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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington

Nonprofit Corporation,

Appellant,

v.

WASHINGTON PUBLIC DISCLOSURE COMMISSION, an agency of

the State of Washington,

Respondent.

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BRIEF OF APPELLANT

---

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10, 11

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3 **I. INTRODUCTION**  
4

5 This case is about the Washington Public Disclosure Commission  
6 (hereinafter the "PDC") intentionally interfering with Automotive United Trades  
7 Organization's (hereinafter "AUTO") right to challenge campaign finance abuses.  
8 The PDC has admitted that it knew that it had no role to play in AUTO's pending  
9 campaign finance challenge and its executive director confessed to having to  
10 "ignore [her] feelings about what the statute says" the PDC had the power to do.  
11 The PDC purported to adjudicate the merits of the AUTO's claim, which the PDC  
12 admits was not a claim at all, to hopefully "influence what a superior court judge  
13 does" in the event AUTO exercised its right to challenge campaign finance abuses.  
14

15 The PDC intentionally concealed what it was doing. It did not include its  
16 deliberation, for lack of a better word, of AUTO's contemplated campaign finance  
17 challenge on any agenda. When AUTO filed a Public Records Act request to  
18 attempt to determine what the PDC was up to, the PDC delayed its response for  
19 months despite having all responsive documents in a "stack" on the desk of Ms.  
20 Lopez's (the director of the PDC at the time).  
21

22 Despite the PDC having no legal basis for the action it took and the PDC's  
23 action having no legal effect, and despite the PDC intentionally concealing its  
24 actions, the trial court ruled that AUTO should have known that the PDC's decision  
25 to not pursue some action on behalf of AUTO was an injury-in-fact to AUTO.  
26

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3 Verbatim Report of Proceedings, Jul. 14, 2017, at 20. This is clearly in error,  
4 because both AUTO and the PDC knew that the PDC had no authority to do  
5 anything. The trial court further found that AUTO had standing under RCW  
6 34.05.530 to immediately file a petition for review of the PDC's actions. This logic  
7 ignores the fact that AUTO and PDC both knew that the PDC had no role to play  
8 and AUTO's injury had nothing to do with the PDC failing to take action. AUTO's  
9 injury resulted from the PDC's violation of the law to "influence what a superior  
10 court judge does" and infringing on AUTO's right to bring a citizen's action.  
11

12 The trial court also erred in ruling that the PDC's failure to put its  
13 deliberation of AUTO's citizen's action on any agenda was lawful. The Open  
14 Public Meetings Act (hereinafter "OPMA") requires state agencies to publish an  
15 agenda detailing what actions will be taken at public meetings. It is undisputed that  
16 no agenda was ever published that even referenced AUTO's citizen's action.  
17 Despite the complete absence of an agenda, the trial court ruled that the PDC  
18 complied with the requirement to publish an agenda.  
19  
20

21 **II. ASSIGNMENTS OF ERROR**

22 The trial court erred in concluding that AUTO's Administrative Procedures  
23 Act (hereinafter "APA") claims were time- barred and that Defendant had not  
24 violated the OPMA when Defendant failed to provide notice that it would be  
25 addressing AUTO's 45-Day Notice of a Citizen's Action prior to the May 26, 2016  
26 meeting.



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3 PDC in this process and did not expect any response from the PDC. *Id.* PDC was  
4 aware it had no further role to play. CP 174.

5 Appellant had no idea what the PDC was doing when it sent the fourteen  
6 page letter, dated June 17, 2017 (hereinafter “The Letter”), which was received by  
7 AUTO’s attorney, Phil Talmadge, on June 20, 2016. CP 81. The 45-Day Citizen’s  
8 Complaint Letter that Ms. Lopez purported to respond to was not addressed to the  
9 PDC. *Id.* More importantly, pursuant to RCW 42.17A.765, it was Appellant’s  
10 understanding that the PDC had nothing to do with AUTO’s 45-day notice. *Id.* The  
11 PDC could not file suit, open an investigation, or otherwise take any action. *Id.*  
12 The PDC, and Ms. Lopez, simply had no role to play. *Id.*; CP 174. Appellant had  
13 already received all of the background information contained in Ms. Lopez’s letter  
14 during AUTO’s request for a rule making three months earlier. CP 81. Because  
15 the PDC had no role to play, and Appellant had already received the information  
16 contained in Ms. Lopez’ letter, AUTO simply had no idea what the purpose of The  
17 Letter was. *Id.*

18  
19  
20 On June 25, 2016, five days after Appellant’s attorney received the letter  
21 from Ms. Lopez (Appellant does not recall exactly when it received the letter and  
22 it was not addressed to AUTO or Mr. Hamilton), AUTO filed a Public Records Act  
23 request with the PDC. CP 81, 101-102. Appellant filed the records request in an  
24 attempt to determine what the PDC was up to and why it had sent The Letter. CP  
25 81. Appellant received the first transmission in response to AUTO’s records  
26 request on July 12, 2017. CP 82. That largely included emails regarding the

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3 petition for rule making and did not tell Appellant anything about why The Letter  
4 had been created. *Id.* The PDC did not fully respond until October 6, 2016. *Id.*

5 On July 6, 2017, AUTO filed its Citizen's Complaint against Friends of Bob  
6 Ferguson in King County Superior Court (hereinafter the "Citizen's Action")  
7 pursuant to RCW 42.17A.765. *Id.* As the Court may be aware, as a general rule, a  
8 government entity may not donate to a political campaign. *Id.* This avoids a  
9 situation where one government entity gains favor from another government entity  
10 through campaign contributions. *Id.* In a nutshell, AUTO's Citizen's Action  
11 sought a ruling that candidates for political office could not accept campaign  
12 contributions from tribal governments. *Id.* It was not intended to affect the rights  
13 of individual tribal members. *Id.* The intent was to stop one government entity  
14 from gaining the favor of another government entity through campaign  
15 contributions. *Id.*

16  
17  
18 Ultimately, Appellant did not learn conclusively what the purpose of The  
19 Letter was until August 31, 2016. *Id.* On August 31, 2016, Appellant's attorney in  
20 the Citizen's Action suit received a letter that enclosed The Letter and alleged that  
21 the merits of the Citizen's Action, namely whether tribal campaign contributions  
22 are legal, had already been adjudicated by the PDC. CP 82, 104-120. No  
23 adjudication, investigation, or interpretive ruling had occurred (as Ms. Lopez  
24 admits in her deposition), but it became clear that the PDC had issued The Letter  
25 in an attempt to undercut AUTO's citizen's action. *See* CP 82; *See also* CP 177-  
26 178.

1  
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3 On October 6, 2016 Appellant received another, final, transmission of  
4 records responsive to AUTO's records request from the PDC. CP 82. That  
5 transmission included a link to a website that had an audio recording of the May  
6 26, 2016 hearing wherein the PDC authorized Ms. Lopez to send The Letter. CP  
7 82, 128-147. As the Court can clearly see, the PDC and Ms. Lopez wanted to stop  
8 AUTO from moving forward with its Citizen's Action as was its right under RCW  
9 42.17A.765. CP 82-83. The PDC admits that it had no role to play and that Ms.  
10 Lopez had to "ignore her feelings" with what she thought the statute says and took  
11 illegal action in order to "influence what a superior court judge does." CP 131-134.  
12 The PDC and Ms. Lopez clearly wanted to do something to stop AUTO from  
13 exercising its rights. CP 83. The Letter, in their view, was the way to do that. *Id.*

14  
15 Appellant had no knowledge that AUTO's 45-day notice would be  
16 addressed at the May 26, 2016 hearing. *Id.* Notice was not sent to Appellant, to  
17 Mr. Hamilton, or to Mr. Talmadge. *Id.* The 45-day notice was not on the posted  
18 agenda. *Id.* Appellant did not learn that the 45-day notice was addressed at the  
19 May 26, 2016 hearing until Appellant received The Letter. *Id.*

20  
21 The Letter was used successfully in the King County matter. CP 83, 153.  
22 The reply brief filed by Friends of Bob Ferguson in support of its Motion to Dismiss  
23 refers to The Letter as an "official" determination by the PDC. *Id.*

24  
25 Ultimately, AUTO filed this case in August of 2016 to protect whatever  
26 rights it might have. CP 83. At the time of filing, Appellant had no concrete  
evidence that The Letter was going to be used in the King County matter. *Id.*

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3 Appellant grew to suspect that was the plan but did not confirm that The Letter was  
4 going to be used in that fashion until it received the August 31, 2016 letter from the  
5 attorneys representing Friends of Bob Ferguson. *Id.* Because the time to challenge  
6 an agency action is so brief, AUTO elected to file suit prior to confirming the  
7 purpose of The Letter. *Id.*  
8

9 **IV. APPELLANT'S MOTION FOR SUMMARY JUDGMENT**

10 The law of summary judgment is familiar. The purpose of summary  
11 judgment is to avoid a useless trial when there is no genuine issue of material fact.  
12 *LaPlante v. State*, 85 Wn.2d 154, 153; 531 P.2d 299 (1975). Summary judgment  
13 shall be granted "if the pleadings, depositions, answers to interrogatories, and  
14 admissions on file, together with the affidavits, if any, show that there is no genuine  
15 issue as to any material fact, and that the moving party is entitled to a judgment as  
16 a matter of law." CR 56(c). A material fact is one upon which the outcome of the  
17 case depends. *Cox v. Malcolm*, 60 Wn. App. 894, 897, 808 P.2d 758 (1991). The  
18 motion can only be granted when, after all facts and inferences are submitted and  
19 evaluated, reasonable persons could only reach one conclusion. *Olson v. Siverling*,  
20 52 Wn. App. 221, 224, 758 P.2d 991 (1988). All inferences must be made in favor  
21 of the non-moving party. *Turngren v. King Cy.*, 104 Wn.2d 293, 312, 705 P.2d 258  
22 (1985). The burden of demonstrating the absence of material facts rests with the  
23 moving party.  
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3 Once the moving party establishes the absence of a genuine issue of material  
4 fact, the non-moving party may not rest on mere allegations or denials in its  
5 pleadings, but must respond by affidavit or other proper method setting forth  
6 specific facts showing there is a genuine issue for trial. *McGough v. Edmonds*, 1  
7 Wn. App. 164, 168, 460 P.2d 302 (1969). If no genuine issue of material fact exists,  
8 it must then be determined whether the moving party is entitled to judgment as a  
9 matter of law. CR 56.  
10

11 **V. ARGUMENT**

12 **Standard of Review**

13  
14 The superior court dismissed Appellant's case on summary judgment. "An  
15 order granting summary judgment is reviewed *de novo*." *Mohr v. Grantham*, 172  
16 Wash.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is appropriate only if  
17 there is no genuine issue as to any material fact and the moving party is entitled to  
18 judgment as a matter of law. *Id.* The evidence is viewed in the light most favorable  
19 to the non-moving party. *Id.*  
20

21 **A. The PDC Violated the OPMA Requirement of Placing Action Items**  
22 **on a Published Agenda by Taking Action Without Ever Making Any**  
23 **Reference to AUTO or AUTO's 45-Day Notice on Any Agenda.**

24 RCW 42.30.077 provides, in relevant part, as follows:

25 Public agencies with governing bodies must make the agenda of  
26 each regular meeting of the governing body available online no later  
than twenty-four hours in advance of the published start time of the  
meeting. An agency subject to provisions of this section is not  
required to post an agenda if it does not have a web site or if it

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3 employs fewer than ten full-time equivalent employees. Nothing in  
4 this section prohibits subsequent modifications to agendas nor  
5 invalidates any otherwise legal action taken at a meeting where the  
6 agenda was not posted in accordance with this section.

7 RCW 42.30.077. In this case, it is undisputed that the PDC is governed by the  
8 OPMA. It is also undisputed there is no agenda in the record that references  
9 AUTO's citizen's action notice. Instead, the PDC contends that it "modified" the  
10 agenda during the May 26, 2016 PDC meeting. CP 29-30. There is no record of  
11 that occurring, either, except the declaration testimony of Director Lopez. Even if  
12 someone orally modified the agenda during the meeting, which appears to be the  
13 allegation here, that oral amendment was not available online or otherwise to  
14 anyone that was not already in attendance. In effect, even if the PDC's claim is  
15 true, no agenda was ever made public that referenced AUTO.

16  
17 Accordingly, the question before this Court is whether a public agency  
18 complies with the requirements of RCW 42.30.077 when it never puts an action  
19 item on any agenda, modified or otherwise. The answer is very clearly no.

20 The legislature has made the purpose of the OPMA clear. RCW 42.30.010  
21 provides as follows:  
22

23 The legislature finds and declares that all public commissions,  
24 boards, councils, committees, subcommittees, departments,  
25 divisions, offices, and all other public agencies of this state and  
26 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.

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4 The people of this state do not yield their sovereignty to the agencies  
5 which serve them. The people, in delegating authority, do not give  
6 their public servants the right to decide what is good for the people  
7 to know and what is not good for them to know. The people insist  
8 on remaining informed so that they may retain control over the  
9 instruments they have created.

10 RCW 42.30.010. The clear purpose of the OPMA is to allow the public, and in this  
11 case parties whose rights are at stake, the right to know what actions the government  
12 is taking. Those rights are fundamental to our system of governance.

13 A ruling that a public agency is allowed to simply “modify” an agenda  
14 without notice to any party, as the Superior Court ruled, renders RCW 42.30.077  
15 meaningless. Courts must “interpret a statute to give effect to all language, so as to  
16 render no portion meaningless or superfluous.” *State v. Ervin*, 169 Wn.2d 815, 823  
17 239 P.3d 354 (2010). If an item can simply be added to the agenda during a  
18 meeting, with no notice published or given to anyone that is not already present,  
19 then there is literally no requirement to ever put an action item on the agenda: a  
20 public body could simply “modify” the agenda to add any item it wanted. Taken  
21 to its logical conclusion, such an interpretation of RCW 42.30.077 would allow an  
22 agency to avoid putting any items on an agenda and then simply “modify” the  
23 agenda at the meeting to conduct whatever business it wanted. That clearly is not  
24 the intent of the legislature and the trial court clearly erred.  
25

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3 **B. AUTO's Claim Under the APA is Not Time-Barred Because AUTO**  
4 **Did Not Learn that its Rights Had Been Affected Until August 31, 2016.**

5 RCW 34.05.542(3) states, in pertinent part, that while the typical deadline  
6 to file a petition under the APA is 30 days:

7 [T]he time is extended during any period that the petitioner did not  
8 know and was under no duty to discover or could not reasonably  
9 have discovered that the agency had taken the action or that the  
10 agency action had a sufficient effect to confer standing upon the  
11 petitioner to obtain judicial review under this chapter.

12 RCW 34.05.542(3). In order to trigger the statutory time limit for seeking review,  
13 an agency must file and serve a final, appealable order. *Harrington v. Spokane*  
14 *County*, 128 Wash.App. 202, 212, (2005). "A letter does not meet this definition  
15 unless it clearly asserts a legal relationship and makes clear that it is the final point  
16 of the administrative process." *Id.* "A decision must be clearly cognizable as a  
17 final determination of rights," and "[d]oubts as to finality are resolved against the  
18 agency." *Id.* The exception found in RCW 34.05.542(3) is akin to the discovery  
19 rule: the statute of limitations is tolled when until a party knows or reasonably  
20 should know of the essential facts.

21 The shifting burdens related to a statute of limitations defense asserted by a  
22 defendant and a discovery rule assertion in response by the appellant in *Clare v.*  
23 *Saberhagen Holdings, Inc.*, 129 Wash.App. 599, 123 P.3d 465 (2005). In *Clare*,  
24 the defendant asserted that the statute of limitations had run. *Id.* at 601-602. In  
25  
26

1  
2 response, the appellant asserted that the discovery rule tolled the statute of  
3 limitations. *Id.* at 602. The court described the shifting burdens as follows:  
4

5 Under Washington's discovery rule, a cause of action does not  
6 accrue until a party knows or reasonably should have known the  
7 essential elements of the possible cause of action.

8 However, [t]he general rule in Washington is that when an appellant  
9 is placed on notice by some appreciable harm occasioned by  
10 another's wrongful conduct, the Appellant must make further  
11 diligent inquiry to ascertain the scope of the actual harm. The  
12 Appellant is charged with what a reasonable inquiry would have  
13 discovered. "[O]ne who has notice of facts sufficient to put him  
14 upon inquiry is deemed to have notice of all acts which reasonable  
15 inquiry would disclose."

16 Thus, the discovery rule requires an appellant to use due diligence  
17 in discovering the basis for the cause of action.

18 The appellant bears the burden of proving that the facts constituting  
19 the claim were not and could not have been discovered by due  
20 diligence within the applicable limitations period. Whether a party  
21 exercised due diligence is normally a factual issue, which usually  
22 precludes granting summary judgment. However, when reasonable  
23 minds could reach but one conclusion, questions of fact may be  
24 determined as a matter of law.

25 In the summary judgment context we determine whether sufficient  
26 undisputed facts exist to establish the time of accrual. In other  
words, the discovery rule will postpone the running of the statute of  
limitations only until the time an appellant, through the exercise of  
due diligence, should have discovered the basis for the cause of  
action. A cause of action will accrue on that date even if actual  
discovery did not occur until a later date. The key consideration  
under the discovery rule is the factual, not the legal, basis for the  
cause of action.

*Id.* at 603-604.

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3 Here, the statute of limitations was tolled unless Appellant knew, or  
4 reasonably should have known, facts sufficient to put Appellant on notice that the  
5 “agency action had a sufficient effect to confer standing upon the petitioner to  
6 obtain judicial review under this chapter.” See RCW 34.05.542(3).

7 Standing is addressed in RCW 34.05.530:

8  
9 A person has standing to obtain judicial review of agency action if  
10 that person is aggrieved or adversely affected by the agency action.  
11 A person is aggrieved or adversely affected within the meaning of  
12 this section only when all three of the following conditions are  
13 present:

14 (1) The agency action has prejudiced or is likely to prejudice that  
15 person;

16 (2) That person's asserted interests are among those that the agency  
17 was required to consider when it engaged in the agency action  
18 challenged; and

19 (3) A judgment in favor of that person would substantially eliminate  
20 or redress the prejudice to that person caused or likely to be caused  
21 by the agency action.

22 RCW 34.05.530. The first and third parts of the APA standing test are collectively  
23 referred to as the “injury-in-fact” test. *Peterson v. Segale*, 171 Wash.App. 251,  
24 258, 289 P.3d 657 (2012). “If the injury is merely conjectural or hypothetical, there  
25 can be no standing.” *Id.* at 259. The factual dispute before the Court is, therefore,  
26 whether AUTO knew of an “injury-in-fact” when it received the Letter or whether  
AUTO reasonably should have known of an “injury-in-fact.”

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3 The PDC's position is that AUTO should have known that Friends of Bob  
4 Ferguson was going to use The Letter in the King County litigation. During oral  
5 argument, PDC specifically argued as follows:

6 I don't think any reasonable reading of this letter suggest that the  
7 PDC is going to take some further action on a 45-day notice. It quite  
8 plainly says, we are done with it, go ahead and bring your action, if  
9 you wish to, and it's copied to the adverse party.

10 So AUTO is aware that the adverse party is aware of PDC's position  
11 in this litigation they are intending to bring. It cannot have come to  
12 a shock to AUTO that the adverse party might end up pointing to  
13 this or to the PDC's prior denial of the rulemaking petitioner or both.  
14 It just defies belief that they had no clue that was a possibility.

15 CP 245-246.

16 A "clue that was a possibility" is not injury in fact and does not confer  
17 standing. An injury that is conjectural or hypothetical does not confer standing.  
18 *Peterson v. Segale*, 171 Wash. App. at 258. AUTO was not injured, and therefore  
19 did not have standing, until The Letter was used to infringe on Appellant's right to  
20 pursue its claims against Friends of Bob Ferguson under RCW 42.17A.765.  
21 Clearly, AUTO did not know of any injury until August 31, 2016. CP 82; CP 245-  
22 246.

23 The question then becomes should AUTO "reasonably" have known of an  
24 "injury-in-fact." Again, the answer is very clearly no. No injury had occurred for  
25 AUTO to know about until August 31, 2016 (after this matter was filed). Further,  
26 AUTO acted very diligently to inquire about the purpose and use of The Letter by

1  
2 filing a Public Records Act request five days after receiving the Letter. CP 82. The  
3 PDC delayed that response, despite easy access to the records, until October of  
4 2016. Despite acting diligently, there was simply no way for AUTO to determine  
5 that The Letter had caused AUTO harm, and therefore conferred standing on AUTO  
6 under the APA, until August 31, 2017.  
7

8  
9 **VI. RELIEF REQUESTED**

10 AUTO respectfully requests that this Court remand the case to the trial court  
11 with instruction to enter summary judgment in AUTO's favor. Either party,  
12 including a nonmoving party, may receive summary judgment if no material facts  
13 are in dispute. *Patriot Gen. Ins. Co. v. Gutierrez*, 186 Wash.App. 103, 110, 344  
14 P.3d 1277, review denied, 183 Wash.2d 1016, 353 P.3d 641 (2015). This Court  
15 should also direct the trial court to enter judgment for AUTO's attorney fees and  
16 costs.  
17

18 The facts are undisputed. The PDC does not allege that it ever published an  
19 agenda. The PDC does not claim that AUTO sustained an injury-in-fact. Rather,  
20 the PDC argues that AUTO should have "had a clue that was a possibility" and  
21 admits that its sending The Letter exceeded its statutory authority. No further fact  
22 finding is required and judgment should be entered in Appellant's favor  
23 immediately.  
24

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4 **VII. REQUEST FOR ATTORNEY FEES AND COSTS**

5 The Appellant respectfully requests that this Court award its attorney fees  
6 and costs in this matter pursuant to RAP 18.1. The prevailing party in an OPMA  
7 claim is entitled to attorney fees and costs pursuant to RCW 42.30.120(4). The  
8 Appellant should be awarded its attorney fees and costs shall pursuant to RCW  
9 42.17A.755 for its APA claims. The Appellant respectfully requests an award of  
10 attorney fee costs for all fees and costs incurred at both the trial and appellate court  
11 level.  
12

13 **VIII. CONCLUSION**

14 It is undisputed that PDC had no role to play in AUTO's citizen's action,  
15 that PDC was aware it had no role to play, that AUTO knew PDC had no role to  
16 play, and that the PDC acted to hopefully influence the outcome of AUTO's  
17 contemplated campaign finance challenge. Simply put, there is no way that AUTO  
18 could have known The Letter caused AUTO injury until a third party indicated that  
19 The Letter would be used against AUTO during the campaign finance litigation.  
20 "A clue that was a possibility" does create an injury-in-fact. AUTO had no standing  
21 at the time The Letter was issued and the deadline to file its petition for review was  
22 tolled.  
23  
24

25 It is also undisputed that no agenda was ever published that even referenced  
26 AUTO's 45-day letter. The trial court erred in ruling that the PDC complied with

1  
2  
3 the statutory requirement to publish an agenda was met even though no agenda was  
4 ever published. This Court should remand this case to the trial court with  
5 instruction to enter summary judgment in favor of AUTO on both the APA and  
6 OPMA claims.

7  
8 DATED this 19th day of January, 2018.

9 SCHEFTER & FRAWLEY

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13 JOE D. FRAWLEY, WSB# 41814  
14 Attorney for Appellant  
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**JOE FRAWLEY, P.S.**

**January 19, 2018 - 4:02 PM**

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**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50652-1  
**Appellate Court Case Title:** Automotive United Trades Organization, Appellant v Washington Public DISCL, Respondent  
**Superior Court Case Number:** 16-2-03237-8

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