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No. 50652-1-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

AUTOMOTIVE UNITED TRADES ORGANIZATION, a Washington
Nonprofit Corporation,

Appellant,

v.

WASHINGTON PUBLIC DISCLOSURE COMMISSION, an agency of the
State of Washington,

Respondent.

**BRIEF OF RESPONDENT
WASHINGTON PUBLIC DISCLOSURE COMMISSION**

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I. INTRODUCTION

Automotive United Trades Organization (“AUTO”) appeals a summary judgment ruling dismissing its lawsuit against the State of Washington’s Public Disclosure Commission (“PDC”). AUTO alleged two causes of action against the PDC: (1) the PDC violated the Administrative Procedure Act, chapter 34.05 RCW (“APA”), by engaging in agency action on June 17, 2016 without conducting an administrative hearing before taking the action; and (2) one or more members of the PDC knowingly violated the Open Public Meetings Act, chapter 42.30 RCW (“OPMA”), by modifying the agenda for a regularly scheduled public meeting on May 26, 2016.

Summary judgment was granted on the following grounds: (1) AUTO’s petition for judicial review of an agency action is time-barred under RCW 34.05.542(3) because a petition for judicial review must be filed within thirty days after the challenged agency action, but AUTO’s petition was filed approximately sixty days after the challenged action; and (2) pursuant to RCW 42.30.077, AUTO is unable to prove a violation of the OPMA because (a) the agenda for an agency’s regularly scheduled meeting may be modified without violating the OPMA, or (b) there is no evidence one or more PDC members knowingly violated the OPMA by permitting an agenda modification. These rulings should be affirmed.

AUTO also improperly asks this Court to *sua sponte* grant summary

judgment on the merits of AUTO's APA claim that the PDC was required to conduct an administrative hearing before taking the challenged agency action. The merits of AUTO's APA claim were not addressed or ruled on by the court below, and are not before this Court on appeal. AUTO also improperly requests attorney fees on appeal even though it has not prevailed on the merits of its APA claim and RCW 42.30.077 expressly states attorney fees are not recoverable under the OPMA if an agency's agenda is deemed deficient. These requests for a *sua sponte* summary judgment and for attorney fees should be denied.

II. ASSIGNMENT OF ERROR

The PDC does not assign error to any of the trial court's rulings. AUTO assigns error to the trial court's summary judgment ruling.

III. ISSUES ON APPEAL

A. Was AUTO's petition for judicial review challenging agency action by the PDC properly dismissed as untimely because AUTO had standing to challenge the agency action and failed to file its petition within thirty days of the agency action as required by RCW 34.05.542(3)?

B. Was AUTO's OPMA claim properly dismissed because RCW 42.30.077 expressly permits agencies to modify agendas for regular public meetings, the challenged modification was within the scope of the broad topic areas listed in the posted agenda, and there is no evidence any

PDC member knew modification of an agenda violated the OPMA?

C. Should AUTO's conclusory request for this Court to *sua sponte* grant summary judgment on the merits of AUTO's APA claim be rejected because the merits of AUTO's APA claim were not before the court below and are not before this Court?

D. Should AUTO's request for attorney fees be denied because AUTO has not prevailed on the merits of its APA claim and RCW 42.30.077 expressly states attorney fees are not recoverable under the OPMA if an agenda for a regular public meeting is deemed deficient?

IV. STATEMENT OF THE CASE

A. Denial of AUTO'S February 2016 Rule-Making Petition

On February 1, 2016, AUTO filed a petition pursuant to RCW 34.05.330(1) asking the PDC to enact a new regulation prohibiting candidates and political committees from accepting campaign contributions from Indian Tribes. CP 27. On March 24, 2016, at the PDC's regularly scheduled monthly meeting that is open to the public,¹ the PDC voted unanimously to deny AUTO's rule-making petition after considering public comments. CP 27, 33-34. The PDC concluded AUTO's request would require statutory amendments and must be addressed to the Legislature. *Id.*

¹ Pursuant to RCW 42.30.075, the PDC enacted a regulation notifying the public that the PDC conducts regularly scheduled public meetings on the fourth Thursday of each month starting at 9:00 a.m. at the PDC's office in Olympia, Washington, with a few stated exceptions. WAC 390-12-010.

AUTO was provided written notification of the PDC's decision by letter dated March 31, 2016, and advised of its right to seek judicial review of the PDC's decision within thirty days. CP 34. AUTO also was notified the PDC's public meetings are recorded and available for viewing on the PDC's website. *Id.*

B. AUTO's May 2016 Notice of Citizen Action against "Friends of Bob Ferguson" and the Attorney General's and the King County Prosecutor's Responses to AUTO's Notice

Rather than appeal the PDC's decision, AUTO chose to pursue a citizen action pursuant to RCW 42.17A.765 challenging contributions allegedly made by two Indian Tribes to a political action committee called "Friends of Bob Ferguson." *See* CP 4, 36, 38. On May 2, 2016, AUTO wrote letters pursuant to RCW 42.17A.765(4) notifying the Attorney General's Office and the King County Prosecuting Attorney of AUTO's intention to initiate a citizen's action on behalf of the State against "Friends of Bob Ferguson" if neither the Attorney General nor the Prosecutor initiated the action within forty-five days of AUTO's notice. CP 27-28, 36, 38, 56.

On May 16, 2016, the Attorney General's Office declined to initiate an action against "Friends of Bob Ferguson" because the complaint involved Attorney General Bob Ferguson's reelection campaign. CP 27-28, 36. The letter from the Attorney General's Office went on to state:

RCW 42.17A.130 authorizes the Public Disclosure

Commission or its staff to obtain legal advice or representation pertaining to this matter by retaining the services of an attorney not employed by the Attorney General's Office "to carry out any function of the attorney general prescribed by this chapter." Alternatively, RCW 42.17A.765 authorizes the local prosecutor to act on the notice.

CP 36. In other words, the letter from the Attorney General's Office suggested the PDC could hire outside counsel, in lieu of the Attorney General's Office, to take enforcement action against "Friends of Bob Ferguson" in response to AUTO's 45-day notice. *See id.*

On May 19, 2016, the King County Prosecutor also declined to file an action under RCW 42.17A.765 against "Friends of Bob Ferguson." CP 28, 38. The County Prosecutor declined to take action on AUTO's request for the following reasons:

Our office routinely defers to the Public Disclosure Commission (PDC) on allegations regarding election law violations. The PDC has primary enforcement authority in this area and has the staffing and expertise to respond.

CP 38.

The PDC's Executive Director, Evelyn Fielding Lopez, received copies of both letters declining AUTO's request to initiate an action under RCW 42.17A.765 and suggesting the PDC could initiate such an action. CP 27-28. In response, the Executive Director believed AUTO should be promptly notified the PDC would not be initiating an action under RCW

42.17A.765 despite the Attorney General's and the County Prosecutor's suggestions the PDC could do so. CP 28-29. The soonest available opportunity to publicly discuss the matter with the PDC was the PDC's next regularly scheduled public meeting on May 26, 2016. *See id.*

C. The PDC's May 2016 Public Meeting Discussion about the Responses to AUTO's Notice of Citizen Action

An agenda for the PDC's May 26, 2016 public meeting was posted online. CP 29, 54. The posted agenda items included "Follow Up From Prior Meetings," "Enforcement" and "Staff Reports, Executive Director," but did not specifically identify AUTO's 45-day notice of a citizen's action as a sub-topic within these agenda items. CP 54.

During the PDC's May 26, 2016 public meeting, the PDC's Executive Director reported AUTO's and one other entity's 45-day notice letters with the PDC. CP 29-30, 46-47. The PDC recognized AUTO's citizen action complaint was requesting essentially the same outcome as AUTO's February 2016 rule-making request - - *i.e.*, that political campaigns be prevented from accepting contributions from Indian Tribes. CP 46-47, 130. During the course of the public meeting, the Executive Director gave the PDC two options: (1) the PDC could do nothing in response to AUTO's 45-day notice because the Executive Director did not believe the PDC had statutory authority to initiate a citizen action in lieu of the Attorney General's

Office or the King County Prosecutor; or (2) the Executive Director “could ignore my feelings about what the statute says” and draft a letter to AUTO stating the PDC would not prosecute AUTO’s citizen action and reiterating the PDC’s March 2016 rule-making decision that campaigns do not violate current law by accepting monetary contributions from Indian Tribes. CP 132-33; *see also* CP 135-39. A PDC member commented during the meeting: “If we have a perspective, an official perspective on the relevant part of the merits, we might as well be on the record. It could ... very well influence what a superior court judge does.” CP 133-34.

Following this discussion, the PDC publicly authorized its Executive Director to send AUTO a letter referencing the PDC’s March 2016 response to AUTO’s rule-making petition and reiterating the PDC’s continuing belief that current law does not prohibit candidates or political committees from accepting campaign contributions from Tribes. CP 46-47, 132-33, 139-40, 175-78. The PDC’s May 26, 2016 public meeting was recorded and available for review on the PDC’s website. CP 82.

D. The PDC’s Executive Director’s June 17, 2016 Letter Notifying AUTO of the Agency’s Action Taken at the May 2016 Public Meeting

On June 17, 2016, pursuant to the PDC’s May 26 authorization, the Executive Director sent AUTO a letter referencing the Attorney General’s and the County Prosecutor’s letters suggesting the PDC could initiate an

action under RCW 42.17A.765(4). CP 30, 56-61. The letter notified AUTO the PDC “does not plan to commence an action pursuant to RCW 42.17A.765(4)” and reiterated the reasons stated in the PDC’s March 2016 decision on AUTO’s rule-making petition that current statutes do not prohibit political campaigns from accepting contributions from Indian Tribes. CP 61. The letter indicated a copy was sent to the “Friends of Bob Ferguson” campaign as well as others. *Id.* AUTO acknowledges its attorney received the June 17th letter on June 20, 2016. CP 81.

E. AUTO’s July 2016 Citizen Action against “Friends of Bob Ferguson” Campaign

On July 6, 2016, AUTO filed its citizen action against “Friends of Bob Ferguson” in King County Superior Court. CP 82. On August 31, 2016, the “Friends of Bob Ferguson” sent AUTO a letter, following up on an August 10 letter, asking AUTO to voluntarily dismiss its citizen action, relying in part on the PDC’s March 2016 rule-making decision and the Executive Director’s June 17, 2016 letter. CP 82, 104-05. The “Friends of Bob Ferguson” later used the PDC’s Executive Director’s June 17th letter as persuasive authority, along with other legal arguments, to support a successful October 2016 motion to dismiss AUTO’s citizen action. CP 82-83, 148-54, 157.

F. AUTO's August 2016 Petition for Judicial Review and Complaint Alleging Violation of the Open Public Meeting Act

Almost sixty days after receiving the June 17th letter, AUTO filed a petition for judicial review on August 16, 2016 challenging the June 17, 2016 notice of agency action declining to initiate an enforcement action under RCW 42.17A.765(4). CP 3-11. AUTO claimed the June 17th letter was an agency action that violated the APA because the action was taken without first conducting an administrative hearing as allegedly required by RCW 42.17A.755. CP 9-10. AUTO alleged in its petition that it was aggrieved as follows: "The purpose of the [June 17th] letter was an attempt to deter AUTO from exercising its citizen rights, and in the event that did not work, to provide political value that could be used in the upcoming elections by the political action committee supporting Attorney General Robert Ferguson." CP 9. In the same pleading, AUTO also alleged the PDC violated the OPMA by failing to specifically reference AUTO's 45-day notice in the posted agenda for the PDC's May 26, 2016 regular public meeting. CP 10.

G. AUTO's August 2016 Executive Ethics Complaint against the PDC's Executive Director

On August 16, 2016, the same day AUTO filed its petition for judicial review in this matter, AUTO also filed an Executive Ethics Board

complaint against the PDC's Executive Director. CP 181, 184-87. In the ethics complaint, AUTO stated as follows:

The only purpose for transmitting the [June 17th] letter was an attempt to inappropriately use PDC resources to intervene in the citizen action by providing a document that would be politically or legally valuable to the Friends of Bob Ferguson. The fact Lopez carbon-copied the letter to Ferguson's political action committee and subsequently transmitted the letter via email to representatives of tribal governments shows the true intended purpose.

CP 187. AUTO also stated in its ethics complaint that upon reading the June 17th letter, "a reader is left with the impression AUTO's citizen action was flawed and without merit. AUTO believes the letter was purposely drafted for this effect." CP 186.

H. AUTO's Petition for Judicial Review and Complaint Alleging an Open Public Meeting Act Violation Were Dismissed on Summary Judgment

AUTO's August 16, 2016 petition for judicial review alleges the Executive Director's June 17, 2016 letter was arbitrary and capricious and violated the APA because the PDC lacked authority under RCW 42.17A.765 to decide whether current law permitted campaigns to accept contributions from Indian Tribes or, if the PDC had such authority, the PDC had to conduct an administrative hearing under RCW 42.17A.755 before deciding whether to prosecute AUTO's citizen action complaint. CP 9-10. AUTO also complained the PDC violated the OPMA by discussing whether and

how to respond to AUTO's 45-day notice of a citizen's action at the May 26, 2016 public meeting without specifically identifying that sub-topic in the posted agenda for the meeting. CP 10.

The PDC moved for summary judgment on both claims, arguing AUTO's petition for judicial review was untimely filed past the thirty-day statutory deadline and there was no violation of the OPMA. CP 18-24. The merits of AUTO's APA claim were not before the court on summary judgment; only the untimeliness of the petition was addressed. *Id.*

The superior court granted PDC's summary judgment motion on the grounds that AUTO's APA claim was untimely under RCW 34.05.542(3) because the petition was filed more than thirty days after the challenged agency action occurred. CP 228-30. The court did not address the merits of AUTO's claim that the PDC violated the APA. *See id.* With respect to AUTO's OPMA claim, the court ruled on the merits the PDC's agenda for the May 26, 2016 meeting complied with the OPMA. *Id.* and CP 201-03.

AUTO timely appealed the superior court's July 14, 2017 final judgment dismissing AUTO's APA and OPMA claims. *See* CP 228-30.²

V. ARGUMENT

A. Applicable Standard of Review

An order granting summary judgment is reviewed de novo. *Mohr*

² AUTO's designation of Clerk's Papers did not include AUTO's July 27, 2017 Notice of Appeal. *Contra* RAP 9.6(b)(1)(a).

v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Evidence is viewed in the light most favorable to the non-moving party (*id.*), which is AUTO in this case.

B. AUTO's Petition for Judicial Review Under the APA Was Properly Dismissed as Untimely Because It Was Filed More Than Thirty Days after AUTO Had Standing to Challenge Agency Action

AUTO's August 17, 2016 petition for judicial review (CP 3-11) was filed and served almost sixty days after the June 17, 2016 agency action occurred. Failure to timely file a petition for judicial review within the thirty-day period provided in RCW 34.05.542(3) justifies dismissal with prejudice. *Wells Fargo Bank, NA v. Dept. of Revenue*, 166 Wn. App. 342, 275-76, 279-80, 271 P.3d 268, *review denied*, 175 Wn.2d 1009 (2012). AUTO's petition challenging the June 17, 2016 agency action was, therefore, properly dismissed because it was untimely under RCW 34.05.542(3).

AUTO alleged in its petition for judicial review the PDC lacked authority under RCW 42.17A.765 to address the merits of AUTO's citizen action or, if the PDC had such authority, the PDC violated the APA and RCW 42.17A.755 by failing to conduct an administrative hearing before

issuing the June 17th letter.³ CP 9-10. AUTO knew or should have known of this alleged APA violation immediately after reading the June 17th letter, partly because AUTO was aware it was not a party to an administrative hearing before the letter was issued. *See* CP 57, 83. Thus, AUTO was aware of the basis for its APA challenge immediately after receiving the June 17th letter. The dismissal of AUTO's petition for judicial review filed almost sixty days after the challenged agency action should be affirmed.

Recognizing it failed to comply with the thirty-day deadline in RCW 34.05.542(3), AUTO tries to excuse its untimeliness by claiming an exception to the statute. RCW 34.05.542(3) provides in its entirety as follows:

A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

AUTO argues it could not reasonably have discovered the June 17th letter "had a sufficient effect to confer standing upon the petitioner to obtain judicial review" (quoting RCW 34.05.542(3)) until August 31, 2016 - - two

³ The PDC denies AUTO can prove a violation of the APA on the merits (*e.g.*, CP 12-15), but the merits of AUTO's APA claim are not currently before this Court, as explained *infra*, at pages 23-24.

weeks after AUTO filed its petition for judicial review. *See* Brief of Appellant, pp. 8, 10, 17-18. AUTO claims “there was simply no way for AUTO to determine that The [June 17th] Letter had caused AUTO harm, and therefore conferred standing on AUTO under the APA, until August 31, 2017 [sic].” AUTO argues it lacked actual or constructive knowledge of standing until attorneys for “Friends of Bob Ferguson” sent AUTO a letter dated August 31, 2016, which cited the PDC’s March 2016 rule-making decision and the June 17, 2016 letter, and asked AUTO to voluntarily dismiss its citizen’s action against “Friends of Bob Ferguson.” *Id.* at pp. 8, 18. *See also* CP 82, 104-05.

Acceptance of AUTO’s argument that it lacked standing to allege an APA violation for failure to conduct a hearing until August 31, 2016, more than two weeks after AUTO filed its petition for judicial review, would require a finding that AUTO filed a frivolous petition at a time when AUTO believed it lacked standing to file this action. The PDC has not alleged the affirmative defense that AUTO lacked standing because AUTO was aggrieved once AUTO received the June 17th letter.

Standing is a question of law reviewed de novo. *City of Snoqualmie v. King County Executive*, 187 Wn.2d 289, 296, 386 P.3d 279 (2016). Under the APA, a person “has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action.” RCW

34.05.530. A person is aggrieved or adversely affected when the following three conditions are met:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530. The first and third conditions are collectively known as the "injury-in-fact" test and the second condition is known as the "zone of interest" test. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 793-94, 920 P.2d 581, cert. denied, 520 U.S. 1210 (1996) (hereinafter *Trades Council*).

AUTO only disputes the timing for when the first prong of the "injury-in-fact" test was met. Brief of Appellant, p. 16. AUTO does not argue it lacked standing under the second prong of the "injury-in-fact" test (*i.e.*, the third condition in RCW 34.05.530), or under the "zone of interest" test.⁴ *See id.*

⁴ The second prong of the "injury-in-fact" test was undisputedly met. A judgment in AUTO's favor on its petition for judicial review finding the June 17th letter was void because the PDC lacked authority to issue the letter without first conducting an administrative hearing would substantially eliminate the prejudicial effect the letter had on AUTO's interests, including AUTO's citizen action against "Friends of Bob Ferguson." The "zone of interest" test was undisputedly met because AUTO's interests were plainly considered when the challenged June 17th agency action occurred.

AUTO had standing under the first prong of the “injury-in-fact” test immediately after receiving the June 17, 2016 letter. Where the injury complained of is failure to comply with a statutory procedure, standing requirements are relaxed and the alleged failure to provide statutory due process is typically deemed a sufficient injury to confer standing. *Trades Council*, 129 Wn.2d at 794-95; *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 303, 268 P.3d 892 (2011). For example, denial of a statutory right to an administrative hearing, as AUTO alleges here, is sufficient to confer standing. *Trades Council*, 129 Wn.2d at 794-95, 798-99. On this authority alone, the dismissal of AUTO’s untimely APA claim should be affirmed because AUTO had standing immediately after receiving the June 17th letter, which indicated no administrative hearing had occurred prior to the challenged agency action.

Additional reasons further justify affirmance of the dismissal. AUTO’s petition for judicial review alleges AUTO was injured as follows: “The purpose of the [June 17th] letter was an attempt to deter AUTO from exercising its citizen rights, and in the event that did not work, to provide political value that could be used in the upcoming elections by the political action committee supporting Attorney General Robert Ferguson.” CP 9. This alleged injury was, or should have been, immediately apparent to AUTO upon reading the letter rejecting AUTO’s citizen action on the merits.

The alleged deterrent effect of the letter referenced in AUTO's petition is the same "injury-in-fact" AUTO claims it was unaware of until August 31, 2016, when the June 17th letter was actually used by the "Friends of Bob Ferguson" to "deter" AUTO from exercising its right to file a citizen's action complaint by asking AUTO to voluntarily dismiss that complaint. *See* CP 82-83, 104-05.

The likely prejudicial effect the June 17th letter had on AUTO's lawsuit against "Friends of Bob Ferguson" was immediately apparent upon reading the June 17th letter, which stated the PDC had concluded AUTO's lawsuit was meritless. The June 17th letter addressed to AUTO's attorney and copied to the "Friends of Bob Ferguson" is entitled "Citizen Action Complaint – Friends of Bob Ferguson – Alleged Violations of RCW 42.17A.550 and 42.17A.555." CP 56. The letter concludes: "the Friends of Bob Ferguson campaign did not violate campaign finance laws when it accepted contributions from the Muckleshoot Indian Tribe in October 2014, or from the Snoqualmie Tribe in November 2015." CP 61. The PDC's conclusion squarely rejected AUTO's sole legal theory in its citizen action against "Friends of Bob Ferguson." *See, e.g.*, CP 36, 82.

Upon reading the PDC's letter stating AUTO's citizen action failed on the merits, AUTO should have reasonably expected "Friends of Bob Ferguson" would cite to the letter as persuasive authority that AUTO's

citizen action lacked merit.⁵ Thus, AUTO knew or should have known immediately after receiving the June 17th letter on June 20th that the letter was likely to cause prejudice toward the sole legal theory raised in AUTO's citizen action. This actual or constructive knowledge provides further grounds for determining AUTO had standing under the "injury-in-fact" test to challenge the PDC's agency action immediately after receiving the June 17th letter.

AUTO argues standing was absent until it "learned conclusively" on August 31, 2016 that lawyers for "Friends for Bob Ferguson" actually cited the PDC's June 17th letter in an unsuccessful attempt to convince AUTO to voluntarily dismiss its citizen action. Brief of Appellant, pp. 8, 17-18. This argument incorrectly suggests actual prejudice is required to confer standing under RCW 34.05.530. However, the statute provides constructive knowledge of the likelihood of prejudice is sufficient. *Id.*; see also RCW 34.05.542(3). The likelihood the June 17th letter would prejudice AUTO's legal theory in its citizen action was immediately apparent upon reading the

⁵ The PDC notes "Friends of Bob Ferguson" alternatively could have relied on the PDC's March 31, 2016 letter denying AUTO's request for rule-making, which also expressly rejected AUTO's argument that political contributions received from tribal governments violate current state law. See CP 33-34. AUTO knew or reasonably should have known the PDC's March 2016 rejection of AUTO's rule-making petition, the grounds for which were reiterated in the PDC's Executive Director's June 17th letter, also had a sufficient effect on AUTO's interests to confer standing upon AUTO to timely obtain judicial review challenging the denial of AUTO's rule-making petition. Surely, AUTO would not claim it lacked standing to timely seek judicial review of the denial of rule-making had it chosen to do so.

letter.

AUTO's actual or constructive knowledge of likely prejudice is further confirmed by AUTO's Executive Ethics Board complaint against the PDC's Executive Director, which was filed the same day AUTO filed its petition for judicial review in this matter. In that August 16, 2016 ethics complaint, AUTO stated as follows:

The only purpose for transmitting the [June 17th] letter was an attempt to inappropriately use PDC resources to intervene in the citizen action by providing a document that would be politically or legally valuable to the Friends of Bob Ferguson. The fact Lopez carbon-copied the letter to Ferguson's political action committee and subsequently transmitted the letter via email to representatives of tribal governments shows the true intended purpose.

CP 181, 187. AUTO also stated in its ethics complaint that upon reading the June 17th letter, "a reader is left with the impression AUTO's citizen action was flawed and without merit. AUTO believes the letter was purposely drafted for this effect." CP 186. AUTO obviously would have, or reasonably should have, formed this impression immediately upon reading the June 17th letter. *See id.* Therefore, AUTO knew or should have known by late June that the PDC agency action set forth in the June 17th letter had sufficient adverse effect to confer standing to obtain judicial review.

Finally, AUTO argues the exception to the thirty-day filing rule in RCW 34.05.542(3) for delayed discovery of standing is akin to the discovery

rule exception to some statutes of limitation. Brief of Appellant, pp. 14-15.⁶ Assuming *arguendo* that is true, AUTO's quotation of *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603-04, 123 P.3d 465(2005), states in pertinent part: "The plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *Id.* at p. 15. If AUTO were duly diligent, it would have promptly reviewed the recording of the PDC's May 26, 2016 public meeting available on the PDC's website, which included a PDC member's statement that sending the June 17th letter could "very well influence what a superior court judge does" in ruling on AUTO's citizen action. *See* CP 133-34.

For any of these reasons, AUTO had standing to challenge the agency action set forth in the June 17th letter immediately upon receipt of the letter. The thirty-day clock began running on June 20, 2016 when AUTO's attorney received the letter. *See* CP 81. Nearly sixty days passed before AUTO filed its petition for review. CP 3-11. AUTO's failure to comply

⁶ Separate from the standing issue, AUTO references *Harrington v. Spokane County*, 128 Wn. App. 202, 212, 114 P.3d 1233 (2005), which holds the statutory time limit for seeking judicial review accrues or begins to run when an agency serves a letter that "makes clear that it is the final point of the administrative process." Brief of Appellant, p. 14. AUTO does not argue the June 17th letter was unclear about whether the PDC was going to take further action on AUTO's 45-day notice of citizen action. *See id.* The letter expressly stated the PDC would take no further action on AUTO's 45-day notice because it lacked merit. CP 61. Thus, the June 17th letter was the agency's final determination of AUTO's right to independently bring its citizen action. AUTO had no doubts about the finality of the PDC's position, and filed its citizen action less than a month after receiving the June 17th letter. *See* CP 82.

with the thirty-day filing deadline in RCW 34.05.542(3) justifies affirmance of the dismissal of AUTO's APA claim. *See Wells Fargo Bank*, 166 Wn. App. at 275-76, 279-80.

C. AUTO's OPMA Complaint Was Properly Dismissed Because the Agenda for an Agency's Regularly Scheduled Meeting Can Be Modified without Violating the OPMA

AUTO complains the PDC's posted agenda for the May 26, 2016 public meeting was deficient under the OPMA, CP 10. To prove an OPMA violation, a plaintiff "must show (1) that a 'member' of a governing body (2) attended a 'meeting' of that body (3) where 'action' was taken in violation of the OPMA, and (4) that the member had 'knowledge' that the meeting violated the OPMA." *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001).

The first two elements are met here. The superior court's ruling that AUTO is unable to prove the third or fourth elements should be affirmed.

1. AUTO is unable to prove the OPMA is violated when a posted agenda for a regularly scheduled meeting is modified to include sub-topics within the scope of the general topics listed in the posted agenda

Before 2014, the OPMA did not require posting an agenda for regularly scheduled meetings; an agenda was required only for special meetings. *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 789-90, 650

P.2d 220, *review denied*, 98 Wn.2d 1008 (1982). In 2014, RCW 42.30.077

was enacted, which provides in pertinent part as follows:

Public agencies with governing bodies must make the agenda of 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 website.... Nothing in this section prohibits subsequent modifications to agendas nor invalidates any otherwise legal action taken at a meeting where the agenda was not posted in accordance with this section. ... Failure to post an agenda in accordance with this section shall not provide a basis for awarding attorney fees under RCW 42.30.120 or commencing an action for mandamus or injunction under RCW 42.30.130. [Emphasis added.]

Here, an agenda was posted online for the PDC's regularly scheduled meeting on May 26, 2016. CP 29-30, 54. The posted agenda items included "Follow Up From Prior Meetings," "Enforcement" and "Staff Reports, Executive Director." *Id.* These broad agenda items encompassed the Executive Director's report on AUTO's citizen action, and her follow-up from the PDC's prior meeting on March 24, 2016 when AUTO's rule-making petition was denied. *See id.* The posted agenda was subsequently modified to specifically include the Executive Director's report on AUTO's citizen action notice. CP 28-30, 46-47. No OPMA violation occurred.

AUTO is incorrect that an interpretation of RCW 42.30.077 that permits subsequent modification of agendas renders the statute meaningless.

See Brief of Appellant, p. 13. The statute plainly states subsequent modifications to posted agendas to discuss topics not specifically identified in the agenda are lawful under the OPMA. Giving effect to the statute's plain language permitting agenda modifications does not render the statute meaningless.

RCW 43.30.077 largely maintains agencies' long-established flexibility to discuss any topic raised at regularly scheduled public meetings, including specific sub-topics encompassed within broadly stated agenda items, by allowing agencies to freely modify their agendas. Thus, dismissal of AUTO's OPMA claim challenging the modification of a posted agenda for a regular public meeting should be affirmed.

2. AUTO is unable to prove a PDC member knowingly violated the OPMA by permitting an agenda modification to include sub-topics

Since RCW 42.30.077 expressly permits subsequent modifications to regular meeting agendas, AUTO cannot prove that any member of the PDC knowingly violated the OPMA by permitting the PDC's Executive Director to report two recent 45-day citizen action notices. Discussion of these items was within the broad agenda topics that were posted in advance of the meeting, including the posted agenda items of "Staff Reports, Executive Director," "Enforcement" and "Follow Up From Prior Meetings." *See* CP 28-30, 46-47. AUTO's OPMA complaint was properly dismissed because

AUTO failed to offer any evidence proving a member of the PDC knowingly violated the OPMA by allowing an agenda modification as expressly permitted by RCW 42.30.077. AUTO's appellate brief similarly fails to point to any evidence of a PDC member's actual knowledge of an OPMA violation. Accordingly, this Court should affirm dismissal of AUTO's OPMA complaint.

D. AUTO's Request for Entry of Judgment on its APA Claim and for an Award of Attorney Fees Should Be Rejected

AUTO asks this Court to remand this case for entry of summary judgment in AUTO's favor and to award AUTO its attorney fees pursuant to RCW 42.17A.755 and 42.30.210(4). Brief of Appellant, pp. 19-20. This Court should affirm the dismissal of AUTO's claims for the reasons stated above and thereby deny AUTO's requests for summary judgment and attorney fees.

Even if this Court were to reverse the dismissal of AUTO's claims and remand for further proceedings, this Court should deny AUTO's request to *sua sponte* enter summary judgment on the merits of its APA claim. The trial court did not reach the merits of AUTO's APA claim because the sole basis sought for dismissal was AUTO's failure to timely file a petition for judicial review as required by RCW 34.05.542(3). CP 18-19, 22, 24. The merits of AUTO's APA claim are not before this Court, and the parties have

not submitted briefs on the merits. AUTO's conclusory request for this Court to *sua sponte* grant AUTO summary judgment on the merits should be denied.

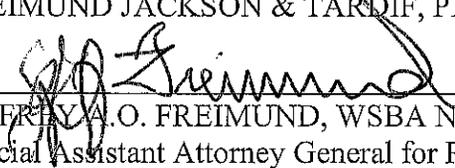
AUTO's request for attorney fees also should be rejected even if AUTO were to prevail in this appeal. AUTO claims it is entitled to attorney fees pursuant to RCW 42.30.120(4) for the PDC's alleged failure to post an adequate agenda in violation of RCW 42.30.077. Brief of Appellant, p. 19. However, RCW 42.30.077 expressly creates an exception to RCW 42.30.120 and plainly forecloses any award of attorney fees for an agency's failure to post an adequate agenda. AUTO alternatively cites RCW 42.17A.755 as a basis for awarding attorney fees (*id.*), but that statute does not address attorney fees and provides no authority for an award of fees. Thus, AUTO's fee request should be denied because AUTO fails to cite any applicable authority supporting its request. *See* RAP 18.1.

VI. CONCLUSION

Based on the foregoing reasons, the superior court's summary judgment rulings dismissing AUTO's APA and OPMA claims should be affirmed. AUTO's petition for judicial review is time-barred by RCW 34.05.542(3), and AUTO is unable to prove the PDC's posted agenda for its May 26, 2016 regular meeting violated the OPMA, or that PDC members knew the posted agenda violated the OPMA.

RESPECTFULLY SUBMITTED this 20th day of February, 2018.

FREIMUND JACKSON & TARDIF, PLLC



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Public Disclosure Commission

CERTIFICATE OF SERVICE

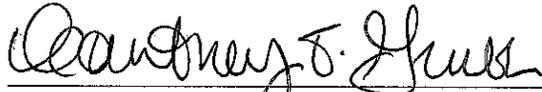
I certify that the foregoing was served by the method indicated below to the following this 20th day of February, 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of February, 2018, at Olympia, WA.



COURTNEY GRUBB

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