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NO. 90500-2

IN THE SUPREME COURT OF  
THE STATE OF WASHINGTON

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CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, a  
Washington non-profit corporation,

Petitioner,

vs.

SAN JUAN COUNTY, et. al;

Respondents

Filed *E*  
Washington State Supreme Court

JAN 26 2015

*R/C*  
Ronald R. Carpenter  
Clerk

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS

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**TABLE OF AUTHORITIES**

**CASES**

*Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985) .....

*Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 500 A2d 900 (Pa. Cmwlth. 1985) .....

*Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010).....

**OTHER AUTHORITIES**

AGO 1986-16.....

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Chapter 42.30 .....

House Journal, 48<sup>th</sup> Legislature .....

RCW 42.30 .....

RCW 42.30.020(2).....

RCW 42.30.030 .....

Substitute Senate Bill 3206.....

## I. INTRODUCTION

Amicus, the Washington State Association of Municipal Attorneys (“WSAMA”), agrees with Respondent San Juan County (“County”) that the informal group organized by the County Administrator did not “act on behalf” of the San Juan County Council.

WSAMA and its member cities fully support transparency in government. However, the Legislature struck a careful balance between transparency and effective operation of government when it limited the application of Washington’s Open Public Meeting Act (“OPMA”), set forth in Chapter 42.30 of the Revised Code of Washington (RCW), only to those subcommittees that act on behalf of a governing body, conduct hearings, or take testimony or public comment.

Requiring any committee that plays any role in policy-making, advisory or otherwise, as suggested by amici Allied Daily News and the Coalition for Open Government (in their Memorandum Supporting Review), would render the Legislature’s balanced approach meaningless. It would require any working group that included an elected official to comply with the OPMA; and, if taken to the extreme, it could require any working group or task force, even if no elected official was a member, to comply with the OPMA.

The “authorization test” outlined in the Attorney General’s 1986 opinion correctly states the law on this matter. When, as in this case, a group does not exert power or influence, or produce an effect as the representative of the governing body, it is not “acting on behalf” of that governing body. *See* AGO 1986-16. Local governments have followed this interpretation and advice for almost 30 years. Any change should come from the Legislature, and not through the courts.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

WSAMA is a non-profit organization of municipal attorneys who represent Washington’s 281 cities and towns. WSAMA members represent municipalities throughout the state.

The extent to which the OPMA applies to informal groups is one of great importance to Washington’s cities and towns. Elected officials and staff need certainty in knowing when the law applies. Also, because full compliance with the OPMA has a real cost in staffing, such as preparing agendas and minutes for meetings, expanding the application of the OPMA outside of what the Legislature intended will have unplanned financial consequences for cities and towns.

## **III. STATEMENT OF THE CASE**

Amicus adopts the Statement of the Case as set forth in the Restatement of Issues in San Juan County’s Supplemental Brief.

#### IV. ISSUES PRESENTED

Amicus adopts the Issues Presented as set forth in San Juan County's Supplemental Brief.

#### V. ARGUMENT

##### 1. The law strikes a careful balance.

Pivotal to the OPMA is its application to "governing bodies," which the Act expressly defines as:

a multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

RCW 42.30.020(2).

The OPMA ties its requirement for open meetings to whether the group meets the definition of a governing body.

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

RCW 42.30.030.

If something does not meet the definition of a governing body, its meetings do not have to be open.

The citizens of the State of Washington, and the Legislature, have clearly recognized that reasonable limitations on the application of the OPMA strike a careful balance between open and transparent government

and the effective operation of that government. The original initiative exempted the Legislature and the Courts. And, in enacting the 1983 amendments, the Legislature also clearly chose the specific language requiring the committee to be “acting on behalf” of the government body, instead of using the already-existing language of “taking action” that applies to a meeting of the governing body.

In its discussion of the 1983 amendments (Substitute Senate Bill 3206), the Senate Committee on Local Government discussed some examples of how the proposed law would apply to gatherings of less than a majority of the governing board, as well as to certain committees. Representative Ballard asked whether two members of a three-member water board traveling together to a site for a new reservoir, “...simply for an informational gathering...but...not to conduct any business...” would be subject to the OPMA. Representative Charnley responded that it would not, because the members were going to gather information and bring it back to the board; the members were “...not acting for the board in this case.” House Journal, 48<sup>th</sup> Legislature, pg. 1293. Also, Representative Isaacson asked whether a budget committee, consisting of less than a majority of the governing body that met with a department head to discuss the budget would be subject to the OPMA. Representative Hines answered “no,” without further explanation. House Journal, 48<sup>th</sup> Legislature, pg.

1294. These examples support the argument that the Legislature knew what it was doing when it used the specific language “acting on behalf.”

This balance, struck by the Legislature and clarified by the Attorney General in AGO 1986-16 is consistent with “sunshine” laws in other states. For example, in Pennsylvania, committees created for the purpose of furnishing information or recommendations are not subject to the sunshine law unless they have decision-making authority. <http://www.dced.state.pa.us/public/oor/SunshineLaw.pdf> (citing to *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 500 A2d 900 (Pa. Cmwlth. 1985)). In Florida, a limited exception to the applicability of Florida’s Sunshine Law to advisory committees has been recognized for advisory committees established for fact-finding only. “[A] committee is not subject to the Sunshine Law if the committee has only been delegated information-gathering or fact-finding authority and only conducts such activities.” *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010). See also *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985). Accord [Florida] AGO 95-06 (when a group, on behalf of a public entity, functions solely as a fact-finder or information gatherer with no decision-making authority, no “board or commission” subject to the

Sunshine Law is created). [http://myfloridalegal.com/webfiles.nsf/WF/KGRG-8RAQUF/\\$file/2012-SunshineManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/KGRG-8RAQUF/$file/2012-SunshineManual.pdf).

In Nevada, a sub-committee is subject to its Open Meetings Law if its recommendation to a parent body is more than mere fact-finding because the sub-committee has to choose or accept options, or decide to accept certain facts while rejecting others, or if it has to make any type of choice in order to create a recommendation, then it has participated in the decision-making process and is subject to the OML. [http://ag.nv.gov/uploadedFilesag.nv.gov/Content/About/Governmental\\_Affairs/OML\\_Portal/omlmanual.pdf](http://ag.nv.gov/uploadedFilesag.nv.gov/Content/About/Governmental_Affairs/OML_Portal/omlmanual.pdf).

Washington's OPMA is consistent with these other jurisdictions, in that it only applies when a committee of a governing body is "acting on behalf" of that governing body.

## 2. CAPR's position creates an absurd result.

Full compliance with the OPMA requires public notice of meetings, publishing of agendas in advance, taking, approving, and publishing minutes of those meetings. For smaller cities and towns that may only have one or two clerks, these requirements would be incredibly burdensome.

Also, members of governing bodies, especially in small jurisdictions, are necessarily involved with the executive in matters that

affect the jurisdiction while not rising to the level of “legislative action.” For example, members participate in community events, such as ribbon-cuttings and chamber of commerce lunches. They may travel together to visit a site of a construction project. They could be asked by the mayor or city manager to sit on an interview panel for a department head, or to discuss the agenda for an upcoming meeting. They may act as a liaison to a citizen’s advisory board or a citizen’s group. (The advisory board would, of course, be subject to the OPMA; however, the inclusion of fewer than a majority of the governing body on that board should not automatically convert that meeting to a meeting of the governing body.) Turning all of these activities, when the members are not “acting on behalf” of the governing body, into a meeting subject to the OPMA vitiates the balance struck by the Legislature and sacrifices the effective operation of government with very little advantage in the area of transparency.

The Legislature clearly intended to accommodate instances when public officials do not need to meet in open. Otherwise, there would be no need to insert the language “when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.” The Legislature could have, but did not, simply make committees subject to the OPMA whenever they took “action,” as already defined in the statute. This Court should not ignore that choice, something

that it is seemingly being asked to do by the Petitioner and *amici* Allied Daily News and the Coalition for Open Government.

Consistent with Washington's OPMA, and the laws of other jurisdictions such as Florida and Nevada, unless the committee is acting on behalf of the governing body in a manner that the statutes requires be done in an open meeting, that open meeting requirement does not apply.

## **VI. CONCLUSION**

Sound policy dictates a workable balance between open and efficient government. This is why the Legislature and the Courts are not subject to the OPMA. Where members of a governing body are not exercising the authority of the governing body or producing an effect as the representative of the governing body, the purpose of the OPMA is not forwarded by imposing the notice and open meeting requirements on meetings that happen to involve those members.

Municipalities have generally followed the guidance in AGO 1986-16 for almost 30 years, and the Legislature has not taken action to override that guidance. If a change is deemed necessary, it is the prerogative of the Legislature to make that change.

WSAMA respectfully requests that the Supreme Court affirm the Court of Appeals' decision in this matter.

Respectfully submitted this 8<sup>th</sup> day of January, 2015.

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CITIZENS ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND vs. SAN JUAN COUNTY  
CASE NO. 90500-2-1

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