumstances would be in accord with *Finch v. Matthews*, 74 Wn.2d 161, 175, 443 P.2d 833 (1968), and *Kramarevsky v. DSHS*, 122 Wn 2d. 738 743 863 P 2d 535, (1992).

Although the case law in Washington is somewhat limited on the issue of serial electronic communications and what exactly constitutes a violation of the OPMA (See *Wood v. Battle Ground School District*, 107 Wn. App 550, 27 P.3d 1208 (2001), a review of the precedent from other States relied upon by the Court in Wood clearly illustrates that the circumstances of this case fall squarely within the type of conduct described by the Washington State Supreme Court and that universally

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<sup>1</sup> It is uncertain why the County Prosecutor, with this apparent conflict of interest, is defending the Commissioners in this case.

seen to be violative of similar Open Public Meeting Laws in other States.

As the Court in Wood held...

(C)ourts have generally adopted a broad definition of "meeting" to effectuate open meetings laws that state legislatures enacted for the public benefit.[4] See, e.g., *Stockton Newspapers*, 214 Cal.Rptr. at 565-66 (**series of telephone calls between individual members and attorney to develop collective commitment or promise on public business violated Brown Act**); **Blackford v. Sch. Bd. of Orange County**, 375 So.2d 578, 580 (Fla.Dist.Ct.App.1979) (**successive meetings between school superintendent and individual school board members violated Sunshine Law**); *Del Papa v. Bd. of Regents of the Univ. & Cmty. Coll. Sys.*, 114 Nev. 388, 956 P.2d 770, 778 (1998) (**use of serial electronic communication by quorum of public body to deliberate toward or to make a decision violates state open meeting law**). (emphasis added)

Significantly, the California Supreme Court in *Stockton Newspapers v. City of Stockton*, 171 Cal. App. 3d 95; 214 Cal. Rptr. 561, (1985) expressly rejected the exact same type of argument made by the County in the present case...

Defendants argue that because the alleged telephone conversations were conducted serially as opposed to simultaneously as in the case of a "speaker phone" conference call among a majority of the members, the case falls within the statutory exception to the open meeting requirement where less-than-a-quorum of the governing body is at any one time involved.

In rejecting this argument, the Court in *Stockton Newspapers* held...

(A) series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time is proscribed by the Brown Act if the contacts are "planned by or held with the collective concurrence of a quorum of the body to privately discuss the public's business" either **directly or indirectly through the agency of a nonmember.** (65 Ops.Cal.Atty.Gen., supra, at p. 66.) (emphasis added)

Similarly, the Nevada Supreme Court ruled, citing *Stockton*:

Based on the foregoing legislative history and case law, we hold that a quorum of 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... if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting. *Del Papa v. Bd. of Regents of the Univ. & Cmty. Coll. Sys.*, 114 Nev. 388, 956 P.2d 770, 778 (1998)

In Florida the Court, in a ruling very applicable to the circumstances of this case, where serial communications were similarly coordinated by a third party, held that the motives of the public board in conducting private deliberations are irrelevant, even in instances when their motives could be seen to be **"as pure as driven snow"**...

Both the memos of the school board attorney and the candid testimony of the superintendent lead us to the conclusion that what transpired here was not so much a willful violation of the Sunshine Law, but rather an attempt *not* to violate it, yet keep the various options secret... However, that is not the point. School boards are not supposed to conduct

their business in secret even though it may all be for the best at the end of the day and notwithstanding that the motives are as pure as driven snow. Blackford v. Sch. Bd. of Orange County, 375 So.2d 578, 580 (Fla. Dist. Ct. App. 1979)

Such a broad view of the requirements of the OPMA is required to not to ensnare the unwary, but to frustrate attempts at evasion and is in accord with the holdings of other State Courts, including the Supreme Court of West Virginia, which held...

**(A)pplying the law should "push [its coverage] beyond debatable limits in order to block evasive techniques." Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal.App.2d 41, 50, 69 Cal.Rptr. 480, 487 (1968).[16] As the Florida court stated in Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla.1974): "One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. **Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices.** This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute,..." McComas v. Bd. of Educ. of Fayette County, 475 S.E.2d 280 (W.Va. 1996) (emphasis added)**

From Tennessee comes a similar holding that is directly applicable to the circumstances of this case...

(o)nce any discussion, whatsoever, begins among the members of the public body regarding what

action to take based upon advice from counsel, whether it be settlement or otherwise, such discussion shall be open to the public and failure to do so shall constitute a clear violation of the Open Meetings Act. Smith County Education Association, 676 S.W.2d at 334 (Tennessee)

The OPMA in Washington should be interpreted in conformity with the overwhelming weight of the well reasoned precedent of these many other States to include conduct such as that evident in the uncontested facts of this case. As the Court in Wood v. Battle Ground stated...

(I)n light of the OPMA's broad definition of "meeting" and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a "meeting."

Because serial Email exchanges are recognized as potential violations of the OPMA and because a there has been prima facia showing of not only serial email communications between and involving a quorum of the commissioners, but also additional telephone deliberations, resulting in a final collective action, summary judgment was inappropriate in the present case.

The overwhelming weight of national precedent and the clear intent of the legislature of this State strongly support the conclusion that the type of serial email communications and telephone deliberations demonstrated in this case, which resulted in a final action on the part of the Pierce County, which was approved and ratified by the Council, can

constitute a violation of the requirements of the OPMA, even if, giving them the benefit of the doubt, the individual council members' motives may have been "as pure as driven snow".

Significantly, the Washington State Open Public Meetings Act contains the following legislative declaration of intent...

The legislature finds and declares that all public commissions, boards, councils, committees, sub-committees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. RCW §§ 42.30.010.

In accord with the broad remedial intent of the OPMA, his Court should vacate and reverse the Order of the Superior Court in all respects.

II The Court erred in failing to interpret the OPMA liberally to effectuate the intent of the legislature that the public have access to all stages of the decision-making processes of our elected officials.

Significantly, the Supreme Court of the State of Washington has repeatedly emphasized that the provisions of the OPMA employ some of the strongest language of any legislation See Equitable Shipyards, Inc. v. State of Washington, 93 Wn. 2d 465, 611 P.2d 396 (1980). Miller vs. City of Tacoma, 138 Wn.2d 318, 979 P.2d 429 (1999) In order to effectuate the Act's purpose, courts applying its provisions are required to construe it liberally. See RCW 42.30.910 "The purposes of this chapter are hereby declared remedial and shall be liberally construed."; See Miller, 979 P.2d at 434.

The OPMA has some of the strongest language and most expansive remedial intent of any existing law. It contains an express statement that it must be interpreted liberally to effectuate its remedial intent. The purpose of the OPMA is to ensure that public bodies make decisions openly. See RCW 42.30.010; Miller v. City of Tacoma, 979 P.2d 429, 432 (Wash. 1999) (en banc).

Some of the purposes of the OPMA as articulated by the courts are: To guarantee public access to and participate in activities of their representative agencies. Mead School Dist. No. 354 v. Mead Education Assn., 85 Wn. 2D 140,530 P.2d 302 (1975), To allow the public to view the decision making process at all stages. Cathcart v. Andersen, 85 Wn. 2d

102, 530 P.2d 313 (1978), To prevent public officials from avoiding public scrutiny and accountability, *Eugster v. City of Spokane*, 128 Wn.App. 1, 114 P.3d 1200 (Div. 3 2005), and; To give the public ready access to first hand knowledge of the deliberations and decisions of public agencies where the executive session does not apply. *Snohomish County Improvement Alliance v. Snohomish County*, 61 Wn. App. 64, 808 P.2d 781 (Div. 1 1991)

In the Order of January 16, the Court ordered that “Mr West Lacks standing under either the Open public meeting (sic) act or the declaratory judgement Act, as required by law.”

A judicially promulgated standing limitation in OPMA cases such as the one created by the Superior Court in this case would eviscerate and render the OPMA toothless and lead to absurd results, as no citizen could possibly know whether they had such particularized standing to contest the unknown secret deliberations of their government, due to the closed nature of such meetings.

It is in accord with common sense, clear legislative intent and the purpose of the sunshine laws that standing under the OPMA be determined just as standing is under the PRA, which does not require a citizen to show a personal interest in records to seek their disclosure, but only that they have been denied the opportunity to inspect them. Being denied the

opportunity to attend a meeting is a particularized harm, and one that West demonstrated in this case.

**III** The Court erred and violated the doctrine of separation of powers in finding that the express language of RCW 42.30.130 stating that “any person may maintain an action” did not provide that any person may maintain an action.....

Significantly, the clear text of RCW 42.30.130 provides...

**Any person may commence an action** either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body. (emphasis added)

The term "any person" in the statute is not ambiguous and obviously demonstrates an intent to include "any person" within the ambit of the statute. Significantly, the original Senate version of the 1971 Bill (485) which was not adopted into law included a restrictive requirement just like that argued by counsel Lake to exist in the presently enacted law.

The version of the House Bill (526) that was actually chosen by the legislature to become law had no limiting requirement, demonstrating the manifest intent of the Legislature to afford every citizen a cause of action in regard to illegal secret meetings of his government. (See CP )

The ordinary meaning rule of statutory construction requires, “an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated.” Ravenscroft v. Washington Water

Power Co., 136 Wash.2d 911, 920, 969 P.2d 75, 80 (1998). The plain meaning of the word “any person,”

If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself. Dep't of Transp. v. State Employees Ins. Bd., 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

The primary goal of statutory construction is to carry out legislative intent. Rozner v. City of Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). The primary intent of the OPMA is to allow citizens to observe every stage of the decision making process and it would be completely subverted if the OPMA became unenforceable due to unreasonable and virtually unattainable standing requirements.

“If a statute’s meaning is plain on its face, then we must give effect to that plain meaning as an expression of legislative intent.” Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

When construing a statute, “[T]he first rule [in statutory construction] is ‘the court should assume that the legislature means exactly what it says.’” Western Telepage, Inc. v. City of Tacoma Dept. of Financing, 140 Wn.2d 599, 608-9, 998 P.2d 884 (2000). A court is not free to “construe unambiguous statutes.” *Id.* at 609. Words within a statute are to be given their ordinary meaning. State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991).

Thus, when construing a statute the court is to look to the wording of the statute, not to outside sources such as legislative intent. Western Telepage, Inc. at 609. A court may “not ignore clear statutory language and...strain to find an ambiguity where the language of the statute is clear.” State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass’n, 140 Wn.2d 615, 632, 999 P.2d 602 (2000). It is “obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh.” Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). The Court in this case erred and violated the doctrine of separation of powers by failing to construe the OPMA in accord with the clear language of statute to provide that any person could maintain an action.

“One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.” State v. Osloond, 60 Wn.App. 584, 587 805 P.2d 263 (1991) review denied, 116 Wn.2d 1030, 813 P.2d 582 (1991).

It “represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, and...is a matter of fundamental necessity...essential to the maintenance of a republican form of government.” Washington State Motorcycle Dealers Ass’n v. State, 111 Wn.2d 667, 675, 763 P.2d 442 (1988)(citing 16 Am.Jur.2d § 296, at 808)

While the Washington Constitution does not contain a formal separation of powers clause, “the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.” *Carrick v. Locke*, 125 Wn.2d 129, 134-5, 882 P.2d 173 (1994).

The doctrine:

...comes from the constitutional distribution of the government's authority into three branches. The state constitution divides the "political power" that is "inherent in the people," article I, section 1, into "legislative authority," article II, section 1, "executive power," article III, section 2, and "judicial power," article IV, section 1. Each branch of government wields only the power it is given. [Emphasis added]. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002).

The purpose of the doctrine is “to ensure that the fundamental functions of each branch remain inviolate.” *Carrick* at 135. Thus, it prevents “one branch of government from aggrandizing itself or encroaching upon the ‘fundamental functions’ of another.” *Moreno* at 505.

“When separation of powers challenges are raised involving different branches of state government,...the state constitution is implicated.” See *Carrick* at n.1.

The test for determining whether separation of powers has been violated is “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Carrick* at 135 (quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

“When a court rule and a statute conflict, the nature of the right at issue determines which one controls.” *State v. W.W.*, 76 Wn.App. 754, 758, 887

P.2d 914 (1995). “If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails.” Id.

A court may “not ignore clear statutory language and...strain to find an ambiguity where the language of the statute is clear.” State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n, 140 Wn.2d 615, 632, 999 P.2d 602 (2000). It is “obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh.” Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

To require a plaintiff in an OPMA case to discern, by clairvoyance what transpired in a secret meeting and then show a personal interest in the subject matter of the secret meeting would lead to absurd results, such as precluding the very same type of action the statute allows and promotes in order to protect each citizen’s right to an open government. “We will construe statutes to avoid strained or absurd results.” State v. Akin, 77 Wn. App. 575, 580, 892 P.2d 774 (1995). Such a construction would also allow the defendants to violate the law with impunity in direct contravention of the law’s statutory intent.

In addition, “A court must not create exceptions in addition to those specified by the Legislature.” Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wash. 2d at 280-81, 4 P.2d at 827-28 (2000).

Significantly, the other sunshine law, the Washington State Public Records Act, allows for individuals to bring citizen's actions regarding public records. The courts' settled interpretation of who can bring suit under the Public Records Act is that any citizen may bring an action, regardless of a personal interest in the subject matter of the records, since the denial of inspection of records is a particularized harm. Similarly, under the OPMA, the conduct of the people's business in secret and/or the denial of the ability to attend a public meeting creates standing irrespective of the particular subject matter of the meeting or the county of residence of the plaintiff.

Clearly, the doctrine of *in pari materia* construction should apply to both sunshine laws, since similar statutes, such as the OPMA and Public Record Acts, must be interpreted similarly. *State v. Tili*, 139 Wash. 2d 107, 985 P.2d 365 (1999). The Washington Supreme Court has called this "a cardinal rule." "In ascertaining legislative purpose, statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Fairbanks*, 25 Wash.2d 686, 690, 171 P.2d 845, 848 (1946).

In addition,

"Where statutes are part of a general system relating to the same class of subjects and rest upon the same reasons, they should be so construed, if possible, to be uniform in their application and the results which

they accomplish.” *State v. Savidge*, 75 Wash. 116, 120, 134 P. 680, 682 (1913).

As their common denomination as the Sunshine Laws demonstrates, the OPMA and Public Records Act are derived from the same intent to preserve an open, accountable government controlled by the citizens. The interpretation of the OPMA must be construed to accomplish the same results as the Public Records Act, which is to grant citizens broader control over their government, and litigation by private citizens enforcing the OPMA is essential to this end.

In order to achieve a uniform application of both statutes, the OPMA must be interpreted to invite citizen’s suits brought forth by any citizen who has been denied the opportunity to observe the deliberations and decision making process of a public body, regardless of an additional personal interest in the subject matter of the meetings they were excluded from.

Plaintiff West asserts the Court erred and violated the doctrine of separation of powers in finding that a plaintiff asserting a cause of action under the OPMA is required to show particularized injury despite the clear and explicit provisions of RCW 42.30.130 to the contrary, and the manifest, broad, and remedial intent of the OPMA to protect the fundamental rights of the “people”

**IV The Court erred in ruling that West lacked standing based upon unpublished “precedent” when he asserted, at least, “an identifiable scintilla of interest”.....**

As the transcript of the hearing of demonstrates, at page , the trial court cited to and relied upon the legal precedent of an unpublished opinion of the Court of Appeals as the basis for its standing ruling. West assigns error both to the Court's reliance upon unpublished “precedent” to require an identifiable scintilla of interest and in its failure to find that he had shown particularized injury despite West having demonstrated at least the required identifiable scintilla of interest and a decade long history of consistent presence in, and association with, the government of Pierce County.

The issue has not previously been addressed, but West believes it to be reversible error for a trial court to rely upon a decision that the parties cannot cite to and which the Court of Appeals has expressly determined has no precedential value as determined by GR 14.1 and RCW 2.06.040.

It is clearly established in Washington that a party may not cite to an unpublished opinion as legal authority. GR 14.1 provides...

A party may not cite as an authority an unpublished opinion of the Court of Appeals.

Further, RCW 2.06.040 provides, in pertinent part...

All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient

precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published.

If the Court of Appeals has made the determination a decision lacks precedential value and the parties are prevented from even citing to it in their briefs, it is inequitable for a trial court to base its determinations upon such grounds, especially since any citation to or analysis of the underlying unpublished decision is barred under GR 14.1, and since the Court of Appeals has already determined the decision should not be published so as to have precedential effect.

Plaintiff West asserts that the Court erred in finding that a plaintiff asserting a cause of action under the OPMA is required to show particularized injury based upon inadmissible unpublished “precedent”, and despite the explicit provisions of RCW 42.30.130 to the contrary.

Further, the trial court erred in finding that West lacked standing even under the “scintilla” standard, as the record reflects that West identified at least an identifiable scintilla of interest. As West certified to the Court (At CP )...

I do not live in Pierce County, but I have had continual relationship with the government of Pierce County for nearly a decade, as evidenced by the (still) ongoing case of West v. Port of Tacoma, 08-2-04312-1. I frequently travel to Pierce County and employ governmental offices there for personal, legal, and recreational purposes. As a citizen who purchased retail goods and services in Pierce county, I pay taxes to Pierce County every time I make copies, purchase gasoline or Diesel fuel, or buy lunch at a restaurant after a hearing in Division II or the Pierce County Superior Court.

Since the diesel fuel at the truck stop (Luvs) by the Port of Tacoma is of better quality and cheaper than I can find

in Olympia, I often stop there to fill up both of the Diesel Mercedes 300 DSL's that I own.

I request that the court take notice of the fact that the current sales tax rate in Pierce County is 2.3%, as can be verified at <http://www.sale-tax.com/PierceCountyWA>.

If the council is allowed to act in secret to take action in regard to projects like the new building involving a ¼ billion dollar bond issue, there is the very real prospect that not only will taxes go up, they will do so behind closed doors, impacting me in my daily activities, as I will be required to pay more for a number of the basis resources I employ on a daily basis.

I also have attended numerous public meetings of the Pierce County Council and various municipalities throughout the county including Tacoma and Puyallup. I recently settled a case with the City of Pacific, which is located in both Pierce and King counties....

As a citizen who frequently travels to Pierce County and employs the area for birdwatching, leisure and sightseeing activities, I am impacted by large developments in the county such as the new county building or a highway interchange See West v. Secretary of the Department of Transportation, 206 F.3d 920 (9th Cir. 2000)

The Pierce County Council, by taking action involving a ¼ of a billion dollar project behind closed doors, and in allowing the office of the Prosecutor to act in an ultra vires manner to employ the power and authority of the County to retaliate against a citizen for exercising his constitutional rights particularly impacts my interests as a recognized advocate for open and accountable government.

The actions of the Pierce County prosecutor, in employing telephone conversations to conduct public business also, according to the eminent authority on public officers, Ramsey Ramerman, directly impacts my interests in *West v. Vermillion*, and implicates substantial issues of public importance involving the conduct of public officers, that according to this authority, are sufficient for review by the Supreme Court.

A demonstration of the use of telephone communications by the office of the Pierce County Prosecutor is a powerful argument to support the contention that the telephone records of the Prosecutor should be disclosed.

This Court should take judicial notice of the commonly known and verifiable circumstances that my case in *West v.*

Vermillion is stayed pending a final determination in Nissen, and the ruling of the Court in Nissen has yet to become final in light of the County's motion for reconsideration.

Thus I have a direct interest in demonstrating the unlawful use of telephone communications by the Pierce County Prosecutor as this may very well impact the determination in West v. Vermillion.

Also attached are pages 29-31 of a brief filed in the Supreme Court by the City of Puyallup, wherein they argue that the OPMA rigorously promotes transparency and accountability so disclosure of communications on "private" devices is unnecessary. In order for this argument not to be seen as unreasonable, the OPMA must be seen to rigorously promote transparency and accountability, and plaintiff has a direct interest in the effectuation of this commonly accepted interpretation of the act, regardless of personal standing issues.

I was also particularly and adversely impacted by the determination of the Commissioners to sue Mr. Gibbs in that, as an advocate for open government who has successfully opposed large projects ranging from a proposed chip manufacturing plant in Dupont, Washington, to a 2 Billion Dollar Highway project in Northern Virginia outside Washington D.C., the ability of a county to act in the absence of approval by its commissioners on the basis of back room determinations has the real prospect of chilling my ability to work with and cooperate with the elected representatives of local governments, as I did with Arlington County to terminate the proposed HOT Lanes Project between Alexandria and the Pentagon.

Further, in light of the bellicose and threatening communications of the office of the Pierce County Prosecutor, what appears to be an open policy of retaliation and persecution of whistleblowers by the Pierce County Prosecutor, and Mr. Hamilton's explicit threats to maintain a court action against me due to his overly sensitive nature, I would be personally impacted by a state of affairs where the Pierce County prosecutor believed they had the authority to maintain court actions absent formal public approval by the County Commissioners.

I also have standing in that, as a fellow activist, I am interested in the Gibbs referendum and controversy, and in that I was barred from attending the confidential meetings of the council and prosecutor that led to the suit against Gibbs. My interest is demonstrated by the fact that when the Council

did hold a meeting on the subject, I was one of the small discrete class of citizens who attended and spoke in opposition to the action. The exclusion from the prior "meetings" about an issue of personal concern was not a harm that all citizens of this State .

At the meeting of council that was open to the public, I testified as to some of the interests I had in the Building suit against Gibbs.

Finally, as to actions in Pierce County that impact my interests, I am also still in litigation with the Port of Tacoma and their reactionary, litigious counsel over records concerning the port of Tacoma's previous alliance with the Port of Olympia, even after seven years and 2 Orders of Remand from the Appellate Courts. Significantly, according to Port Counsel Lake, the project that the records involve has resulted in a 7 Million Dollar judgment against Thurston County.

If there is to be a uniformly enforced standing requirement under the OPMA, how is it to be defined and what its parameters should be are difficult issues to resolve. Does standing require residency in a municipality or County? Or does it require an interest in the specific subject matter of the meeting complained of? Either one of these requirements would make a statute that is very little used to begin with even less of a viable measure to require transparency and accountability.

West does not live in Pierce County but has a decade of regular interaction with the government of Pierce County that exceeds that of many residents. He pays taxes on purchases he makes in the county and supports the operation of the County with fees and imposes the county collects.

West has a particularized interest in government accountability and the evasion of the Sunshine laws by means of electronic communications by entities such as the Puyallup City Council and the Pierce County prosecutor. As an activist who has suffered retaliation by government entities, West has a special interest in requiring government entities like Pierce County to act in public before they use the powers of their agency to pick on an ordinary citizen.

West also, as a regular consumer of Pierce County government services would experience more impacts than most residents from the relocation and reorganization of all of the County functions into a new megabuilding. As a citizen who regularly interacts with Pierce County officials he would experience effects just as severe as any resident, and probably more than most who do not as a general practice interact with the government.

As the Supreme Court ruled in *United States v. SCRAP*, 412 U.S. 669 (1973),

- (a) Standing is not confined to those who show economic harm, as "[a]esthetic and environmental wellbeing, like economic wellbeing, are important ingredients of the quality of life in our society." *Sierra Club, supra*, at 405 U. S. 734. P. 412 U. S. 686.
- (b) Here, the appellees claimed that the specific and allegedly illegal action of the ICC would directly harm them in their use of the natural resources of the Washington area. Pp. 412 U. S. 686-687.

In *West v. Secretary of the Department of Transportation*, 206 F.3d 920 (9th Cir. 2000), a case dating back to 1994, the federal District Court found that West had standing to challenge a 10 Million Dollar Highway interchange in Pierce County.

With over 2 decades of consistent history of activity in Pierce County and a judicially recognized interest in large development projects in Pierce County, is it reasonable to suggest he lacks standing to address issues relating to a mega-development 25 times more costly than the Dupont Highway interchange?

This court should find that the clear language and broad remedial intent of the OPMA are incompatible with any form of threshold standing requirement, or at the very least determine that what minimal standing requirements may be imposed in accord with the goals of the OPMA are more than satisfied by the appellant's showing of his various types of interests and his documented history of over 2 decades of presence in and consistent interaction with the activities of government in Pierce County.

## **CONCLUSION AND RELIEF SOUGHT**

The Washington State Open Public Meetings Act has some of the strongest language and most expansive remedial intent of any existing law. It contains an express statement that it must be interpreted liberally to effectuate its remedial intent, to ensure that public bodies make decisions

openly. See RCW §§ 42.30.010; *Miller v. City of Tacoma*, 979 P.2d 429, 432 (Wash. 1999) (en banc).

The Court should draw all reasonable inferences in favor of the plaintiff and rule in accord with the intent of the Legislature that the type of serial email communications and telephone deliberations demonstrated in this case, which resulted in a final action on the part of the Pierce County, can and did constitute a violation of the requirements of the OPMA.

Because serial Email and telephone exchanges are recognized as potential violations of the OPMA and because a there has been prima facia showing of not only serial email communications between all of the Pierce County Council Members, but additional telephone deliberations involving active participation by at least a quorum of the council, and a final collective action, which was subsequently ratified in public, the trial court clearly erred in granting the county summary judgment, as no evidence or reasonable inference therefrom supported such a determination.

The Court erred in failing to recognize that multiple transmissions of emails to all of the Pierce County Council concerning a matter that would come before the Council, in addition to active participation in transmitting emails and in initiating telephone conversations by more than a quorum of the Council to authorize the County Prosecutor to maintain an

action, (which action was subsequently voted on and ratified by the Council on March 10, 2015), constituted a textbook example of a violation of the OPMA by means of serial electronic meetings, and in establishing and unreasonable unprecedented standing requirements not founded upon any statutory language or published precedent.

Washington State's Open Public Meetings Act is essential to the fundamental right of the "People" of the State of Washington to knowledge of, and control over, the instruments they have created. The express statutory language of the OPMA does not limit its reach to those residing within certain geographic areas or those with special interests, but speaks broadly to the rights of "the people" and the ability of "any person" to maintain an action.

The issue of whether the Pierce County Council can confer in secret to authorize the prosecutor to maintain an action against a citizen is a controversy that concerns the actions of public officers and is of widespread public importance, and one that should not be subject to arbitrary and nonuniform standing requirements as an obstacle for a citizen to address under the broad remedial intent and express language of the Uniform Declaratory Judgments Act or the OPMA.

The Courts have traditionally applied standing requirements more liberally in cases like this one that involve the public interest. See Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 77 Wn.2d

94, 96, 459 P.Zd 633 (1969) ("Where a controversy is of serious public importance . . . questions of standing to maintain an action should be given less rigid and more liberal answer.") It was error for the Court to fail to interpret the OPMA broadly in accord with these principles to effectuate the sound public policy of accountability and transparency in the conduct of the people's business.

The Orders September 18<sup>th</sup> and October 21<sup>st</sup> of 2015 should be vacated and reversed, and this case remanded back to the Superior Court with instructions to grant the relief sought in the Complaint.

Respectfully submitted this 8<sup>th</sup> day of March, 2016.

By: *s/ Arthur West*  
ARTHUR WEST

**CERTIFICATE OF SERVICE**

I certify that I served a copy of the foregoing Brief of Respondent, by **Email with backup by regular U.S. Mail** on the 8<sup>th</sup> day of March, 2016, to counsel of record:

This document was electronically served upon the following counsel on this 8<sup>th</sup> day of March, 2016.

Dan Hamilton  
dhamilt@co.pierce.wa.us

Dated this 8<sup>th</sup> day of March, 2016.

s/ Arthur West  
ARTHUR WEST

## CUSHMAN LAW OFFICES PS

**April 08, 2016 - 10:05 AM**

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