

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 92455-4

(Clark County Superior Court No. 13-2-03431-3)

COLUMBIA RIVERKEEPER; SIERRA CLUB; and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER,

Plaintiffs-Petitioners,

v.

PORT OF VANCOUVER USA; JERRY OLIVER, Port of Vancouver
USA Board of Commissioners President; BRIAN WOLFE, Port of
Vancouver USA Board of Commissioners Vice President; and NANCY I.
BAKER, Port of Vancouver USA Board of Commissioners Secretary,

Defendants-Respondents.

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION.

“All political power is inherent in the people, and governments derive their just powers from the consent of the governed....” WASH. CONST. Art. I, § 1. The Open Public Meetings Act (“OPMA”) provides “meaning and substance” to this concept of governance by ensuring that “[t]he people [of Washington State]... remain[] informed so that they may retain control over the instruments they have created.” RCW 42.30.010; *Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.*, 184 Wn.2d 428, 452–53, 359 P.3d 753, 766 (2015) (Yu, J., dissenting in part). At issue here are systemic violations of OMPA’s basic mandate that the public have access to all stages of government decision-making and a trial court decision sanctioning such conduct.

OMPA requires that governing bodies of agencies make their meetings open to the public. RCW 42.30.030. The Port of Vancouver (“Port”) and its Board of Commissioners (“Board” or “Commissioners”) disregarded this requirement by repeatedly excluding the public while planning to develop the nation’s largest “crude-by-rail” oil terminal on the banks of the Columbia River near downtown Vancouver, Washington.

The Commissioners had already met behind closed doors numerous times to discuss essentially every aspect of the project before it was announced to the public. The Board even held a secret meeting with

the project developers to discuss the proposal—including safety and environmental issues and other topics of great public concern. The project was thus already well-developed when it was finally disclosed to the public. The OPMA violations did not cease there, however, as the Board continued to exclude the public from significant deliberations right up to the morning it voted to execute a lease for the oil terminal.

The Board made the untenable argument below that all of its private meetings were permissible under an OPMA exception that allows executive session on leasing public property to discuss one narrow issue. That provision strikes a balance between the paramount interest in providing public access to all deliberations of elected officials and the public's interest in obtaining fair value for public property. Significantly, the exception narrowly circumscribes executive sessions to consider only the minimum price at which real estate will be offered and only when public knowledge thereof would likely reduce the lease price.

The trial court adopted the Port's proffered interpretation of this provision, holding that the Board may exclude the public from discussions on any issues related to a potential lease of public property that could somehow advantage either a potential customer or a competitor in the negotiations. The trial court thus found that most of the Board's private meetings on the proposed oil terminal were permissible.

The interpretation of OPMA announced by the trial court is divorced from the statutory language, allowing elected officials to meet privately to discuss human health, safety, and environmental concerns regarding proposed uses of public property. Indeed, one Commissioner candidly admitted that any issue related to real estate matters would be a permissible topic for executive session under the Port's interpretation. This undermines government transparency in a manner never intended by the Washington legislature. Plaintiffs-Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center (collectively, "Riverkeeper") respectfully request the Court reverse the decision of the trial court and remand for further proceedings.¹

II. ASSIGNMENTS OF ERROR.

A. Statement of Assignment of Error.

The trial court erred as a matter of law when it granted summary judgment to the Board, denied summary judgment to Riverkeeper, and held that the Board complied with OPMA when it excluded the public from five meetings to deliberate on the proposed crude-by-rail terminal.

¹ The Court heard oral argument on June 23, 2016, in a related appeal wherein Riverkeeper challenges the Port's compliance with the State Environmental Policy Act for this proposed crude-by-rail terminal (Supreme Court No. 92335-3).

B. Issues Pertaining to the Assignments of Error.

Issues pertaining to the assignment of error involve an exception to OPMA that allows executive sessions to “consider the minimum price at which real estate will be offered...when public knowledge...would cause a likelihood of decreased price.” *See* RCW 42.30.110(1)(c).

A. Whether OPMA limits executive sessions to a consideration of the minimum price at which real estate will be offered.

B. Whether the Board violated OPMA by discussing extensive issues related to the proposed crude-by-rail terminal other than the minimum lease price during five executive sessions.

C. Whether the Board established with admissible evidence that there are no disputed facts as to whether public knowledge of its private discussions would have caused a likelihood of a decreased price.

D. Whether the trial court erred in considering supposed expert opinions on legal issues and hearsay testimony in deciding the issues presented herein.

III. STATEMENT OF THE CASE.

A. The Open Public Meeting Act.

OPMA is intended “to allow the public to view the decisionmaking process at all stages.” *Cathcart v. Andersen*, 85 Wn.2d 102, 107, 530 P.2d 313, 316 (1975). In enacting the statute, the legislature declared:

...that all public commissions... 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. This is "some of the strongest language used in any legislation." *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 482, 611 P.2d 396, 406 (1980). OPMA further directs that its "purposes are... remedial and shall be liberally construed." RCW 42.30.910.

The centerpiece of OPMA is the requirement that "[a]ll 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 [OPMA]." RCW 42.30.030. This applies to a multimember commission of a public agency, including a municipal corporations like the Port. *See* RCW 42.30.020(1)–(2).² A "meeting" under OPMA is one "at which action is taken." RCW 42.30.020(4). "Action" is defined broadly to encompass "the transaction

² Port districts are municipal corporations of the State. RCW 53.04.060.

of the official business of a public agency by a governing body including but not limited to... deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3). Thus, an action is not limited to “final action,” but rather occurs if “[t]he governing body members... merely ‘communicate about issues that may or will come before [them] for a vote.’” *Eugster v. City of Spokane*, 110 Wn. App. 212, 225, 39 P.3d 380, 385 (2002).

OPMA demands strict enforcement at all stages of government deliberations—not just at a final public vote:

“Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire *decision-making process* that the legislature intended to affect by the enactment of the [OPMA]. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action.”

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If the [OPMA] is to be effective, it must apply at the point where authority is exercised, as well as where it is initially lodged.

Cathcart v. Andersen, 10 Wn. App. 429, 435–36, 517 P.2d 980, 984 (1974) (quoting *Times Publ’g Co. v. Williams*, 222 So. 2d 470, 473 (Fla. Ct. App. 1969)), *aff’d*, 85 Wn.2d at 107 (“the purpose of the [OPMA] is to allow the public to view the decisionmaking process at all stages”).

OPMA contains narrow exceptions that permit a governing body to go into executive session to discuss specific issues, including:

To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price.

RCW 42.30.110(1)(c). OPMA's mandate for liberal construction in furtherance of the statute's general rule of openness, RCW 42.30.910, carries with it a "concomitant intent that its exceptions be narrowly confined." See *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429, 433 (1999) (quoting *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 145, 530 P.2d 302, 305 (1975)).

Once an executive session is lawfully convened, a governing body is "not immunized from the provisions of the [OPMA];" rather, it is "required to limit its action in executive session to that authorized by the relevant exception." *Miller*, 138 Wn.2d at 327 ("any action taken beyond the scope of the exception violate[s] the [A]ct").

B. The Port's Extensive Use of Executive Sessions.

The Port owns about four miles of property along the Columbia River west of downtown Vancouver, Washington. Clerk's Papers ("CP") 959 (¶ 8); CP 975 (¶ 8). Much of the business conducted by the Board relates to leasing this public property. See CP 1455–56 (Tr. 9:9–10:3).

The Board itself has limited involvement in determining the price at which this real estate will be offered. Commissioner Wolfe testified:

Q. Okay. How does the port decide at what price to offer its real estate for lease?

A. The real estate is at fair market value. There is a system that the Real Estate Office has to determine what fair market value is.

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Q. Who ultimately makes the decision at the port about the price that real estate will be offered?

A. The commission ultimately makes that decision. But because we're on a fair-market-value basis, all we have to do is make sure that our real estate and our staff—Real Estate Office and staff have properly found out what fair market value is.

Q. Any how do the commissioners go about determining whether those individuals engaged in that process in the proper way?

A. We ask them.

Q. You ask them? Do the commissioners do any sort of independent investigation?

A. No. We haven't up till now, anyway.

CP 1456 (Tr. 11:9–13, 12:1–13); *see also* CP 1416 (Tr. 22:19–23:9)

(similar testimony from Commissioner Oliver). The Port similarly testified that Port staff negotiates and establishes the price for leases, Port staff keeps the Commissioners informed of that process through one-on-one

meetings (*i.e.*, not in Board meetings with all three Commissioners), and the Commissioners' only approval comes from their final deliberation and vote on whether to accept a proposed lease. CP 1174 (Tr. 30:21–31:12).

However, for purposes of OMPA's provision allowing executive sessions to "consider the minimum price at which real estate will be offered," the Port interprets "minimum price" to encompass "anything that would affect...two issues:" information that (1) could be used by a potential tenant to negotiate a lower price or (2) could be used by a competitor in an effort to solicit a potential tenant and thereby drive down the price. CP 1172, 1179 (Tr. 23:25–24:17, 52:25–53:11); *see also* CP 1471 (Tr. 72:17–73:17) (executive sessions used to "guard against... poaching" by hiding "basically all topics" related to potential tenants). Commissioner Baker candidly admitted that all topics about real estate are permissible topics for executive session under the Port's interpretation. CP 1507 (Tr. 61:13–25). The Board thus excludes the public at "just about every commission meeting," which occur twice each month. CP 1496 (Tr. 15:5–7, 15:16–18); *and* CP 1457 (Tr. 15:9–19) (executive sessions held "[a]bout 95 percent of the time").

C. The Proposed Crude-by-Rail Terminal.

Tesoro-Savage Joint Venture ("Tesoro-Savage") was formed by two companies—Tesoro Corporation and Savage Companies—to develop

a petroleum storage and transportation facility at the Port. CP 963 (§ 26); CP 978 (§ 26); *and see* CP 150. Tesoro-Savage seeks to transform this area near downtown Vancouver into the “hub for the distribution of North American crude oil to West Coast refining centers.” CP 150.

The proposed crude-by-rail facility would receive petroleum products by rail, offload and store the material in tanks, and then load the petroleum products onto marine vessels. CP 118; CP 123; CP 147. The project would include a rail unloading facility, six storage tanks with a combined capacity of over 2.25 million barrels (94.5 million gallons), and vessel loading operations on approximately forty-two acres of Port property. *See* CP 123; *and* CP 963 (§ 26); CP 978 (§ 26). The project would receive up to an average of 360,000 barrels of petroleum product each day. CP 118; CP 123. An average of up to four trains a day would bring the oil to the Port, each train consisting of 110 cars and measuring one and a half mile in length. CP 147.

This would be the largest crude-by-rail facility in the United States. CP 991. It would be constructed “on the north shore of the Columbia River” “within the City of Vancouver.” CP 124. The oil to be shipped and stored would be from the Bakken Formation, which is the same oil that has been involved in disastrous rail car explosions such as that which occurred in Lac-Mégantic, Quebec, Canada that killed forty-

seven people. *See* CP 147; *and* CP 1478 (Tr. 101:13–17); *and* CP 1516–17; *and* CP 1957. This proposal has thus garnered an enormous amount of public attention and concern, with community members and organizations expressing an overwhelming interest in observing and participating in all deliberations and decisions by their elected officials on the project. *See, e.g.,* CP 214–32; CP 1227–1229; CP 1234–36, 1238–45; CP 1247–57; CP 1259–60, 1262–69; *and see* CP 991–94; CP 1516–17.

D. The Port’s Private Deliberations on the Terminal.

Before the proposed crude-by-rail facility was even announced to the public on April 22, 2013, the Board had already met multiple times in private to address key aspects of the project and to deliberate on concerns raised by the Commissioners about moving forward. *See* CP 150; *and* CP 1218–22. The Port had also already executed an exclusivity agreement with Tesoro-Savage for lease negotiations. *See* CP 1187 (Tr. 84:16–17). The Port held a secret meeting on April 9, 2013, to introduce the Board to Tesoro-Savage representatives, to discuss far ranging topics about the project, and to allow the Board an opportunity to ask questions directly of the developers on the risks and benefits of the project. *See* CP 1283–84.

In all, the public was excluded from at least thirteen Board meetings during which matters related to leasing public property for this oil terminal were discussed. *See* CP 1218–22. Unfortunately, the public

will never know most of what occurred during these closed-door meetings because the Board and other witnesses claim to remember very little about the discussions. *See, e.g., id.*; CP 1509 (Tr. 66:19–67:6) (Commissioner Baker did not remember being present at Board meetings discussing the lease or any details of those meetings); CP 1481 (Tr. 112:19–113:2) (Commissioner Wolfe did not “have any memory of a specific executive session”). The Port did, however, admit some of the content discussed at seven executive sessions held by the Board, as described below.

1. The Board’s March 26, 2013 executive session.

The Port held an executive session on March 26, 2013. CP 1271; CP 1190 (Tr. 94:10–25). That private meeting included discussions related to a proposed exclusivity agreement with Tesoro-Savage; specifically, issues on the schedule and duration for the agreement. CP 1190 (Tr. 96:5–20). Port staff also presented “to the Commissioners the current status of the terms” of the lease, including the lease rate and the wharfage, dockage, and rail fees. *Id.* (Tr. 96:5–10).

2. The Board’s April 9, 2013 executive session.

The Board held an executive session on April 9, 2013, for nearly three hours. CP 1280–81. There was no public portion of that meeting and the meeting minutes—the only publically available information on the executive session—represented that only the Commissioners and Port staff

attended. *Id.* In fact, representatives from Tesoro-Savage attended too. CP 1191 (Tr. 102:7–14). Indeed, the meeting was specifically pitched to those developers as an opportunity for a private meeting with Commissioners:

I would like you to consider a visit to the [Port] by some of your key executive staff on **April 9, 2013** for an introduction with the Port Commissioners and discussion with them in Executive Session (which is closed to any public) regarding the project.

CP 1355 (emphasis in original).

The meeting began with a presentation by Port staff on the project development, lease negotiations to date, and the last workshop with the Commissioners. CP 1284; *and* CP 1193 (Tr. 106:4-16). Port staff also presented its “May 2012 Six Hats” evaluation—a process that evaluated “all of the pluses, minuses, mitigations, and so forth” for a crude-by-rail facility—while focusing on safety issues, utilization of underutilized Port facilities, and impacts to adjacent tenants. CP 1284; CP 1193 (Tr. 106:19–108:10). This was followed by introductions and discussions on modifications to a rail loop for the project and the statement of interest process that culminated in the Port’s selection of Tesoro-Savage for exclusive negotiations. CP 1284; CP 1193–94 (Tr. 109:9–110:19).

Port staff then presented a PowerPoint that covered a wide variety of topics, including the “makeup of the Project Team, Project Timeline and Project Announcement Control Points.” CP 1284; *and see* CP 1286–

95; CP 1194, 1196 (Tr. 111:12–112:2, 118:23–119:8). While the Port was somewhat unclear as to which PowerPoint slides were orally discussed at the meeting, the Port admitted that discussions during this presentation focused on the facility design, proposal highlights, and the oil refineries to be served by the terminal. CP 1196–97 (Tr. 119:9–123:14).

Representatives from Tesoro-Savage then provided their own PowerPoint presentations to the Board. CP 1284; CP 1194 (Tr. 111:12–19). These PowerPoint slides covered an even wider range of topics, including safety, corporate priorities and capabilities, project objectives, and economic evaluations and projections—a thorough sales pitch to the Board. *See* CP 1297–1347. Port staff thought that Tesoro-Savage “did a very good job of delivering their presentation...and engaging with the Commissioners with a genuine and open approach.” CP 1284; *see also* CP 1349. Witnesses were again unclear on which slides topics were verbally discussed at the meeting, but the Port admitted that there were discussions on the number of unit trains and vessels expected at the terminal, the expectations for job creation, and impacts to other tenants during construction. CP 1197–99 (Tr. 124:4–10, 127:22–129:1, 131:21–132:12).

The Commissioners then “had a number of questions” for Tesoro-Savage and BNSF Railway, which is also involved with the project, on several issues, including “around the safety aspects.” CP 1194 (Tr.

112:12–113:14); CP 1284; *see also* CP 1349. Commissioner Baker addressed the number and types of jobs that will supposedly be created, the number of trains that will move through the facility each day, and the number of acres that the facility would occupy. CP 1199–1200 (Tr. 132:13–134:6). Commissioner Wolfe asked questions about the market variability and risk and the type of crude oil that would move the facility—whether it would be “Bakken crude.” CP 1200 (Tr. 134:7–135:1). A “key” issue for Commissioner Wolfe discussed at the meeting was whether Tesoro-Savage would only be handling their own product or whether it would be an open facility. *Id.* (Tr. 135:2–18). Commissioner Wolfe also inquired about the corrosiveness of the oil in relation to concerns about leaks or failures. *Id.* (Tr. 136:5–22). Commissioner Oliver’s questions related to the level of investment and commitment from Tesoro-Savage, who would be responsible for construction and management of the facility—*i.e.*, local or out-of-town workers—whether Tesoro and Savage had worked together before, whether the oil would be exported, whether new rail cars will be used or older and potentially poorly-maintained rail cars, and the type of vessels that would be used. CP 1200–01 (Tr. 137:12–141:5). The project proponents were able to provide most of the information requested from the Commissioners. CP 1284.

The meeting wrapped up with Port staff reminding the Board that the project was a “heavy lift.” CP 1284; CP 1194–95 (Tr. 113:15–114:9). There was also discussion of the then-upcoming public announcement of the project “as a way to take the cap off the project and allow it to ‘breathe’ for a period of time.” CP 1284; CP 1195 (Tr. 114:14–116:4). Before the Commissioners left, they received an invitation from Tesoro-Savage to tour a crude oil transfer facility in Anacortes. CP 1195 (Tr. 116:23–117:11). According to Port staff, “[a]ll three Commissioners walked away excited about moving forward and...ready to handle Tesoro/Savage [public] announcement on [April] 22nd...” CP 1349.

3. The Board’s July 9, 2013 executive session.

The Commissioners met in private for nearly an hour and a half on July 9, 2013. *See* CP 1365. During that time, they continued a “discussion around the formation of the new entity, the LLC that [Tesoro–Savage] would operate under and the risks associated with that.” CP 1205 (Tr. 156:5–17). The Commissioners had concerns related to whether the new Tesoro-Savage “joint venture was merely a shell without adequate assets to do the cleanup and things that [the Commissioners] were concerned about.” CP 1470 (Tr. 66:7–20).

Commission Wolfe also admitted that, although he could not recall specific dates, the Board discussed in executive session the tragic crude-

by-rail disaster in Lac-Mégantic, Canada. CP 1470 (Tr. 67:4–18). The July 9, 2013, executive session was just a few days after that incident and the same day that Commissioner Wolfe was quoted in a newspaper article discussing the accident and the proposed terminal at the Port. *See* CP 1468 (Tr. 60:22–61:25); *and* CP 1516–17.

4. The Board’s July 16 and 17, 2013 executive sessions.

The Board held extensive executive sessions on July 16 and 17, 2013, totaling over eight hours to discuss the proposed terminal. CP 1375–77; *and* CP 1221. These private meetings included discussions “about a number of items,” including “what types of crude would flow through the facility” and differences between those types, the facility premises, timelines for operation of the facility and lease, construction start and finish deadlines, whether extensions would be allowed, insurance requirements (property, liability, and pollution insurance), and the “risk associated with any of the potential crude oil that could be handled through the facility.” CP 1205–06 (Tr. 157:25–158:22, 161:9–11).

A document describing the “Ground Lease Highlights” was used as an agenda and addressed all of the key lease terms negotiated at that time, the majority of which were covered during the two days of executive sessions. CP 1206 (Tr. 160:4–161:17); CP 1357–63. The agenda items

discussed in the executive sessions included the environmental and safety provisions of the lease. CP 1361–62; *and see* CP 1206 (Tr. 161:7–17).

The Board also went through typed-up questions related to concerns raised by Commissioner Wolfe. CP 1206–07 (Tr. 161:24–162:6); CP 1379. Concerns discussed at these closed-meetings included those related to “the size of the tanks and the risks associated with the tanks,” such as those from gases, vapors, and fumes, and the Port’s ability to require “later generation rail cars.” CP 1207 (Tr. 162:7–22).

5. The Board’s July 22, 2013 executive session.

The Board held a meeting on July 22, 2013—the evening before the Board was scheduled to vote on the lease—that included public presentations by Port staff, testimony from the public, and an executive session. *See* CP 1247–57; *and* CP 1207 (Tr. 163:25–164:10). This was described as a “long, lengthy public workshop” attended by an “extraordinary” number of people from the public. CP 1480 (Tr. 107:14–21); CP 1441 (Tr. 124:19–125:2).

Commissioner Oliver announced that the Board “intended to hold an executive session after the comments to discuss what they had heard during the public testimony and how that impacts their deliberations.” CP 713–14. Around 30 to 40 members of the public testified for about two hours, the vast majority of which opposed the project. *See* CP 1250–56;

and CP 1207 (Tr. 164:9–10); *and* CP 713. Commissioner Oliver then announced that “the Commissioners were going into executive session to review the comments and discuss them.” CP 714; *see also* CP 1256.

The purpose of the executive session was to determine whether the Commissioners wanted to add or modify any lease terms in light of the public comments. CP 1207 (Tr. 164:14–18); CP 1480, 1488 (Tr. 107:22–25, 140:21–141:5). After the public was excluded, there were discussions on numerous issues related to the lease, including pollution liability insurance requirements, safety provisions, how payments under the lease would be made, the approval process for the facility’s operations plan, the public comments, and safety and security concerns. CP 810, 812–13, 815.

During the executive session, Port staff “went . . . quickly over the general themes . . . heard as far as [public] concerns and then asked the Commissioners if there were any additional terms that they wanted to have changed.” CP 1207 (Tr. 165:4–9). The public concerns covered in the executive session included “safety, fossil fuel, and emissions.” *Id.* (Tr. 165:10–14). Port staff explained to the Board that “we’ve heard a lot of comments tonight that are concerned about safety relative to spills, explosions, and fossil fuels,” and then asked whether there are “any other terms that the Commission needs to have put into [the lease] before we bring it before you tomorrow morning.” CP 1208 (Tr. 167:11–22).

The “Commissioners were still concerned over the recent incident in Quebec and how [they] could make sure that [they] felt comfortable that [they] had done everything [they] could within [their] facilities to minimize any potential risk.” *Id.* (Tr. 167:25–168:7). Commissioner Wolfe responded during the executive session that the Board “needed to have in the lease” a term providing the Port with “approval rights for the [terminal’s] operation plan.” CP 1207–08 (Tr. 164:20–165:1, 168:16–22). The Commissioners then announced during the executive session that they “had enough information” and were “ready to go forward” with the vote on the lease. CP 1488–89 (Tr. 141:19–142:3).

6. The Board’s July 23, 2013 executive session.

The Board met again in an executive session on July 23, 2013, for around an hour. CP 1259. During that closed meeting, the Board reviewed the new lease term added in response to its private deliberations from the previous evening—a term requiring that the Port “approve the operation and safety plan before [Tesoro-Savage] could go into operation.” CP 1209 (Tr. 170:18-23); *see also* CP 1443 (Tr. 131:4–21). The Board then held a public vote approving the lease for the crude-by-rail terminal. CP 1268.

E. Proceedings Below.

Riverkeeper filed a complaint on October 2, 2013, alleging OPMA violations based on Commissioner Oliver’s public announcement of what

the Board intended to discuss in executive session at the July 22, 2013, meeting. CP 7–8. The Board then held another public vote re-approving the lease on October 22, 2013, in an effort to “cure” its OPMA “shortcomings.” CP 214, 217, 232.

The Port filed an early summary judgment motion on December 6, 2013, that addressed the only meeting then at issue—the July 22, 2013, meeting. CP 47–86. The trial court continued the motion under CR 56(f) to allow for discovery. CP 948. However, the trial court found that the Board’s two public votes approving the lease and adoption of a procedure³ to announce executive sessions rendered moot any requests for injunctive relief or to have the lease declared null. *Id.*

Riverkeeper’s subsequent discovery revealed that the Board had repeatedly excluded the public from meetings throughout the development of the project. Riverkeeper amended its pleadings to allege that numerous meetings violated OPMA. CP 955–72. Riverkeeper moved for summary judgment on June 12, 2015, requesting the trial court find that the Board violated OPMA by excluding the public from the seven meetings described above. CP 1116–58. Riverkeeper further requested that the trial

³ The supposed new procedure consists of a one and a half page document that merely recites some language from the Revised Code of Washington on executive sessions. CP 2589–90.

court reconsider its mootness ruling and declare the lease null and void in light of the expanded claims addressing pervasive OPMA violations throughout the project development and lease negotiations. CP 1119.

The Board argued in response that all the meetings were permissible under OPMA's allowance for executive sessions "[t]o consider the minimum price at which real estate will be offered for...lease when public knowledge regarding such consideration would cause a likelihood of decreased price." CP 1554-55, 1572-73; *and* RCW 42.30.110(1)(c). The Board further requested that it be granted summary judgment on mootness grounds raised in the Board's December 6, 2013, motion that had been continued under CR 56(f). CP 1592-93.

The trial court issued an oral ruling on July 24, 2015, and signed a written order on September 23, 2015. Report of Proceedings ("RP") 50:18-61:9; CP 2719-24. The trial court affirmed its prior mootness ruling, indicating that "any sort of [OPMA] violations" were cured by the Board's public votes approving the lease. RP 50:25-52:8; *and* CP 2721.

The trial court adopted the Board's interpretation of OPMA's "minimum price" exception, holding that the Board may exclude the public to discuss any:

- (1) information that would give the customer an advantage in negotiating a lower price; and
- (2) information that would give a competitor an opportunity to negotiate with the

Port's customer, thus creating a bidding process that would decrease the Port's price.

CP 2721–22. In announcing this interpretation, the trial court recognized “[i]t’s likely that a reviewing Court would see this differently.” RP 56:22–23. The trial court found that the executive sessions held on March 26, July 9, July 16, July 17, and July 23, 2013, complied with OPMA and therefore granted summary judgment to the Board and denied summary judgment to Riverkeeper as to those meetings. CP 2722. The trial court held that disputed facts preclude summary judgment to either party as to whether the April 9 and July 22, 2013, meetings complied with OPMA. *Id.*

This Court granted direct discretionary review as to the five executive sessions for which the Board was granted summary judgment.

IV. ARGUMENT.

OPMA allows the Board to go into executive session to “consider the minimum price at which real estate will be offered” when public disclosure of such discussions “would cause a likelihood of decreased price.” RCW 42.30.110(1)(c). This provision has two limitations. First, it limits what may be considered in executive session to one subject matter: the minimum price at which real estate will be offered. Second, it limits consideration of that subject in executive session to circumstances where public knowledge thereof would likely decrease the price obtained.

The trial court erred by adopting an interpretation of this provision that ignores the former limitation altogether and allows the Board to go into executive session to discuss any matter whatsoever, regardless of how tangentially related to price it may be. Riverkeeper should be granted summary judgment because the Board violated OPMA when it excluded the public from five meetings during which it discussed numerous issues well-beyond the minimum price at which the lease will be offered.

Moreover, the Board did not present any admissible evidence on the second limitation of OPMA's minimum price provision—evidence demonstrating that public disclosure of its private deliberations would have likely reduced the lease price. Summary judgment therefore should not have been granted to the Board even if the issues discussed at the private meetings are somehow considered part of the “minimum price.”

This Court should reverse the decision of the trial court with directions to grant summary judgment to Riverkeeper on five of the Board's closed meetings and for further proceedings as to the other two meetings. Further, the Court should disregard and order stricken the inadmissible hearsay and opinion testimony submitted by the Board.

A. Standards of Review.

This Court reviews interpretations of statutes de novo.

Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty., 172 Wn.2d

702, 715, 261 P.3d 119, 125 (2011). Grants of summary judgment are reviewed de novo, with the Court conducting “the same inquiry as the trial court.” *Id.* The Court also reviews evidentiary rulings made by the trial court in connection with a summary judgment motion de novo. *Wilkinson v. Chiwawa Cmty. Ass’n*, 180 Wn.2d 241, 249, 327 P.3d 614, 618 (2014).

“Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259, 261 (2000). “All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party.” *Id.* “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Id.* Only admissible evidence may be considered on a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141–42, 331 P.3d 40, 46–47 (2014).

B. OPMA Narrowly Limits What May Be Discussed in Executive Sessions to the Minimum Price.

The trial court’s interpretation of OPMA’s minimum price exception is inconsistent with the plain language of the statute—particularly given the Court’s instruction to construe such exceptions narrowly—and with the legislative history of the statute. The Court should

reject that interpretation and hold that OPMA limits discussions closed meetings to the minimum price at which the real estate will be offered.

The Court’s “fundamental objective when interpreting a statute is ‘to discern and implement the intent of the legislature.’” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892, 897 (2011) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003)). “If a statute’s meaning is plain on its face, [the Court] must ‘give effect to that plain meaning as an expression of legislative intent.’” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 627, 278 P.3d 173, 177 (2012) (quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4, 9 (2002)). A statute is ambiguous if it is susceptible to more than one *reasonable* interpretation—more than one *conceivable* interpretation does not render a statute ambiguous. *Five Corners Family Farms*, 173 Wn.2d at 305. If the statute is ambiguous, the Court may look to legislative history to determine legislative intent. *Id.* at 305–06.

OPMA allows the Board to go into executive session to:

To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price.

RCW 42.30.110(1)(c). The trial court adopted an interpretation of this provision that completely ignores the limitation on discussions in

executive sessions to the “minimum price.” Instead, the trial court focused only on the second limitation, holding that the public may be excluded where the Board is discussing any:

(1) information that would give the customer an advantage in negotiating a lower price; and (2) information that would give a competitor an opportunity to negotiate with the Port’s customer, thus creating a bidding process that would decrease the Port’s price.

CP 2721–22. The statute unambiguously limits what the Board may consider in executive session to the minimum price at which real estate will be offered. To the extent there is any ambiguity, the legislative history reinforces this interpretation. The trial court erroneously read this limitation out of the statute altogether.

1. The plain language limits private discussions to the minimum price that property will be offered.

The OPMA provision at issue allows the Board to go into executive session to consider only one topic: “the minimum price at which real estate will be offered for sale or lease.” RCW 42.30.110(1)(c). A plain reading of this provision limits discussions from which the public may be excluded to the least amount of money to be accepted for a lease.

“In determining the plain meaning of a provision, [the Court] look[s] to the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions,

and the statutory scheme as a whole.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354, 356 (2010) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005)). The statute should be construed in a manner that gives effect to all of the language used and that does not render any terms superfluous. *Citizens Alliance*, 184 Wn.2d at 440. Further, where the legislature uses different terms within the same statute, it is presumed that different meanings were intended. *Id.*

This Court has emphasized the importance of OPMA’s context when construing the statute. *See, e.g., Miller*, 138 Wn.2d at 324; and *Cathcart*, 85 Wn.2d at 107. Notably, OPMA “uses some of the strongest language...seen in any legislation” to describe the policy behind ensuring public access to agencies’ “decisionmaking process[es] at all stages”:

The people...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.

Cathcart, 85 Wn.2d at 107 (quoting RCW 42.30.010). The legislature further provided explicit instruction on how to interpret the statute: “[t]he purposes of [OPMA] are hereby declared remedial and shall be liberally construed.” RCW 42.30.910. This mandate for liberal construction in furtherance of the statute’s open government objectives carries with it a

“concomitant intent that [the] exceptions be narrowly confined.” *E.g.*, *Miller*, 138 Wn.2d at 324–28 (narrowly construing executive session provision “in accordance with the purposes of the act”). It is within this context that the “minimum price” exception should be construed. *See id.*

The term “minimum price” is not defined by OPMA. *See* RCW 42.30.020. “Dictionaries are an appropriate source of plain meaning when the ordinary definition furthers the statute’s purpose.” *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625, 628 (2015); *and see Miller*, 138 Wn.2d at 327. The dictionary definition of “price” is:

1. *archaic* : genuine and inherent value : WORTH, EXCELLENCE, PRECIOUSNESS... **2a** : the quantity of one thing that is exchanged or demanded in barter or sale for another : a ration at which commodities and services are exchanged **b** : the amount of money given or set as the amount to be given as a consideration for the sale of a specified thing... **3** : the terms or consideration for the sake of which something is done or undertaken : as **a**: an amount or gain sufficient to price one : something for which one is prepared to sacrifice probity, responsibility, or other quality or duty...

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1798 (2002).

The most reasonable definition of “price” when referring to the sale or lease of property is the amount of money to be given by the purchaser or the tenant in exchange for the property.

Moreover, OPMA uses the word “minimum” as an adjective that modifies the word “price.” *See* RCW 42.30.110(1)(c). The dictionary defines “minimum,” when used as an adjective, as:

of, or relating to, or constituting a minimum : least attainable or possible...

WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 1438 (2002).

Thus, the term “price” as used in OPMA is something that is quantifiable. This is further demonstrated by the statute’s allowance for executive sessions only when public disclosure of the discussions would cause a “decreased price.” *See* RCW 42.30.110(1)(c).

Construed together, there is only one reasonable interpretation—“minimum price” refers to the least amount of money that public property will be offered for sale or for lease. A broader interpretation of these terms beyond their ordinary meaning would be inconsistent with the “legislative command” on how OPMA is to be applied. *See Mead Sch. Dist.*, 85 Wn.2d at 143–45 (rejecting a broad definition of the term “emergency” as used in an exception to OPMA requirements); *and see* RCW 42.30.910.

The legislature’s intent to limit private discussions to the minimum price at which public property will be offered is further demonstrated by a comparison to other OMPA provisions. *See Ervin*, 169 Wn.2d at 820 (plain meaning may be determined by looking to related provisions).

Notably, OPMA contains a parallel, but broader, exception for the acquisition of property, allowing executive sessions:

To consider the selection of a site or the **acquisition** of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price.

RCW 42.30.110(1)(b) (emphasis added). This provision allows executive sessions to discuss matters related to the acquisition of property that, if disclosed, would increase the price. Thus, when it comes to purchasing property, there is only one limitation on what may be discussed—the topics discussed must be those that would cause an increase in the price paid by the agency if they were disclosed to the public.

The legislature included a similar limitation for executive sessions on the disposition of property, allowing executive sessions only when public disclosure of the discussion would reduce the price obtained by the agency. *See* RCW 42.30.110(1)(c). However, the legislature included a second limitation—allowing executive sessions only to consider the “minimum price” that property will be offered for sale or lease. *Id.* “Where [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.” *Kucana v. Holder*, 558 U.S. 233, 249

(2010) (quotation omitted); *see also Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885, 889 (2007) (“When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings.”).

The legislature used different language for these two closely-related provisions to define the permissible scope of executive sessions for the disposition and acquisition of public property. As was the case in *Densley*, “[o]ne clearly appears broader than the other.” 162 Wn.2d at 220. The legislature limited private discussions on the sale or lease of public property to the minimum price that the real estate will be offered. The legislature did not similarly limit private discussions on the acquisition of property to the maximum price that will be offered. The United States Supreme Court remarked when faced with a similar issue:

We refrain from concluding...that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

Russello v. United States, 464 U.S. 16, 23 (1983). The Court should give effect here to the legislature’s intentional use of different language.

Similarly, OPMA’s “minimum price” provision should be construed in a manner that gives effect to all of the language used and that does not render any portion meaningless or superfluous. *See, e.g., Citizens*

Alliance, 184 Wn.2d at 440. The trial court's interpretation is inconsistent with this fundamental principle of statutory construction. OPMA allows executive sessions to "consider the minimum price at which real estate will be offered" when public disclosure "would cause a likelihood of decreased price." RCW 42.30.110(1)(c). The trial court held that the Board could exclude the public to discuss any information that could be used by a potential tenant or by a competitor in a manner that could reduce the price. CP 2721–22. This interpretation impermissibly renders meaningless the language in the statute that limits executive sessions to consider only the minimum price at which real estate will be offered.

The Board has argued that an interpretation that limits discussions in executive session to the minimum price at which real estate will be offered should be rejected under the canon of construction that seeks to avoid absurd results. CP 1568, 1572. This canon should "be applied sparingly" because it refuses to give effect to the plain language used by the legislature and therefore "raises separation of powers concerns." *Five Corners Family Farms*, 173 Wn.2d at 311. Thus, if a result is conceivable, it is not absurd and the canon should not be applied. *Id.* (citing *Ervin*, 169 Wn.2d at 824). The legislature's decision to require public access to all deliberations related to the sale or lease of public property other than those on the minimum price is neither absurd nor inconceivable. Rather, as

demonstrated by the legislative history described below, this reflects an intentional balancing of the public interests in access to government decision-making and in obtaining a fair price for public property.

2. **The legislative history reinforces the intent to limit private discussions to the minimum price.**

To the extent this provision is ambiguous, the Court may look to legislative history to determine legislative intent. *See, e.g., Five Corners Family Farms*, 173 Wn.2d at 305–06. The legislative history conclusively evinces the legislature’s intent to limit discussions in executive sessions to the minimum price at which public property will be offered.

When OPMA was enacted in 1971, it included several exceptions for executive sessions, including one for the acquisition of property, but it did not allow for executive sessions on the sale or lease of public property. 1971 Wash. 1st Extraordinary Sess. Laws ch. 250, p. 1116. OPMA first provided for executive sessions on the sale or lease of public property when the statute was amended in 1979:

Nothing contained in this chapter shall be construed to prevent a governing body from holding executive sessions during a regular or special meeting... ; to consider the selection of a site or the acquisition of real estate by lease or purchase, when publicity regarding such consideration would cause a likelihood of increased price; [or] to consider the disposition of real estate by lease or sale, when publicity regarding such consideration would cause a likelihood of decreased price... If executive sessions are held to discuss the disposition by sale or lease of real estate,

the discussion shall be limited to the minimum selling or leasing price.

1979 Wash. Reg. Sess. Laws ch. 42, pp. 217–18 (underlined text added by the 1979 amendments). Thus, when the legislature amended OPMA in 1979 to first allow for executive sessions on the sale or lease of public property, it was explicit: “the discussion shall be limited to the minimum selling or leasing price.” *Id.*

Notably, the 1979 bill—House Bill 248—as originally drafted would have included a less-restrictive limitation on private discussions:

If executive sessions are held to discuss the disposition or lease of real estate, the discussion shall be limited to whether to lease or dispose of real estate and the minimum leasing or disposal price.

House Bill 248, 46th Legislature, Regular Session (Wash. 1979).⁴ This would have allowed broader executive sessions to discuss “whether to lease or dispose of real estate....” *Id.* That language⁵ was stricken when an amendment to the bill proposed by Senator Wilson was approved by the Senate during a March 2, 1979, hearing. *See* Senate Amendments to

⁴ Riverkeeper requests the Court take judicial notice of this document. *See* Petitioners’ Motion for Judicial Notice, Decl. of Hannah Lew, Exhibit 2. A copy is included in the Appendix for the Court’s convenience.

⁵ The language from the original bill was previously amended from “whether to lease or dispose of real estate” to “whether to sell or lease real estate.”

Substitute House Bill 248.⁶ Senate Floor Proceedings from that hearing

describe the intent of Senator Wilson's the amendment:

SENATOR WILSON: I'd like to try to explain this a little more clearly so the body is aware of what is happening.

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What this bill then is trying to accomplish is to say that the public body could hold a comparable executive session when it is considering the sale or lease of property, but **executive session would be limited to deciding how high or how low they are willing to go on**—in terms of negotiation with the other entity that is concerned.

All other aspects relating to the sale or lease of the property, assuming my floor amendment is adopted, the decision to sell or lease and the reasons for it and what property might be sold or leased and so on would have to be conducted in open meeting and only the details of the proposed negotiation with respect to the price could be conducted in executive session.

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SENATOR BOTTIGER: I've—I've had about three people ask me if this is still a consent bill. I think it is. I hope it is. I—I hope that this discussion hasn't caused it to be controversial because I—I don't believe that what Senator Wilson is trying to accomplish is controversial.

But speaking on the amendment, what Senator Wilson is attempting to do with the floor amendment is to prevent sweetheart deals, where they go into executive session, decide to sell or lease, decide the price, and then that's the first time that anybody knows about it. It's already done. So

⁶ Riverkeeper requests the Court take judicial notice of this document. *See* Petitioners' Motion for Judicial Notice, Decl. of Hannah Lew, Exhibit 3. A copy is included in the Appendix for the Court's convenience.

what he's saying with his amendment is they discuss whether to—to sell or lease it in public and then everybody gets a chance to make an offer so that there aren't any sweetheart deals. I agree with that.

Transcript of Senate Floor Proceedings, pp. 7–8, 10, March 2, 1979

(excepts) (emphasis added).⁷

Thus, the legislature considered language that would have allowed more general discussions on whether to sell or lease property. After deliberations, the legislature decided to narrowly limit executive sessions to discussions on price—how high or low to go in the negotiations. These revisions to House Bill 248 before its passage demonstrate a deliberate intent to narrowly confine executive session to the minimum price at which the property will be offered. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 719, 934 P.2d 1179 (1997) (citing *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 549, 707 P.2d 1319, 1323 (1985)).

A House Bill Analysis explained the purpose of the amendment:

The act [currently] does not permit a closed meeting to take place when public officials discuss the sale or lease of governmentally owned real estate. Since sale and lease prices are discussed at these open meetings, the potential buyers are aware of a minimum price and, therefore, usually [sic] offer the public agency a higher price. This practice results in a disservice to the public because public agencies receive low sale and lease prices.

⁷ Riverkeeper requests the Court take judicial notice of this document. *See* Petitioners' Motion for Judicial Notice, Decl. of Hannah Lew, Exhibit 1. A copy is included in the Appendix for the Court's convenience.

House Comm. on Constitution, Elections & Gov't Ethics, House Bill Analysis on Substitute H.B. 248, 46th Legislature, Regular Session (Wash. 1979).⁸ The legislature was thus plainly focused on excluding potential tenants and buyers from discussions on the minimum price that would be accepted for public property.

This legislative history demonstrates that the 1979 amendments to OPMA were intended to allow executive sessions on the sale or lease of public property, but to narrowly limit the private discussions to the minimum price that property would be offered. The legislature amended OPMA's provisions on executive sessions into the current version in 1985. Compare 1985 Wash. Reg. Sess. Laws ch. 366, pp. 1302–03, and RCW 42.30.110. That amendment was not intended to affect the scope of executive sessions for the sale or lease of public property.

A House Bill Report explained that the 1985 amendments reorganized the description of executive sessions, added language to clarify what may and may not occur in executive sessions, and included new authorizations for executive sessions on employee matters and for attorney-client discussions. House Comm. on State Gov't, House Bill

⁸ Riverkeeper requests the Court take judicial notice of this document. See Petitioners' Motion for Judicial Notice, Decl. of Hannah Lew, Exhibit 4. A copy is included in the Appendix for the Court's convenience.

Report on Substitute S.B. 3386, at 2–3, 49th Legislature, Regular Session (1985).⁹ With respect to the provision at issue here, the report provided:

Specific, nontechnical, modifications of existing law are as follows:

(1) The authorization to discuss, in executive session, the minimum price at which public property may be sold or leased is left intact. However, the law is amended to clarify that final action must be taken at a meeting open to the public.

Id. at 2; *see also* Senate Comm. on Governmental Operations, Senate Bill Report on Substitute S.B. 3386, 49th Legislature, Regular Session (1985) (summary of bill does not suggest substantive revision to provision on executive sessions for the sale and lease of property).¹⁰ The 1985 amendments therefore were not intended to substantively affect OPMA's provision for executive sessions on the sale or lease of public property.

OPMA's provision for executive sessions on the sale or lease of public property should therefore be interpreted consistent the legislature's intent as expressed when it introduced such a provision in 1979. The

⁹ Riverkeeper requests the Court take judicial notice of this document. *See* Petitioners' Motion for Judicial Notice, Decl. of Hannah Lew, Exhibit 6. A copy is included in the Appendix for the Court's convenience.

¹⁰ Riverkeeper requests the Court take judicial notice of this document. *See* Petitioners' Motion for Judicial Notice, Decl. of Hannah Lew, Exhibit 5. A copy is included in the Appendix for the Court's convenience.

legislature plainly intended to limit discussions in executive sessions to the minimum price at which real estate will be offered.

C. The Trial Court Erred in Holding that Five of the Board's Private Meetings Complied with OPMA.

The trial court erred in granting summary judgment to the Board on five closed-door meetings. These supposed executive sessions were not convened to consider the minimum price at which Port property would be offered to Tesoro-Savage. Instead, these meetings covered a broad range of topics of great public concern and regional significance that should have been discussed in a forum open to the public. Further, OPMA only allows executive sessions to consider the minimum price when public disclosure would likely reduce the price received for property. The Board did not submit any admissible evidence on this issue.

1. The Board violated OPMA by excluding the public from discussions beyond the price.

The trial court erred in finding that five private Board meetings complied with OPMA—those held on March 26, July 9, July 16, July 17, and July 23, 2013. *See* CP 2733. The record establishes¹¹ that these

¹¹ The Port admitted the content of these meetings through a deposition conducted under CR 30(b)(6). *See* CP 1166, 1211–13. That rule required the Port to “give complete, knowledgeable, and binding answers on behalf of the [Port].” *See Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 39, 111 P.3d 1192, 1205 (2005) (quotation omitted); *and see* CR 30(b)(6) (witness

meetings included discussions beyond the minimum price at which the real estate would be offered—indeed, the deliberations covered nearly every conceivable aspect of the proposed crude-by-rail terminal. Summary judgment should be granted to Riverkeeper on these five meetings

a. **The Board's March 26, 2013, meeting violated OPMA.**

The executive session on March 26, 2013, included discussions on entering into an exclusivity agreement with Tesoro-Savage to negotiate development of a crude-by-rail oil terminal at the Port, including issues on the schedule and duration of such an agreement. CP 1190 (Tr. 96:5–20). The Board does not even suggest that this discussion was related to setting the minimum price of a lease; rather, the Board excluded the public because it wanted to prevent a “competing port” from “swoop[ing] in and tak[ing] the Port’s opportunity.” CP 1573–74. The Board violated OPMA by excluding the public from these discussions on an important milestone on the project—the decision to negotiate exclusively with one company to transport and store dangerous materials near downtown Vancouver.

must testify as to “the matters know or reasonably available to the organization”).

b. The Board's July 9, 2013, meeting violated OPMA.

The Board's private meeting on July 9, 2013, included discussions on the formation of a new corporate entity—Tesoro-Savage—to operate the crude-by-rail terminal and the risks associated therewith. CP 1205 (Tr. 156:5–17); *see also* CP 1470 (Tr. 66:7–20) (Commissioners were concerned about whether the new joint venture was “merely a shell without adequate assets to do the cleanup...”). The public should not have been excluded from the Board's consideration of risks associated with leasing public property to a newly formed corporate entity for the development of the nation's largest crude-by-rail terminal. These discussions were not limited to the minimum price at which the property would be leased and therefore violated OPMA.

c. The Board's July 16 and 17, 2014, meetings violated OPMA.

The Board's private meetings on July 16 and 17, 2013—one week before approving the lease—covered nearly every aspect of the project.

Topics discussed included the type of crude oil that would be handled and the differences associated therewith, the layout of the facility, timelines for operation of the facility and the lease, construction deadlines and whether extensions would be allowed, insurance requirements (property, liability, and pollution insurance), and the “risk associated with

any of the potential crude oil that could be handled through the facility.” CP 1205–06 (Tr. 157:25–158:22, 161:9–11). There were also discussions on the environmental provisions (*e.g.* post-lease remediation) and the safety provisions (*e.g.*, operations and safety plan) of the proposed lease. *See* CP 1361–62; *and* CP 1206 (Tr. 161:7–17). These closed meetings also covered a number of concerns raised by Commissioner Wolfe related to “the size of the tanks and the risks associated with the tanks,” such as those from gases, vapors, and fumes, and the Port’s ability to require “later generation rail cars.” CP 1207 (Tr. 162:7–22).

The public should not have been excluded from these important deliberations on the project. These discussions went well beyond the minimum price at which the property would be offered for lease and therefore violated OPMA.

d. **The Board’s July 23, 2013, meeting violated OPMA.**

The Board held a private meeting on July 23, 2013, immediately before approving the lease. During that closed-meeting, the Board reviewed a newly-added lease term that allows the Port to “approve the operation and safety plan before [Tesoro-Savage] could go into operation.” CP 1209 (Tr. 170:18-23). That term was drafted in response to the Board’s private deliberations from the previous evening during which

it discussed public testimony and concerns about the project. CP 1207-09 (Tr. 164:20-165:14, 167:11-24, 168:16-22, 170:18-23). The public should not have been excluded from the Board's review of this term added to the lease in a supposed effort to address the public's safety and environmental concerns. This meeting was not limited to the minimum price for the lease and therefore violated OPMA.

2. **The Board did not establish that disclosure would likely reduce the lease price.**

Summary judgment should be granted to Riverkeeper because it is undisputed that the five private Board meetings described above went well-beyond the "minimum price" at which public property would be offered. However, even if the broad issues discussed could somehow be considered part of the "minimum price," summary judgment should not have been granted to the Board. OPMA allows executive sessions to consider the minimum price only "when public knowledge... would cause a likelihood of decreased price." RCW 42.30.110(1)(c). The Board did not submit any competent evidence demonstrating that disclosure of its discussions would have likely reduced the price. The trial court thus erred in determining on summary judgment that the Board's private discussions met this standard. That is a factually disputed issue.

The Board's summary judgment motion was filed nearly a year before Riverkeeper amended its pleadings to address meetings other than that held on July 22, 2013. *See* CP 47–86; *and* CP 955–72. The Board's motion therefore only addressed the July 22, 2013, meeting. *See* CP 47–86. The Board did not submit any evidence with its motion demonstrating that public disclosure of the discussions on March 26, July 9, July 16, July 17, and July 23, 2013, would have decreased the price.

Riverkeeper was therefore not required to produce evidence on this issue to avoid a grant of summary judgment to the Board on those five meetings. *See, e.g., Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152, 1155 (1977) (summary judgment should not be entered if the moving party does not meet its initial burden of demonstrating the absence of an issue of material fact). Indeed, the Board never even moved for summary judgment as to whether the content of these five meetings complied with OPMA. *Cf.* CP 1592–93 (in opposing Riverkeeper's summary judgment motion, the Board argued that it should be granted summary judgment for all meetings on mootness grounds).

The Board submitted declarations from three individuals that provided opinions on this issue in opposing Riverkeeper's request for summary judgment—Curtis Shuck, Julianna Marler, Todd Coleman. CP 1610–12 (Decl. ¶¶ 2–3, 9); CP 1615 (Decl. ¶ 7); CP 2544 (Dec. ¶ 4).

These opinions as to whether public disclosure of certain discussions may have reduced the lease price should have been stricken as requested by Riverkeeper. *See* CP 2714–15 (request to strike).

Opinions may only be considered where it is demonstrated that the witness is competent and qualified to testify as to the matters asserted. *See, e.g., McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705–06, 782 P.2d 1045, 1048 (1989); and *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370, 378 (1991) (“The opinion of an expert which is only a conclusion or which is based on assumptions is not evidence which satisfies the summary judgment standards...”). The declarations do not describe any expertise or provide foundational support for the opinions expressed. CP 1610–17, 2543–48. These unsupported opinions should be stricken. *See Wilkinson*, 180 Wn.2d at 260–61.¹²

Accordingly, there was no admissible evidence indicating that public disclosure of any of the Board’s private discussions would have decreased the price of the lease. This remains a disputed factual issue. The

¹² Further, Riverkeeper served discovery requesting the Board identify any experts that it may use and describe their qualifications and opinions. CP 2666–67 (“identify” was defined to require a description of qualifications and opinions). The Board did not indicate that any of its witnesses would provide opinions or provide any expert qualifications. CP 2672.

trial court therefore erred in finding, as a matter of law, that the Board's meetings complied with OPMA.

3. **The trial court erred in considering inadmissible opinion and hearsay testimony.**

The trial court also erred in not striking legal opinions and hearsay testimony submitted by the Board. *See* CR 2712–17 (request to strike).

The Board submitted a declaration from its general counsel—Alicia Lowe—instructing the trial court on how to interpret OPMA's minimum price provision, CP 1602 (Decl. ¶¶ 5–7). Ms. Lowe also represented that her interpretation is consistent with that of the Municipal Research and Service Center and “counsel for other Ports in Washington,” but she does not describe how she knows any of this or to whom she is referring. *Id.* at ¶ 5. Counsel for the Board emphasized this plainly inadmissible material at oral argument and the trial court engaged in a discussion on how much weight it should be given vis-à-vis this Court's instruction to narrowly construe OPMA exceptions. RP 29:17–32:14.

“Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony.” *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054, 1078 (1993) (emphasis in original). Ms. Lowe's opinion on how to interpret OPMA should be stricken—courts “interpret and apply

the law,” not witnesses. *See id.* Further, statements “based on hearsay evidence carry no weight at summary judgment.” *SentinelC3, Inc.*, 181 Wn.2d at 141. Ms. Lowe’s description of how others supposedly interpret OPMA’s minimum price exception necessarily derives from out-of-court statements and therefore constitutes inadmissible hearsay. These assertions are also inadmissible because Ms. Lowe provides no foundation for her supposed knowledge of these matters. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–60, 753 P.2d 517, 518–19 (1988).

Any consideration of these materials was inappropriate. Moreover, Ms. Lowe was paid by the Port to “attend every single one of the executive...sessions” at issue to ensure the Board complied with OPMA. *See* RP 36:21–25. Even if her statements about the lawfulness of these meetings were somehow admissible, they deserve little weight given her personal involvement in this matter.

V. CONCLUSION.

Instead of presuming that most of their deliberations on the use of public property should be open to the public, the Commissioners have closed-door discussions at “just about every commission meeting.” CP 1496 (Tr. 15:5–7, 15:16–18). This deprives the public of important rights:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions [sic] is a source of strength in our country.... [T]hese specified

boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Cathcart, 85 Wn.2d at 108 (quoting *Board of Pub. Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969)). The public's ability to observe all deliberations on whether and how to allow the nation's largest crude-by-rail terminal to be developed on the banks of the Columbia River is critical to holding the elected Commissioners accountable for their decisions. The Board's systemic OPMA violations have caused "irreparable injury to the public interest." See *Cathcart*, 10 Wn. App. at 436 (citation omitted).

Plaintiffs-Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center respectfully request that this Court reverse the decision of the trial court and remand with instructions to grant summary judgment to the plaintiffs as to five meetings and for further proceedings as to the other two meetings.

RESPECTFULLY SUBMITTED this 17th day of August, 2016.

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CERTIFICATE OF SERVICE

I, Brian A. Knutsen, declare under penalty of perjury of the laws of the State of Washington, that I am co-counsel for Plaintiffs-Petitioners Columbia Riverkeeper, Sierra Club, and Northwest Environmental Defense Center and that on August 17, 2016, I caused the foregoing Petitioners' Opening Brief and the associated Appendix to be served on the following in the manner indicated:

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Subject: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4

Clerk of the Court,

Please accept for filing in the matter of Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4, Petitioners' Opening Brief and the associated Appendix attached hereto.

Thank you, Brian.

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RCW 42.30.010

Legislative declaration.

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, 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 42.30.020

Definitions.

As used in this chapter unless the context indicates otherwise:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

(2) "Governing body" means the 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.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

RCW 42.30.030

Meetings declared open and public.

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 42.30.110

Executive sessions.

(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

(a) To consider matters affecting national security;

(b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;

(c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;

(d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;

(e) To consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;

(f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;

(g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;

(h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6 or RCW 5.60.060(2)(a) concerning:

(i) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

(ii) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

(iii) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

(j) To consider, in the case of the state library commission or its advisory bodies, western library network prices, products, equipment, and services, when such discussion would be likely to adversely affect the network's ability to conduct business in a competitive economic climate. However, final action on these matters shall be taken in a meeting open to the public;

(k) To consider, in the case of the state investment board, financial and commercial information when the information relates to the investment of public trust or retirement funds and when public knowledge regarding the

discussion would result in loss to such funds or in private loss to the providers of this information;

(l) To consider proprietary or confidential nonpublished information related to the development, acquisition, or implementation of state purchased health care services as provided in RCW 41.05.026;

(m) To consider in the case of the life sciences discovery fund authority, the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information;

(n) To consider in the case of a health sciences and services authority, the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information.

(2) Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

RCW 42.30.910

Construction—1971 ex.s. c 250.

The purposes of this chapter are hereby declared remedial and shall be liberally construed.

RCW 53.04.060

District declared formed.

Within five days after an election held under the provisions of RCW 53.04.020, the board of county commissioners shall canvass the returns, and if at such election a majority of the voters voting upon the proposition shall vote in favor of the formation of the district, the board of county commissioners shall so declare in its canvass of the returns of such election, and the port district shall then be and become a municipal corporation of the state of Washington and the name of such port district shall be "Port of" (inserting the name appearing on the ballot).

in the enforcement of the provisions of this section.

Passed the Senate May 10, 1971.

Passed the House May 10, 1971.

Approved by the Governor May 20, 1971.

Filed in Office of Secretary of State May 21, 1971.

CHAPTER 250

[Engrossed Senate Bill No. 485]

OPEN PUBLIC MEETINGS ACT OF 1971

AN ACT Relating to public officers and agencies; amending section 3, chapter 237, Laws of 1967 and RCW 34.04.024; repealing section 1, chapter 216, Laws of 1953 and RCW 42.32.010; repealing section 2, chapter 216, Laws of 1953 and RCW 42.32.020; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. Section 1. The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, 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 act 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.

NEW SECTION. Sec. 2. As used in this act unless the context indicates otherwise:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution or other state agency which is created by or pursuant to statute, other than courts and the legislature.

(b) Any county, city, school district, special purpose district or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance or other legislative act, including but not limited to planning commissions, library or park boards, and other boards, commissions and agencies.

(2) "Governing body" means the multimember board, commission,

committee, council or other policy or rule-making body of a public agency.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to a collective decision made by a majority of the members of a governing body, a collective commitment or promise by a majority of the members of a governing body to make a positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

NEW SECTION. Sec. 3. 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 act.

NEW SECTION. Sec. 4. A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his attendance.

NEW SECTION. Sec. 5. In the event that any meeting is interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are interrupting the meeting, the members of the governing body conducting the meeting may order the meeting room cleared and continue in session or may adjourn the meeting and reconvene at another location selected by majority vote of the members. In such a session, final disposition may be taken only on matters appearing on the agenda. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the governing body from establishing a procedure for readmitting an individual or individuals not responsible for disturbing the orderly conduct of the meeting.

NEW SECTION. Sec. 6. No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this act. Any action taken at meetings failing to comply with the provisions of this section shall be null and void.

NEW SECTION. Sec. 7. The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the

conduct of business by that body. Unless otherwise provided for in the act under which the public agency was formed, meetings of the governing body need not be held within the boundaries of the territory over which the public agency exercises jurisdiction. If at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day. If by reason of fire, flood, earthquake, or other emergency, it shall be unsafe to meet in the place designated, the meetings may be held for the duration of the emergency at such place as is designated by the presiding officer of the governing body: PROVIDED, That the notice requirements of this act shall be suspended during such emergency.

NEW SECTION. Sec. 8. A special meeting may be called at any time by the presiding officer of the governing body of a public agency or by a majority of the members of the governing body by delivering personally or by mail written notice to each member of the governing body; and to each local newspaper of general circulation and to each local radio or television station which has on file with the governing body a written request to be notified of such special meeting or of all special meetings. Such notice must be delivered personally or by mail at least twenty-four hours before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the governing body a written waiver of notice. Such waiver may be given by telegram. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. The notices provided in this section may be dispensed with in the event a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage.

NEW SECTION. Sec. 9. The governing body of a public agency may adjourn any regular, adjourned regular, special or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn from time to time. If all members are absent from any regular or adjourned regular meeting the clerk or secretary of the governing body may declare the meeting adjourned to a stated time and place. He shall cause a written notice of the adjournment to be given in the same manner as provided in section 8 of this act for special meetings, unless such notice is waived as provided for special meetings. Whenever any

meeting is adjourned a copy of the order or notice of adjournment shall be conspicuously posted immediately after the time of the adjournment on or near the door of the place where the regular, adjourned regular, special or adjourned special meeting was held. When a regular or adjourned regular meeting is adjourned as provided in this section, the resulting adjourned regular meeting is a regular meeting for all purposes. When an order of adjournment of any meeting fails to state the hour at which the adjourned meeting is to be held, it shall be held at the hour specified for regular meetings by ordinance, resolution, bylaw, or other rule.

NEW SECTION. Sec. 10. Any hearing being held, noticed, or ordered to be held by a governing body at any meeting may by order or notice of continuance be continued or recontinued to any subsequent meeting of the governing body in the same manner and to the same extent set forth in section 9 of this act for the adjournment of meetings.

NEW SECTION. Sec. 11. Nothing contained in this act shall be construed to prevent a governing body from holding executive sessions during a regular or special meeting to consider matters affecting national security; the selection of a site or the purchase of real estate, when publicity regarding such consideration would cause a likelihood of increased price; the appointment, employment, or dismissal of a public officer or employee; or to hear complaints or charges brought against such officer or employee by another public officer, person, or employee unless such officer or employee requests a public hearing. The governing body also may exclude from any such public meeting or executive session, during the examination of a witness on any such matter, any or all other witnesses in the matter being investigated by the governing body.

NEW SECTION. Sec. 12. Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this act applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this act does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense. Reasonable expenses, including attorney's fees, shall be awarded the person bringing the action if the suit results in assessment of the civil penalty. The members held to be in violation shall be personally liable only for their pro rata share of the expenses.

NEW SECTION. Sec. 13. Any person may commence an action

either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this act by members of a governing body.

NEW SECTION. Sec. 14. If any provision of this 1971 amendatory act conflicts with the provisions of any other statute, the provisions of this 1971 amendatory act shall control: PROVIDED, That this act shall not apply to:

(1) the proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation or profession or to any disciplinary proceedings involving a member of such business, occupation or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or

(2) that portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or

(3) matters governed by Title 34 RCW, the administrative procedures act, except as expressly provided in section 17 of this 1971 amendatory act.

NEW SECTION. Sec. 15. The following acts or parts thereof are each hereby repealed:

(1) Section 1, chapter 216, Laws of 1953 and RCW 42.32.010;

(2) Section 2, chapter 216, Laws of 1953 and RCW 42.32.020.

NEW SECTION. Sec. 16. This act may be cited as the "Open Public Meetings Act of 1971".

Sec. 17. Section 3, chapter 237, Laws of 1967 and RCW 34.04.025 are each amended to read as follows:

(1) Prior to the adoption, amendment or repeal of any rule, each agency shall:

(a) Give at least twenty days notice of its intended action by filing the notice with the code reviser, mailing the notice to all persons who have made timely request of the agency for advance notice of its rule-making proceedings, and giving public notice as provided in ((RCW 42.32.010)) this 1971 amendatory act, as now or hereafter amended. Such notice shall include (i) reference to the authority under which the rule is proposed, (ii) a statement of either the terms or substance of the proposed rule or a description of the subjects and issues involved, and (iii) the time when, the place where, and the manner in which interested persons may present their views thereon.

(b) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if

requested by twenty-five persons, by a governmental subdivision or agency, or by an association having not less than twenty-five members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within thirty days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(2) No rule hereafter adopted is valid unless adopted in substantial compliance with this section, or, if an emergency rule designated as such, adopted in substantial compliance with RCW 34.04.030, as now or hereafter amended. In any proceeding a rule cannot be contested on the ground of noncompliance with the procedural requirements of this section, or of RCW 34.04.030, as now or hereafter amended, after two years have elapsed from the effective date of the rule.

NEW SECTION. Sec. 18. The purposes of this 1971 amendatory act are hereby declared remedial and shall be liberally construed.

NEW SECTION. Sec. 19. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Passed the Senate May 10, 1971.

Passed the House May 10, 1971.

Approved by the Governor May 20, 1971.

Filed in Office of Secretary of State May 21, 1971.

CHAPTER 251
[Substitute Senate Bill No. 678]
OPTIONAL MUNICIPAL CODE

AN ACT Relating to the optional municipal code;amending section 35A.02.050, chapter 119, Laws of 1967 ex. sess. as amended by section 2, chapter 52, Laws of 1970 ex. sess. and RCW 35A.02.050; amending section 35A.02.080, chapter 119, Laws of 1967 ex. sess. and RCW 35A.02.080; amending section 35A.02.090, chapter 119, Laws of 1967 ex. sess. and RCW 35A.02.090; amending section 35A.12.070, chapter 119, Laws of 1967 ex. sess. and RCW 35A.12.070; amending section 35A.14.030, chapter 119, Laws of 1967 ex. sess. and RCW 35A.14.030; amending section 35A.14.050, chapter 119, Laws of 1967 ex. sess. and RCW 35A.14.050; amending section

(6) Civil proceedings to enforce this chapter may be brought by the attorney general or the prosecuting attorney of any county affected by the violation on his own motion or at the request of the council. Criminal proceedings to enforce this chapter may be brought by the prosecuting attorney of any county affected by the violation on his own motion or at the request of the council.

((4)) (7) The remedies and penalties in this section, both civil and criminal, shall be cumulative and shall be in addition to any other penalties and remedies available at law, or in equity, to any person.

NEW SECTION, Sec. 2. This 1979 act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House February 22, 1979.

Passed the Senate March 8, 1979.

Approved by the Governor March 16, 1979.

Filed in Office of Secretary of State March 16, 1979.

CHAPTER 42

[Substitute House Bill No. 248]

PUBLIC AGENCIES—EXECUTIVE SESSIONS—REAL ESTATE TRANSACTION DISCUSSIONS

AN ACT Relating to open public meetings; and amending section 11, chapter 250, Laws of 1971 ex. sess. as amended by section 2, chapter 66, Laws of 1973 and RCW 42.30.110.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 11, chapter 250, Laws of 1971 ex. sess. as amended by section 2, chapter 66, Laws of 1973 and RCW 42.30.110 are each amended to read as follows:

Nothing contained in this chapter shall be construed to prevent a governing body from holding executive sessions during a regular or special meeting to consider matters affecting national security; to consider the selection of a site or the acquisition of real estate by lease or purchase, when publicity regarding such consideration would cause a likelihood of increased price; to consider the disposition of real estate by lease or sale, when publicity regarding such consideration would cause a likelihood of decreased price; to consider the appointment, employment, or dismissal of a public officer or employee; or to hear complaints or charges brought against such officer or employee by another public officer, person, or employee unless such officer or employee requests a public hearing. The governing body also may exclude from any such public meeting or executive session, during the examination of a witness on any such matter, any or all other witnesses in the matter being investigated by the governing body. If executive sessions

are held to discuss the disposition by sale or lease of real estate, the discussion shall be limited to the minimum selling or leasing price.

Passed the House March 8, 1979.
 Passed the Senate March 2, 1979.
 Approved by the Governor March 19, 1979.
 Filed in Office of Secretary of State March 19, 1979.

CHAPTER 43

[House Bill No. 126]

TERM PAPER COMMERCIAL SALES

AN ACT Relating to postsecondary education; creating new sections; adding new sections to chapter 223, Laws of 1969 ex. sess. and to chapter 28B.10 RCW; and providing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. There is added to chapter 223, Laws of 1969 ex. sess. and to chapter 28B.10 RCW a new section to read as follows:

(1) The legislature finds that commercial operations selling term papers, theses, and dissertations encourages dishonesty on the part of students attending Washington state institutions of higher learning, and in so doing impairs the public confidence in the credibility of these institutions to function within their prime mission, that of providing a quality education to the citizens of the state.

(2) The legislature further finds that this problem, beyond the ability of these institutions to control effectively, is a matter of state concern, while at the same time recognizing the need for and the existence of legitimate research functions.

It is the declared intent of sections 1 through 3 of this act, therefore, that the state of Washington prohibit the commercial sale of term papers, theses and dissertations: **PROVIDED**, That such legislation shall not affect legitimate and proper research activities: **PROVIDED FURTHER**, That such legislation does not impinge on the rights, under the First Amendment, of freedom of speech, of the press, and of distributing information.

NEW SECTION. Sec. 2. There is added to chapter 223, Laws of 1969 ex. sess. and to chapter 28B.10 RCW a new section to read as follows:

Unless the context clearly indicates otherwise, the words used in sections 1 through 3 of this act shall have the meaning given in this section:

(1) "Person" means any individual, partnership, corporation, or association.

(2) "Assignment" means any specific written, recorded, pictorial, artistic, or other academic task, including but not limited to term papers, theses, dissertations, essays, and reports, that is intended for submission to any postsecondary institution in fulfillment of the requirements of a degree, diploma, certificate, or course of study at any such educational institution.

NEW SECTION. Sec. 11. If no agreement can be reached under section 10 of this act, the commission may refer the matter to the administrative law judge for hearing pursuant to RCW 49.60.250. If the administrative law judge finds that the state agency, institution of higher education, or state patrol has not made a good faith effort to correct the noncompliance, the administrative law judge shall order the state agency, institution of higher education, or state patrol to comply with this chapter. The administrative law judge may order any action that may be necessary to achieve compliance, provided such action is not inconsistent with the rules adopted under sections 1(20), 5(21), and 6(5) of this act, whichever is appropriate.

An order by the administrative law judge may be appealed to superior court.

NEW SECTION. Sec. 12. If the superior court finds that the state agency, institution of higher education, or state patrol has not made a good faith effort to correct the noncompliance, the court, in addition to any other penalties and sanctions prescribed by law, shall order the state agency, institution of higher education, or state patrol to comply with this chapter. The court may require any action deemed appropriate by the court which is consistent with the intent of this chapter.

NEW SECTION. Sec. 13. Sections 7 through 12 of this act shall constitute a new chapter in Title 49 RCW.

Passed the Senate April 23, 1985.

Passed the House April 19, 1985.

Approved by the Governor May 20, 1985.

Filed in Office of Secretary of State May 20, 1985.

CHAPTER 366

[Substitute Senate Bill No. 3386]

PUBLIC AGENCY GOVERNING BODIES—EXECUTIVE SESSIONS

AN ACT Relating to executive sessions of governing bodies; and amending RCW 42.30.020 and 42.30.110.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 2, chapter 250, Laws of 1971 ex. sess. as last amended by section 1, chapter 155, Laws of 1983 and RCW 42.30.020 are each amended to read as follows:

As used in this chapter unless the context indicates otherwise:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

(2) "Governing body" means the 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.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective ~~((decision-made-by-a majority-of-the-members-of-a governing-body, a collective commitment or promise-by-a majority-of-the-members-of-a governing-body-to-make-a))~~ positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

Sec. 2. Section 11, chapter 250, Laws of 1971 ex. sess. as last amended by section 3, chapter 155, Laws of 1983 and RCW 42.30.110 are each amended to read as follows:

(1) Nothing contained in this chapter ~~((shall))~~ may be construed to prevent a governing body from holding an executive session~~((s))~~ during a regular or special meeting:

(a) To consider matters affecting national security;

(b) To consider the selection of a site or the acquisition of real estate by lease or purchase~~((;))~~ when ~~((publicity))~~ public knowledge regarding such consideration would cause a likelihood of increased price;

(c) To consider the ~~((disposition-of))~~ minimum price at which real estate ~~((by-lease-or))~~ will be offered for sale~~((;))~~ or lease when ~~((publicity))~~ public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;

(d) To ~~((consider))~~ review negotiations on the performance of public-bid contracts when ~~((publicity))~~ public knowledge regarding such consideration would cause a likelihood of increased costs; ~~((to-consider-the appointment, employment, or dismissal-of-a public-officer-or-employee: PROVIDED, That interviewing-of-proposed appointees-to-elective-office-by-a governing-body shall-not-be-conducted-in-executive-session, or-to-hear~~

~~complaints or charges brought against such officer or employee by another public officer, person, or employee unless such officer or employee requests a public hearing. The governing body also may exclude from any such public meeting or executive session, during the examination of a witness on any such matter, any or all other witnesses in the matter being investigated by the governing body. If executive sessions are held to discuss the disposition by sale or lease of real estate, the discussion shall be limited to the minimum selling or leasing price:))~~

(e) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;

(f) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;

(g) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;

(h) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

(2) Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

Passed the Senate April 22, 1985.

Passed the House April 12, 1985.

Approved by the Governor May 20, 1985.

Filed in Office of Secretary of State May 20, 1985.

HOUSE BILL NO. 248

State of Washington
46th Legislature
Regular Session

by Representatives Whiteside, Charnley
and Garrett

Read first time January 15, 1979, and referred to Committee on
Constitution, Elections & Governmental Ethics.

1 AN ACT Relating to open public meetings; and amending section
2 11, chapter 250, Laws of 1971 ex. sess. as amended by
3 section 2, chapter 66, Laws of 1973 and RCW 42.30.110.
4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:
5 Section 1. Section 11, chapter 250, Laws of 1971 ex.
6 sess. as amended by section 2, chapter 66, Laws of 1973 and RCW
7 42.30.110 are each amended to read as follows:
8 Nothing contained in this chapter shall be construed to
9 prevent a governing body from holding executive sessions during
10 a regular or special meeting to consider matters affecting
11 national security; the selection of a site or the acquisition or
12 disposition of real estate by lease or purchase, when publicity
13 regarding such consideration would cause a likelihood of
14 increased price; the appointment, employment, or dismissal of a
15 public officer or employee; or to hear complaints or charges
16 brought against such officer or employee by another public
17 officer, person, or employee unless such officer or employee
18 requests a public hearing. The governing body also may exclude
19 from any such public meeting or executive session, during the
20 examination of a witness on any such matter, any or all other
21 witnesses in the matter being investigated by the governing
22 body. If executive sessions are held to discuss the disposition
23 or lease of real estate, the discussion shall be limited to
24 whether to lease or dispose of real estate and the minimum
25 leasing or disposal price.

HOUSE OF REPRESENTATIVES
Olympia, Washington

BILL NO.

HOUSE
YE

		NOT
AYE	NAY	VOTING
94	1	3

BILL ANALYSIS

SHB 248

Committee on Constitution, Elections & Govt. Ethics
(originally Reps. Whiteside, Charnley and Garrett)
Sponsor (Note if Agency, Committee, or Executive Request)

2/21/79 PASSED H
3/02/79 PASSED S
3/07/79 FINAL H

Allowing executive sessions for the disposal of real estate
Brief Title (~~From Status of Bills~~)

Gary Robinson
3-4810
Staff Contact
(Name and Phone)

Reported by Committee on Constitution, Elections & Govt. Ethics

ISSUE

Currently, the Open Public Meetings Act allows a closed meeting of a public body to occur when the public officials are considering the purchase or lease of real estate. The act does not permit a closed meeting to take place when public officials discuss the sale or lease of governmentally owned real estate. Since sale and lease prices are discussed at these open meetings, the potential buyers are aware of a minimum price and, therefore, usually offer the public agency a higher price. This practice results in a disservice to the public because public agencies receive low sale and lease prices.

SUMMARY OF BILL

The Open Public Meetings Act is amended to authorize a public agency to hold a closed meeting whenever it considers the selling or leasing of real estate, when publicity regarding such a sale or lease would likely cause a decreased sale or lease price. The bill states that the discussion at such a closed meeting shall be limited to the minimum leasing or disposal price.

Appropriation: _____
Revenue: _____
Fiscal Note: N/A

HOUSE BILL REPORT

SSB 3386

BY Committee on Governmental Operations (originally sponsored by Senators Thompson, Talmadge and Zimmerman)

Revising laws on executive sessions of governing bodies.

House Committee on State Government

House Majority Report: Do pass with amendments. (13)

SIGNED BY Representatives Belcher, Chair; Peery, Vice Chair; Baugher, Brooks, Fuhrman, Hankins, O'Brien, Sanders, Taylor, Todd, van Dyke, Vekich and Walk.

House Minority Report:

SIGNED BY

House Staff: Ken Conte (786-7135)

As Reported by Committee on State Government April 3, 1985

BACKGROUND: Public agencies and governing bodies are required to conduct their business in open, public meetings, pursuant to the Open Public Meetings Act of 1971. However, the Legislature has created several exceptions to this requirement (RCW 42.30.110). Governing bodies may hold closed executive sessions to consider: (1) matters affecting national security; (2) the selection of a site or the acquisition of real estate; when publicity would cause a likelihood of increased price; (3) the disposition of real estate by sale or lease, when publicity would cause a likelihood of decreased price (these considerations are limited to discussions of the minimum price); (4) negotiations on the performance of publicly-bid contracts, when publicity would cause a likelihood of increased costs; (5) the appointment, employment, or dismissal of a public officer or employee; or (6) complaints or charges brought against a public officer or employee.

When a witness is testifying in regard to a complaint or charge against an employee in either a public meeting or in executive session, other witnesses may be excluded from the meeting.

Currently, governing bodies may hold closed executive sessions to consider the employment of a public officer or employee. According to the Attorney General, "employment" includes such matters as compensation. However, the question of whether final and binding action may be taken in executive session on any of the six enumerated matters is not specifically addressed in the Open Public Meetings Act.

The Open Public Meetings Act also does not address the matter of holding executive sessions where an attorney-client relationship of confidentiality is necessary, nor does it set forth procedures for convening or concluding an executive session.

SUMMARY: BILL AS AMENDED: RCW 42.30.110 regarding exemptions from open public meetings is reorganized and substantially re-written with the intent of clarifying its meaning.

Language is added to clarify what may or may not occur in executive session and authorization is given to hold executive session for certain discussions where a client-attorney relationship exists.

Specific, nontechnical, modifications of existing law are as follows:

- (1) The authorization to discuss, in executive session, the minimum price at which public property may be sold or leased is left intact. However, the law is amended to clarify that final action must be taken at a meeting open to the public.
- (2) The provision of law allowing witnesses to be excluded from a meeting held to hear charges against an employee while one witness is testifying is deleted.
- (3) Executive sessions may be held to evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, discussions of salaries, wages, and other conditions of employment generally applied within the agency and final action regarding hiring, setting the salary of an individual or a class of employees and discharging or disciplining an employee are to take place at a meeting open to the public.
- (4) The evaluation of qualifications of a candidate for appointment to elective office may be conducted in executive session. However, any interview and the actual appointment is to occur at a meeting open to the public.
- (5) Discussions with legal counsel in regard to agency enforcement actions or litigation or potential litigation to which the agency, the governing body, or a member of the governing body is or is likely to become a party may be held in executive session only when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.
- (6) Before calling an executive session, the presiding officer is to announce the reason for excluding the public and when the meeting will be concluded. Executive sessions may be extended to a stated later time.

The definition of "action" is amended to clarify that the term can include receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final actions" are collective, positive or negative decisions or actual votes by a majority of the members of the body.

AMENDED BILL COMPARED TO SUBSTITUTE: The definition of "action" is amended to clarify that the term can include receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final actions" are collective, positive or negative decisions or actual votes by a majority of the members of the body.

Appropriation:

Revenue:

Fiscal Note: Not Requested.

Effective Date:

HOUSE COMMITTEE - Testified For: Paul Conrad, Allied Daily Newspapers and Washington Newspaper Publishers Association.

HOUSE COMMITTEE - Testified Against: None Presented.

HOUSE COMMITTEE - Testimony For: This proposal takes the existing statute pertaining to executive sessions and clarifies it by breaking it down into subsections. It allows closed sessions to discuss applicants or employees. It also adds a very important section allowing a governing body to meet in closed session with legal counsel and it requires a statement explaining why the body is going into closed session and for how long.

HOUSE COMMITTEE - Testimony Against: None Presented.

Senate Amendment to Substitute House Bill
No. 248

By Senator Wilson

On page 1, line 26, strike "whether to sell or
lease real estate and"

ADOPTED March 2, 1979

Senate Committee Amendments to Substitute House
Bill No. 248

By Senate Committee on Local Government

On line 11, after "security;", insert "to consider"

MAR 2 1979 ADOPTED

On line 13, after "price;", insert "to consider"

MAR 2 1979 ADOPTED

On line 16, after "price;", insert "to consider"

MAR 2 1979 ADOPTED

FINAL BILL REPORT

SSB 3386

C 366 L 85

BY Senate Committee on Governmental Operations (originally sponsored by Senators Thompson, Talmadge and Zimmerman)

Revising laws on executive sessions of governing bodies.

Senate Committee on Governmental Operations

House Committee on State Government

SYNOPSIS AS ENACTED

BACKGROUND:

There is no distinction in the definition section of the Open Public Meetings Act of 1971 between "action" and "final action" of a governing body. The matters which a public governing body may consider in executive (closed) session are set forth in a single section of the Act. They include considering or reviewing matters affecting national security; selection of a site or acquisition of real estate; negotiations on public contracts; complaints or charges against a public officer or employee; the appointment, employment or dismissal of an officer or employee; and the qualifications of a candidate for appointment to public office.

The statute is silent on executive sessions where an attorney-client relationship of confidentiality is required, although the issue has been addressed in cases from the Washington Court of Appeals. No specific procedure is set forth for convening and concluding executive sessions.

SUMMARY:

The definition of "action" is clarified so that the term can include receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final actions" are collective, positive or negative decisions or actual votes by a majority of the members of the body.

The matters for which a governing body may hold executive session are re-ordered in specific subsections, in several instances without significant revision.

A governing body may hold executive session to evaluate the qualifications of an applicant for public employment or to

evaluate the performance of an employee. The existing exemption for strategy meetings in labor negotiations is reinforced by specific reference to the appropriate section. However, governing bodies must hold open public meeting to discuss salaries, wages, and other conditions of employment to be generally applied within the agency. Action shall also be taken in open public meeting when a governing body elects to take final action hiring, or setting the salary of an individual employee or class of employees, or discharging or disciplining an employee.

Closed sessions with legal counsel representing the agency may be held on matters relating to agency enforcement actions, or to discuss litigation or potential litigation to which the agency, the governing body or a member acting in an official capacity is, or is likely to become, a party, when public knowledge of the discussion is likely to result in an adverse legal or financial consequence to the agency.

The procedure for convening an executive session requires the presiding officer to announce the purpose for excluding the public, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

VOTES ON FINAL PASSAGE:

Senate	48	1	
House	96	0	(House amended)
Senate	41	1	(Senate concurred)

EFFECTIVE: July 28, 1985

SENATE FLOOR PROCEEDINGS

MARCH 2, 1979

EXCERPT

1 * * *

2 SENATE PRESIDENT: Substitute House Bill
3 Number 248.

4 Secretary, read the last word of the bill.

5 SENATE SECRETARY: (Inaudible).

6 SENATE PRESIDENT: Senator Wilson, on
7 (inaudible).

8 SENATOR WILSON: Mr. President, I'd like to
9 have the pre-committee amendments to state -- to
10 consider simultaneously, and I move their adoption.

11 SENATE PRESIDENT: Senator Wilson has moved
12 the adoption of the three committee amendments.

13 Senator Wilson.

14 SENATOR WILSON: Mr. President, members of
15 the Senate; this pertains to the Open Meeting Act.
16 The original intent of the act was that public bodies
17 could hold executive sessions when they were
18 evaluating individual employees. It was not the
19 intent that they could go into executive sessions to
20 discuss CETA or other general employment problems.

21 The adoption of these amendments will make it
22 clear that the (inaudible) affected discussion should
23 be limited to individual evaluations and not to
24 general employment matters.

25 SENATE PRESIDENT: Further remarks?

1 Question is the adoption of three amendments
2 is made.

3 All in favor say aye.

4 Opposed.

5 Amendments are adopted.

6 Further amendment. Secretary, please read
7 the last words.

8 SENATE SECRETARY: Line 14, (inaudible).

9 SENATE PRESIDENT: Senator Wilson.

10 SENATOR WILSON: Mr. President, I move the
11 adoption of this amendment.

12 SENATE PRESIDENT: Senator Wilson moves the
13 adoption of the amendment.

14 Senator Wilson.

15 SENATOR WILSON: Mr. President, this is --
16 the bill generally is -- pertains to public questions
17 related to selling and leasing real estate can be
18 conducted in the executive session. The amendment
19 before us would limit the effect of the bill on the
20 port district.

21 Senator Bottiger is going to speak in
22 opposition of the amendment. And, frankly, I have no
23 objection to defeating this amendment providing the
24 floor amendment which will follow his adoption.

25 SENATE PRESIDENT: Senator Bottiger.

1 SENATOR BOTTIGER: Mr. President, members of
2 the Senate; the existing law exempts from the Public
3 Meeting Act the negotiations for the sale or purchase
4 of property where there would be a likelihood that the
5 public discussion could increase the price that
6 would -- that might be asked. In other words, it's a
7 prohibition against allowing speculators to use the
8 Open Meeting Law to discover if there -- where a new
9 school building is going.

10 The amendment limits that restriction to port
11 districts. And it's my opinion that there is as much
12 likelihood of abuse in the -- the discussion by school
13 districts, urban renewal, sales of -- of towns, land
14 of the state that we're deciding to buy or sell or
15 locate something and that the Public Meeting Law
16 should not just be restricted in this sense to port
17 districts.

18 And I informed Senator Wilson that I would
19 oppose this, but I would support his floor amendment
20 which I think does what he wants to do without
21 limiting his port district.

22 SENATE PRESIDENT: Senator Rasmussen.

23 SENATOR RASMUSSEN: Neither Senator Bottiger
24 nor Senator Wilson (inaudible) the question.

25 My concern is this. The rule says when

1 publicity regarding such consideration would cause the
2 likelihood of decreased price. They would -- they
3 would evidently hold an open meeting then if it was
4 the likelihood of increasing the price; is this
5 correct?

6 SENATE PRESIDENT: Senator Bottiger.

7 SENATOR BOTTIGER: Senator Rasmussen, if you
8 look on line 13, it -- there it says cause the
9 likelihood of increased price. And the amendatory
10 language also supports in the likelihood of a
11 decreased price when -- when they're selling. When
12 they're purchasing we're worried about an increase
13 because of speculation. When we're selling we might
14 be worried about a decreased price to the public body.
15 And in either case, they would be allowed to go into
16 public -- or into executive session.

17 Senator, however, the amendment before us
18 right now pertains to the question of should this be
19 restricted only to port districts or should it apply
20 to any governmental units.

21 SENATOR RASMUSSEN: Senator Bottiger, I guess
22 my concern, though, is a little further than that.
23 All of these bodies that you speak of have the powers
24 of condemnation. And rather than negotiations, they
25 all have the power of condemnation which would go to

1 court and then a fair price would be determined.

2 I'm -- I'm concerned why any of this is needed.

3 SENATOR BOTTIGER: Well, Senator, if I were
4 to make a guess, I would -- I would tell you that
5 probably two or three percent of all of the property
6 either acquired by a government ever has to go that
7 far as condemnation. That's the final straw.

8 What we're talking about in the original
9 language of the bill, the original existing law, is
10 when a governmental unit decides to negotiate for the
11 purchase or the sale of a piece of property, should
12 they do that in executive session where if they didn't
13 there would be a likelihood of a increase or decrease
14 in the price of what they were buying or selling?

15 The only -- the question before us right now
16 is: Should we restrict this only to port districts?
17 I think not.

18 SENATE PRESIDENT: Senator Hayner.

19 SENATOR HAYNER: Mr. President and ladies and
20 gentlemen of the senate; I want to support Senator
21 Bottiger. I have seen this occur with respect to
22 school districts, and I think it's a real fear. And I
23 would really believe that his providing of that second
24 amendment is appropriate.

25 SENATE PRESIDENT: Senator Wilson.

1 SENATOR WILSON: I'd like to try to explain
2 this a little more clearly so the body is aware of
3 what is happening.

4 The principal thing that the -- the existing
5 Open Meeting Act permits bodies to go into executive
6 session when they are considering the purchase of
7 property simply to discuss how high they're going to
8 go so that their negotiators will be informed. And of
9 course it is not in the public interest for the other
10 party to the transaction to know what are the limits
11 the public body is willing to go.

12 What this bill then is trying to accomplish
13 is to say that the public body could hold a comparable
14 executive session when it is considering the sale or
15 lease of property, but executive session would be
16 limited to deciding how high or how low they are
17 willing to go on -- in terms of negotiation with the
18 other entity that is concerned.

19 All other aspects relating to the sale or
20 lease of the property, assuming my floor amendment is
21 adopted, the decision to sell or lease and the reasons
22 for it and what property might be sold or leased and
23 so on would have to be conducted in open meeting and
24 only the details of the proposed negotiation with
25 respect to the price could be conducted in executive

1 session.

2 SENATE PRESIDENT: Senator Odegaard.

3 SENATOR ODEGAARD: Senator Wilson, you --

4 SENATE PRESIDENT: Senator Wilson.

5 SENATOR ODEGAARD: Senator Wilson, why should
6 an exception be made then for port -- port districts?

7 SENATOR WILSON: Well, Senator, the -- the
8 local government committee, in proposing the amendment
9 which was before it, was trying to keep things as
10 tight as possible and make the exemptions to the Open
11 Meeting Act as limited as possible and then recommend
12 an amendment limiting it to port districts. However,
13 if the floor amendment is adopted, I would see no
14 reason why this should not apply to all types of
15 districts.

16 SENATE PRESIDENT: Anybody else want to
17 discuss this amendment on the consent calendar?

18 The question is the adoption of the Wilson
19 amendment is made.

20 In favor say aye.

21 VOICE: Mr. President, the question is the
22 adoption -- the adoption or rejection of the committee
23 amendment.

24 SENATE PRESIDENT: The port committee
25 amendment.

1 Members in favor say aye.

2 Opposed.

3 Amendment is law.

4 Floor amendment. Secretary, please read.

5 SENATE SECRETARY: Senator Wilson, page 1,
6 exception 1, line 26 (inaudible).

7 SENATOR WILSON: Mr. President --

8 SENATE PRESIDENT: Senator Wilson.

9 SENATOR WILSON: -- and members;
10 Mr. President, I move the adoption of the amendment.

11 SENATE PRESIDENT: Senator Wilson moves to
12 adopt the amendment.

13 Senator Wilson.

14 SENATOR WILSON: I believe it's already been
15 explained.

16 SENATE PRESIDENT: The question is the
17 adoption of the amendment.

18 Senator Sellar.

19 SENATOR SELLAR: I -- I wanted to disagree
20 with the amendment. Basically we've already
21 established the fact that they can have an executive
22 session to discuss whether to purchase a piece of
23 property. I see nothing wrong with having an
24 executive session in order to discuss whether to sell.
25 We're saying that -- that you must have the executive

1 meeting to discuss whether you're going to sell, then
2 you can have the executive meeting to discuss the
3 price. It seems to me that those two are synonymous
4 and in many instances it would be in the public's best
5 interest to -- to have those discussions not made
6 public.

7 SENATE PRESIDENT: Senator Bottiger.

8 SENATOR BOTTIGER: I've -- I've had about
9 three people ask me if this is still a consent bill.
10 I think it is. I hope it is. I -- I hope that this
11 discussion hasn't caused it to be controversial
12 because I -- I don't believe that what Senator Wilson
13 is trying to do is controversial.

14 But speaking on the amendment, what Senator
15 Wilson is attempting to do with the floor amendment is
16 to prevent sweetheart deals, where they go into
17 executive session, decide to sell or lease, decide the
18 price, and then that's the first time that anybody
19 knows about it. It's already done. So what he's
20 saying with his amendment is they discuss whether
21 to -- to sell or lease it in public and then everybody
22 gets a chance to make an offer so that there aren't
23 any sweetheart deals. I agree with that.

24 SENATE PRESIDENT: The question is the
25 adoption of the floor amendment.

1 Members in favor say aye.
2 Opposed.
3 Amendment is adopted.
4 (Inaudible) the amendment is the title.
5 Senator Wilson has made the usual motion to advance.
6 Hearing no objection, so ordered. It's now
7 in final passage. Secretary will call the role.
8 SENATE SECRETARY: Bausch.
9 Bennett.
10 Bichelle.
11 Bottiger.
12 Clarke.
13 Conner.
14 Day.
15 Dadia.
16 Fleming.
17 Gallaghan.
18 Gaspard.
19 Low.
20 Haley.
21 Garrett.
22 Hanson.
23 Hayner.
24 Henry.
25 Owen.

1 Heathly.
2 Rier.
3 Lysen.
4 Marsh.
5 Matson.
6 Magnarmous.
7 Lord.
8 Mullison.
9 Newschwander.
10 Martz.
11 Odegaard.
12 Peterson.
13 Nolan.
14 Prague.
15 Rasmussen.
16 Ridder.
17 Scott.
18 Sellar.
19 Shinpoch.
20 Talley.
21 Talmadge.
22 Van Hollebeke.
23 Vognild.
24 Von Reichbauer.
25 Walgren.

1 Wannamaker.

2 Williams.

3 Wilson.

4 Wojahn.

5 Winsley.

6 (Inaudible).

7 SENATE SECRETARY: Mr. President, 46 yays, no
8 nays, two absent, one excused.

9 SENATE PRESIDENT: Substitute House Bill No.
10 248 then received. The constitutional majority is
11 declared fact. There will be no objection. The title
12 of the bill will remain title of the act.

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C E R T I F I C A T E

I, Shannon K. Krska, a Certified Court Reporter for Washington, pursuant to RCW 5.28.010 authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify that after having listened to an official audio recording of the proceedings having occurred at the time and place set forth in the caption hereof, that thereafter my notes were reduced to typewriting under my direction pursuant to Washington Administrative Code 308-14-135, the transcript preparation format guidelines; and that the foregoing transcript, pages 1 to 14, both inclusive, constitutes a full, true and accurate record of all such testimony adduced and oral proceedings had on the official audio recording, to the best of my ability, and of the whole thereof.

Witness my hand and CCR stamp at Vancouver, Washington, this 12th day of August, 2016.

Shannon K. Krska
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Certified Court Reporter
Certificate No. 2967



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Subject: Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4

Clerk of the Court,

Please accept for filing in the matter of Columbia Riverkeeper, et al. v. Port of Vancouver USA, et al., Supreme Court No. 92455-4, Petitioners' Opening Brief and the associated Appendix attached hereto.

Thank you, Brian.

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