

NO. 67263-1

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

CENTER FOR JUSTICE,

Appellant,

v.

ARLINGTON SCHOOL DISTRICT,

Respondent.

BRIEF OF APPELLANT

Greg Overstreet
Chris Roslaniec
Attorneys for Appellant

2200 Sixth Avenue, Suite 770
Seattle, WA 98121
(206) 443-0200 (Phone)
(206) 428-7169 (Fax)



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I. INTRODUCTION

This case concerns whether “study session” meetings of a school board that occurred 43 times out of 46 times that the Board held a regular meeting qualifies as “regular meetings” under the Open Public Meetings Act (“OPMA”), ch. 42.30 RCW, requiring public notice so that the public will have notice of it and know they can participate. The trial court held that these regularly occurring meetings were, instead, “special meetings” requiring no meaningful notice to the public.

This appeal brought by Appellant Center for Justice (“CJF”) will address the issue of whether a governing body subject to the OPMA such as the school board of Respondent Arlington School District (“Board”), may hold regularly scheduled, recurring meetings pursuant to the “special meeting” notice provisions contained in the OPMA, thereby relieving the body from providing meaningful notice of such meetings to the public.

The OPMA requires that regular meetings occur at a consistent time that must be published by the rules that govern the body such as an ordinance, resolution, or bylaws. RCW 42.30.070. This is so that the public can easily find out when regular meetings are held.

In contrast, the OPMA requires allows special meetings to merely be noticed twenty four hours in advance—and without notice to the public at large. RCW 42.30.080. Instead of notice to the public, a special

meeting notice must only be given to members of the governing body (here, the Board), and to members of the media that have previously requested notice. Id.

The Board established a pattern of holding what it titled “study sessions” at regularly recurring intervals—before nearly every regular meeting that it holds. This happened 43 times out of the 46 regular meetings that occurred during the time period encompassed by the complaint in this case. CFJ submits that 43 out of 46 is just as “regular” as the meetings it holds that it declares are regular meetings.

The OPMA defines “regular” meetings as “recurring meetings held in accordance with a periodic schedule declared by statute or rule.” RCW 42.30.075. However, the Board treated these regularly recurring “study session” meetings as “special” meetings which can occur “at any time.” RCW 42.30.080.

This appeal will determine whether a governing body complies with the letter and spirit of the OPMA by holding regularly recurring meetings without providing the meaningful “regular” meeting notice, but rather providing 24-hour “special” meeting notice that is not required to reach the general public.

II. ASSIGNMENTS OF ERROR

Assignment of Error: The trial court erred in granting summary judgment in favor of Arlington School District finding no violation of the Open Public Meetings Act for holding regularly scheduled study sessions not noticed as regular meetings.

Issues Pertaining to Assignment of Error:

- No. 1 Whether a body subject to the OPMA may hold regularly recurring meetings that are not noticed as regular meetings pursuant to the OPMA.
- No. 2 Whether special meeting notice is appropriate to notice meetings that occur with nearly the same regularity as an entity's "regular" meetings under the OPMA.

Assignment of Error: The trial court erred in its award of attorney fees to Appellant by performing calculations inconsistent with the court's ruling in awarding attorney fees.

Issue Pertaining to Assignment of Error:

- No.1 Whether the trial court erred in failing to credit Appellant for prevailing on the multiple grounds in which Respondent was found to have violated the OPMA in making its attorney fee calculations.
- No. 2 Whether the trial court erred in failing to include its ruling regarding multiple violations of the OPMA per executive session in its deviation from the lodestar calculation.

III. STATEMENT OF THE CASE

A. Background

CFJ is a non-profit organization and public interest law firm. CP 1771 (Amended Complaint ("Amend. Compl.") at ¶1). Respondent is the Arlington School District ("District"), a public agency located in

Arlington Washington. CP 1771, (Amend. Compl. at ¶¶ 2-3); and CP 1801 (Defendant Answer and Affirmative Defense (“Answer”) at ¶ 1.2). The District operates two high schools, two middle schools, five elementary schools, and a home schooling support center. CP 1772 (Amend. Compl. at ¶5); CP 1801 (Answer at ¶1.2). The District is overseen by a five-member Board of Directors (“Board”). CP 1772 (Amend. Compl. at ¶6); CP 1767 (Defendant’s Amended Answer & Affirmative Defense to Amended Complaint (“Amend. Answer”) at ¶ 1.3).

B. “Normal” Regular Meetings

To avoid confusion between around the term “regular” meetings, CFJ will describe the non-study session meetings—the normal Board meetings where the public attended—as the “normal” regular meetings. The Board held “normal” regular meetings on the second and fourth Mondays of each month, with the meeting moving to a Tuesday if the Monday fell on a holiday. CP 1772 (Amend. Compl. at ¶8); CP 1767 (Amend. Answer at ¶1.2). These normal regular meetings were properly noticed by a Board resolution. These normal regular meetings are not at issue in the case—the regularly recurring “study session” meetings that immediately preceded the regular meetings 43 out of 46 times are the meetings at issue.

C. Regularly Recurring “Study Session” Meetings

During the time period encompassed by this action, the Board’s normal regular meetings were to be the second and fourth Monday of the month at 7:30 p.m. CP 1630.¹ When the Monday fell on a holiday, the normal regular meeting was moved to the Tuesday following it.²

Between March 2006 and December 2006, the Board held normal regular meetings 15 times on the second and fourth Monday with the meeting moving to the Tuesday if the Monday was a holiday. CP 1086-1096 at ¶¶8-22, CP 1144-1262. In 2008, the Board held a study session immediately preceding 14 of these 15 normal regular meetings. CP 1086-1096 at ¶¶8-22, CP 1144-1262 (Study sessions occurring March 27, April 24, May 8 and 22, June 12, July 10, August 14, September 11 and 25, October 9 and 23, November 13, and December 4 and 11). The Board held only one normal regular meeting in 2006 (on August 28, 2006) that was not immediately preceded by a study session. CP 1091 at ¶14.

The Board held a normal regular meeting immediately preceded by a study session according to the Board’s regular meeting schedule 21 times between January 2007 and November 2007, missing only June 25,

¹ Many meetings began at 7:00 pm as well.

² Meetings were held on a Tuesday due to the Monday holidays of Memorial Day on May 28, 2007 and May 26, 2008, and Veterans Day on November 12, 2011. CP 1104 at ¶34, CP 1119 ¶59, and 1113 at ¶49. This follows the provisions set out for regular meetings in the OPMA that “[i]f at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day.” RCW 42.30.070.

2007. See CP 1096-1114 at ¶23-50, and CP 1263-1520 (2007 regular meetings held January 8 and 22, February 12 and 26, March 12 and 26, April 9 and 23, May 14 and 29, June 11, July 9 and 23, August 13 and 27, September 10 and 24, October 8 and 22, and November 13 and 26). From January to November 2007, the Board also held a study session immediately preceding each of its 21 normal regular meetings. See CP 1096-1114 at ¶23-50, and CP 1263-1520 (2007 study sessions held January 8 and 22, February 12 and 26, March 12 and 26, April 9 and 23, May 14 and 29, June 11, July 9 and 23, August 13 and 27, September 10 and 24, October 8 and 22, and November 13 and 26). Therefore, from January to November of 2007, study sessions were held immediately preceding every normal regular meeting. There was one normal regular meeting held December 10, 2007 that was not preceded by a regular meeting. CP 1114, ¶50.

In 2008, from January through May (the time period encompassed by this action), the Board held normal regular meetings 9 times on the second or fourth Monday with the meeting moving to the Tuesday if the Monday was a holiday. CP 1114-1120 at ¶¶51-59, CP 1521-1610. In 2008, the Board held a study session immediately preceding 8 of these 9 normal regular meetings. CP 1114-1120 at ¶¶51-59, CP 1521-1610 (study sessions preceding regular meetings held during 2008 on January 7,

February 11 and 25, March 10 and 24, April 28, and May 12 and 27). The Board held only one normal regular meeting from January 2008 to May 27, 2008, that was not preceded by a study session. That occurred on January 14, 2008.

The trial court held that the study sessions were “special meetings” and not “regular meetings” and thus had been properly noticed as “special meetings” in spite of the fact that they were regularly recurring, always at the same time and place, and always immediately preceding the normal regular meeting. See CP 971 (Order Granting Defendant’s Motion for Summary Judgment In Part, finding “study sessions” are special meetings).

D. Executive Sessions

The second issue in the case, the proper method for calculating attorney fees, involves executive sessions. In May of 2007, the Washington State Auditor’s Office held an exit conference after its audit of the practices and policies of the District. CP 1772 (Amend. Compl. at ¶11); CP 1801 (Answer at ¶1.2). The State Auditor’s Office told the District that it was not correctly scheduling its executive session meetings; specifically, the State Auditor’s Office noted the necessity of the Board first holding an open meeting, and only then convening into an executive session. See CP 1102 at ¶32, CP 1157-1158 (Exhibit 93 at 4-5). On July

9, 2007, after the exit conference with the State Auditor's Office, the District amended its relevant policies to end the practice of convening executive sessions without first beginning in an open meeting.³ See CP 1106 at ¶37, CP 1403-1405, 1407-1408; see also CP 1630-1634 (Board Policy Nos. 1400 and 1400P).⁴

CFJ alleged that the District violated the OPMA with respect to 33 executive sessions. See CP 1741-1749 (Motion for Summary Judgment alleging OPMA violations pertaining to executive sessions); and CP 1614-1628 (Chart submitted with Appellant's Motion for Summary Judgment organizing the alleged OPMA violations by meeting date). CFJ alleged that each of the 33 executive session contained three separate OPMA violations: (1) failure to begin in an open public meeting prior to convening into an executive session; (2) for failure to announce a proper purpose for convening to executive session; and (3) for failure to announce a proper ending time prior to convening in executive session. See CP 1741-1749 (Motion for Summary Judgment alleging OPMA violations pertaining to executive sessions); and CP 1614-1628 (Chart

³ Instead of "ordinances," school boards use "policies" to carry out their enactments.

⁴ Board Policies Nos. 1400 and 1400P are also *available at* <http://www.asd.wednet.edu/education/goto.php?sectiondetailid=3582&type=outlink&newlink=1&search=aHR0cDovL3d3dzluYXNkLnd1ZG5ldC5lZHUvYm9hcmQvcG9saWNpZXMvaW5kZXguaHRt>. (Last accessed September 26, 2011).

submitted with Appellant's Motion for Summary Judgment organizing the alleged OPMA violations by meeting date).

The trial court granted CFJ summary judgment on two of three separate OPMA violations for 21 executive sessions. See CP 965-969 (Order Granting Plaintiff's Motion for Summary Judgment in Part); and CP 54 (Order on Attorney's Fees). Specifically, the trial court held that the District committed two separate violations (1) failure to begin in an open public meeting, and (2) failure to publicly announce the purpose of the executive session prior to the start of the executive session for each of the 21 executive sessions at issue. The number of violations for each of the 21 executive sessions later becomes an issue when calculating attorney fees.

E. Award of Attorney Fees

CFJ alleged a total of 144 violations of the OPMA below—but many of these violations were from three violations per executive session.

CFJ obtained summary judgment on two of the three separate OPMA violations (for failure to begin in an open meeting prior to convening an executive session and for failure to announce a proper purpose for the executive session) for 21 executive sessions. See CP 965-969 (Order Granting Plaintiff's Motion for Summary Judgment in Part); and CP 54 (Order on Attorney's Fees). When calculating what portion of

the case CFJ prevailed on for an award of attorney fees, the trial court used all 144 alleged violations as the denominator and 21 as the numerator. That is, the trial court found CFJ prevailed on 21/144ths (14.6%) of the claims. However, the trial court did not account for the fact that CFJ prevailed on *two* violations per meeting. Accordingly, the trial court should have doubled the top number of the fraction—to 42/144ths (29.2%).⁵

The trial court held that CFJ had a “degree of success of 14.6%”—for 21 of 144 violations. However, CFJ’s actual degree of success—because the trial court found two violations per executive session meeting—was 42 of 144 violations, or 29.2%.

The trial court multiplied the attorney fees by 14.6%. CP 55. However, the actual degree of success was 29.2% based on the trial court’s determination so the attorney fees should at a minimum have been multiplied by this amount—resulting in an award nearly twice as high as the trial court’s.⁶ This faulty math caused the trial court to deduct the award of attorney fees in several respects. Namely, the trial court multiplied the hours expended by CFJ’s counsel on summary judgment by

⁵ The trial court rounded the 14.6% number up to the nearest tenth of a percent (14.58% rounded up to 14.6%). CFJ similarly rounds the 29.2% number up to the nearest tenth of a percent (29.16% rounded up to 29.2%).

⁶ The trial court’s use of the 14.6% figure deprived CFJ of 55.3 hours of attorney fees. At a rate of \$289 per hour, the rate determined to be reasonable by the Court (a rate to which CFJ does not assign error), this constitutes a total of \$15,981.70. See CP 55.

14.6 percent, as well as multiplying “other time spent on the case” by 14.6 percent. CP 55. This improper math was used to discount the fees awarded Appellant, and effectively cut in half the majority of the reasonable fees that should have been awarded by the Court’s reasoning as Appellant actually prevailed on 42 of 144 alleged violations below, or 29.2 percent of the alleged violations.

IV. STANDARD OF REVIEW

Appellate review of the granting of a motion for summary judgment is *novo*. Here, where the sole issue pertaining to OPMA violations is a question of law, *de novo* review is further supported. See Wood v. Battle Ground School Dist., 107 Wn. App. 550, 558, 27 P.3d 1208 (2001) (reviewing claim “*de novo* because it involves interpreting and construing the OPMA”). Here, where the trial court granted summary judgment for the District, finding that the manner in which it gave notice of “study sessions” did not violate the OPMA, and, conversely denying CFJ’s motion for summary judgment alleging that they did violate the OPMA, the standard of review is *de novo*.⁷ West v. State, Washington Ass’n of County Officials, 162 Wn. App. 120, 128-29, 252 P.3d 406 (2011) (*de novo* review of denial of summary judgment regarding whether agency was subject to the OPMA).

⁷ The standard of review pertaining to the issue of attorney fees is addressed below.

V. LEGAL AUTHORITY AND ARGUMENT

This is a case brought by a public-interest law firm to enforce the transparency requirements of the OPMA. Specifically, the case was brought to enforce the unusually strong policy behind open meetings law in Washington:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country.... One purpose of [open meetings acts] was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these 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 v. Andersen, 85 Wn.2d 102, 108, 539 P.2d 313 (1975) (OPMA case discussing analogous law of another state); **see also Wood v. Battle Ground School Dist.**, 107 Wn. App. 550, 562 n.3, 27 P.3d 1208 (2001) (same).

To make it possible for the public “to be present and to be heard at all deliberations wherein decisions affecting the public are being made,” the OPMA requires several things, including that the public has notice of regular meetings by ordinance or similar enactment.

A. OPMA Requires Open Meetings

The OPMA can be summarized into one sentence: “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 ... except as otherwise provided in this chapter.” RCW 42.30.030; **see also Eugster v. City of Spokane**, 128 Wn. App. 1, 7, 114 P.3d 1200 (2005). There are a few exceptions (*e.g.*, for executive sessions), but the presumption is that all meetings of governing bodies must be open to the public, and adequate notice of the meetings to the public is required for the meeting to be deemed “open.”

B. The Open Public Meetings Act Must Be Construed Broadly In Favor of Openness

The basis for interpreting the OPMA can be found in the legislative declaration in RCW 42.30.010, which states:

The legislature finds and declares that all public commission, 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.

See also Clark v. City of Lakewood, 259 F.3d 996, 1012 (9th Cir. 2001)

(interpreting OPMA). The State Supreme Court has observed that this

policy statement in the OPMA is “some of the strongest language we have ever seen in any legislation.” Cathcart, 85 Wn.2d at 107; see also Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 482, 611 P.2d 396 (1980) (citing Cathcart). Quite simply, “The purpose of the OPMA is to permit the public to observe the steps employed to reach a governmental decision.” Eugster, 128 Wn. App. at 7 (citation omitted).

Moreover, and of great significance to the outcome of this case, the OPMA “shall be liberally construed.” RCW 42.30.910; see also Clark, 259 F.3d at 1012. “Declarations of policy in an act ...serve as an important guide in determining the intended effect of the operative sections.” Oliver v. Harborview Med. Ctr., 94 Wn.2d 559, 565, 618 P.2d 76 (1980) (citing Hearst Corp. v. Hoppe, 90 Wn.2d 123, 128, 580 P.2d 246 (1978)); see also Servais v. Port of Bellingham, 127 Wn.2d 820, 832, 904 P.2d 1124 (1995) (same). When the Board makes a highly-technical argument that makes it difficult and impractical for the public to observe its decision-making, the Court should keep in mind the Legislature’s directive that the OPMA “shall be liberally construed.” RCW 42.30.910. CFJ submits that meetings occurring 43 times out of 46 times the Board holds a normal regular meeting, and occurring at the same time (second and fourth Monday of every month), are “regular” meetings. If there is any question about this, the liberal construction requirement of

RCW 42.30.910 would be a “tie-breaker” in favor of openness and requiring notice to be provided via ordinance or resolution of these regularly recurring meetings at which the public’s business was done ... without the public.

C. Elements of OPMA Claim

To support a claim under the OPMA, and subject governing board members to personal liability, a plaintiff must show (1) members of a “governing body,” (2) held a “meeting” of that body, (3) where that body took “action” in violation of the OPMA, and (4) members of that body knew that the meeting violated the statute.⁸ **Eugster v. City of Spokane**, 118 Wn. App. 383, 424, 76 P.3d 741 (2003) (citation omitted); **see also Wood**, 107 Wn. App. at 558. Each relevant element is analyzed below.⁹

1. “Public Agency” and “Governing Body”

As previously noted, the OPMA requires: “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

⁸ The fourth element (a knowing violation) only applies when the \$100 per-violation civil penalty is at issue. **See** RCW 42.30.120(1) (civil penalty awarded for knowing violation). However, for a finding of a non-knowing violation, only the first three elements must be proven (but no \$100 penalty would be awarded). **See Wood**, 107 Wn. App. at 566 (“Under the OPMA, individual members of a governing body are subject to civil penalties only if they attend a meeting knowing that it was in violation of the OPMA.”) (citation omitted).

⁹ The fourth element (whether the members of the governing body knew that the meeting violated the OPMA) will not be addressed because it is not at issue.

42.30.030. “Public agency” is defined, in part, in RCW 42.30.020(1)(b) as “[a]ny county, city, *school district*, special purpose district, or other municipal corporation or political subdivision of the state of Washington.” (emphasis added). The Arlington School District is thus a public agency. It does not challenge this fact. See CP 1801 (Answer at ¶1.2).

Likewise, RCW 42.30.020(2) defines a “governing body” as “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.” This definition encompasses school boards. See Att’y Gen. Op. No.33 at 7; see also Pierce v. Lake Stevens Sch. Dist. No.4, 84 Wn.2d 772, 787, 529 P.2d 810 (1974) (implicitly acknowledging that OPMA can apply to school boards). Defendant admits that the Board is a governing body. See CP 1801 (Answer at ¶1.2).

2. “Meeting” and “Action” under the OPMA

The respective definitions of “meeting” and “action” under the OPMA are intertwined. The OPMA defines “meeting” as meetings “at which action is taken.” RCW 42.30.020(4). In turn, “action” is defined as “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.” RCW 42.30.020(3) (emphasis added).

a) “Action”

“Action” is defined broadly under the OPMA, and encompasses many more activities of the governing body than holding formal votes. It includes mere “deliberations, discussions, considerations, reviews, evaluations[.]” RCW 42.30.020(3); **see also** CP 1636-1644 (Attorney General Open Government Manual (“Att’y Gen. Open Gov’t Manual”), Chapter 3, § 3.4(B)).¹⁰ However, activities that constitute “action” under the OPMA are not limited by the list provided in the above statute—the relevant inquiry in finding “action” is whether the activity relates to “the transaction of the official business of a public agency by a governing body.” **See** 1971 Att’y Gen. Op. No. 33 at 11-12. As the State Supreme Court noted, “The plain language of the statute does not support [the] distinction between action and discussions short of action, as the definition of ‘action’ includes ‘discussion.’” **Organization to Preserve Agr. Lands v. Adams County**, 128 Wn.2d 869, 883, n.2, 913 P.2d 793 (1996). Therefore, for “action” triggering the OPMA, “it is not necessary that the discussion, consideration, review, or evaluation by the governing body

¹⁰ This chapter is also available online at <http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter3.aspx> (last accessed September 27, 2011).

lead to a final action.” Eugster v. City of Spokane, 110 Wn. App. 212, 225, 39 P.3d 380, *review denied*, 147 Wn.2d 1021 (2002); see also CP1646-1666 (PUBLIC RECORDS ACT DESKBOOK: WASHINGTON’S PUBLIC DISCLOSURE ACT AND OPEN PUBLIC MEETINGS ACT (Wash. State Bar Assoc. 2006) (“DESKBOOK”), § 21.3(1), at 21-5).¹¹

Therefore, a meeting need not be a formal meeting, but rather can include briefing sessions and informal discussions or gatherings—as long as “action,” such as “discussion” of official business, takes place. 1971 Op. Att’y Gen. No. 33 at 11. This interpretation of the OPMA has also been accepted by an association made up of local governments. See CP 1668-1702 (MUNICIPAL RESEARCH AND SERVICES CENTER, *The Open Public Meetings Act: How it Applies to Washington Cities, Counties, and Special Purposes Districts* (“MRSC Report”), Report Number 60 (May 2008), at 6).¹²

¹¹ In full disclosure to the Court, counsel for CFJ, Greg Overstreet, is the Editor-in-Chief of the DESKBOOK and wrote several of its chapters—but not the chapter addressing the OPMA. However, the DESKBOOK does not contain the mere personal opinions of the authors: “This Deskbook is balanced and objective by design. Chapter authors include a Court of Appeals judge, agency attorneys, and requestor attorneys.... Each chapter was edited by a person from the ‘other side.’ For example, a chapter written by a requestor attorney was edited by an agency attorney. Finally, the Washington State Bar Association provided the final edits, applying their neutrality and accuracy standards.” DESKBOOK at 1-3. The OPMA chapter in the DESKBOOK was written by an attorney for a municipal organization, the Municipal Research and Services Center.

¹² The MRSC Report is also available online at <http://www.mrsc.org/Publications/opma08.pdf>. Washington case law has recognized the MRSC as a source of persuasive authority in OPMA cases. See Wood, 107 Wn. App. at 567 n.9.

Courts in Washington, and in other jurisdictions, have repeatedly recognized a broad interpretation of “meeting” in open public meeting laws. See Wood, 107 Wn. App. at 562-63 (“[C]ourts have generally adopted a broad definition of ‘meeting’ to effectuate open meetings laws that state legislatures enacted for the public benefit.”) (citation omitted). Therefore, a majority of the Board *discussing* school district business in a “study session” is “action”—and hence a “meeting” under the OPMA. (As noted below, the school board association guidance materials state that study sessions are “meetings.”) Because the study sessions are “meetings” under the OPMA, the meetings must be open to the public and the notice requirements of the Act must be followed. They were not, as analyzed below.

b) “Final Action”

In addition to “action,” the OPMA requirements are also triggered by meetings where the governing body takes “final action.” See RCW 42.30.020(3) (“action” includes “final action”). “Final action” is “a collective positive or negative decision, *or* an actual vote by a majority of the members of the governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.” Id. (emphasis added). See generally DESKBOOK, § 21.3(1), at 21-5–21-6 (citing cases); see also Att’y Gen. Open Gov’t Manual, Chapter 3, § 3.4(B).

Specifically, “Reaching a consensus on a position to be voted on at a *later* meeting qualifies as a collective decision and, consequently, as ‘final action.’” DESKBOOK, § 21.3(1), at 21-5-21-6 (citing Miller v. City of Tacoma, 138 Wn.2d 318, 331, 327, 979 P.2d 429 (1999); Eugster, 110 Wn. App. at 225) (emphasis added). As will be shown below, the Board took “action,” and in some instances also “final action,” at its “study sessions,” including decisions and consensuses to be formally voted on in later meetings.

3. Regular Meetings, Special Meetings, and Executive Sessions

There are three basic forms of meetings held by governing bodies to which the OPMA applies: regular meetings, special meetings, and emergency meetings. (Emergency meetings are not at issue here.) A closed proceeding within a meeting, called an executive session, is also permitted under the OPMA in certain circumstances.

a) Regular Meetings

Under the OPMA, “regular meetings” are “recurring meetings held in accordance with a periodic schedule declared by statute or rule.” RCW 42.30.075; see also CP 1681 (MRSC Report at 9). 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.” RCW 42.30.070. See also DESKBOOK, §21.4(1), at 21-9

(discussing regular meetings) (citation omitted); **see also** 1971 Att’y Gen. Op. No. 33 at 25-27 (“[I]f a particular governing body does hold regular meetings on a date fixed by law or rule, it must identify a time for such meetings by ordinance, resolution, etc.—and not, for example, by word of mouth or informal memo among the members or the like.”). Defendant has at least constructive knowledge of this requirement as the Washington State School Directors Association (“WSSDA”) guide for schools regarding public meetings titled, *Open Public Meetings: A Guide to Public Accountability for School Board Members and Superintendants* (“School Board Guide”), indicates that, “The board is required by state law to adopt a board policy that identifies the date, time and place of the board’s regular meetings.” **See** CP 1704-1716 (School Board Guide).¹³ As detailed below, the Board’s recurring “study sessions” were, and are, “regular meetings” for which no proper notice was provided by ordinance or other enactment.

b) Special Meetings

A special meeting is “a meeting other than a scheduled regular meeting[.]” DESKBOOK, § 21.4(2), at 21-9. **See also** RCW 42.30.080; Att’y Gen. Open Gov’t Manual, Chapter 3, §3.5(B). There must be at least 24-hour notice in advance of a special meeting to each member of the

¹³ An online version of the revised (2007) School Board Guide is available at <http://wssda.org/wssda/WebForms/En-US/Publications/opmaman.pdf>.

governing body, and the notice must be in person, mail, fax, or email.

RCW 42.30.080. This notice (in person, mail, fax, or email) must also be given to those newspapers, radio, or television-related personnel who have made a written request for notice of special meetings. **Id.** The notice must specify the time, place, and subject of the special meeting, and the agency cannot take final action on matters not discussed in the notice. **Id.**

As analyzed below, the District’s “study sessions” were unnoticed regular meetings for which the notice given did not conform to RCW 42.30.080. The Board’s treatment of regularly recurring study sessions as special meetings without notice to the public does not conform to the OPMA.

4. Study Sessions are “Meetings” under the OPMA

“Study sessions” were held immediately prior to the regular meeting on almost every single occasion over a nearly three year period, usually beginning at least an hour before the normal regular meeting was scheduled. **See** CP 1086 at ¶8 through CP 1120 at ¶59 (showing Board holding study session before every normal regular meeting but three over the time period encompassed in the complaint—August 28, 2006, December 10, 2007, and January 14, 2008).

CFJ notes that the meeting minutes for the study sessions fail to mention who was present at each session, thus making it difficult to

determine from only the minutes exactly which board members were present at a given meeting.

However, the minutes themselves make clear on multiple occasions that a quorum of Board members was indeed present at the study sessions. See CP 1114, ¶51, CP 1524 (January 7, 2008 study session minutes stating that all members of the Board were present); see CP 1118 at ¶57, CP 1586 (March 24, 2008 study session minutes stating “no directors were absent” from the session); see CP 1118-19 at ¶58, CP 1601 (April 28, 2008 study session minutes stating “[n]o Directors were absent”); see CP 1119-20 at ¶59, CP 1608 (May 27, 2008 study session minutes stating “[n]o Directors were absent”).

The minutes from other study sessions strongly indicate that at least a quorum, if not all members of the Board, was present at the study sessions. For instance, on multiple occasions, the study session minutes indicate that presentations or proposals were made, and then a presenter took “questions from the Board” or that requests were made to the Board. See, e.g., CP 1089-90 at ¶13, CP 1192 (minutes from July 10, 2006 study session where a presenter “answered questions from the Board”); CP 1095-96 at ¶22, CP 1260 (minutes from December 11, 2006 study session where presenter “asked for Board direction”; CP 1098 at ¶25, CP 1286

(minutes from January 22, 2007 study session where presenters “answered questions from the Board members”).

Some of the minutes from other study sessions show that the Board was present and explicitly taking action or even final action. See CP 1100 at ¶28, CP 1321 (minutes from March 12, 2007 study session indicating “the Board requested that the District proceed with the implementation” of a proposed plan); CP 1104-05 at ¶34, CP1381 (minutes from May 29, 2007 study session where “Board members discussed the policies one-by-one and agreed upon a few minor adjustments”); CP 1106 at ¶37, CP 1403 (minutes from July 9, 2007 study session where “[t]he Board of Directors discussed changes for a few of the policies. The changes will be made before the next Board meeting[.]”); CP 1108 at ¶41, CP 1441 (minutes from August 27, 2007 study session where the Board reviewed graduation requirement policies, and “confirmed the requirement will remain the same”); and CP 1110 at ¶44, CP 1463 (minutes from September 24, 2007 study session where “[m]embers of the Board requested minor adjustments” to some District policies, and that “[t]hose changes will be made and these policies will be presented for first reading at the next meeting”). The Board was thus conducting official business at the “study sessions.”

These study sessions constitute “meetings” under the OPMA. This fact cannot be seriously disputed, and is confirmed by the School Board Guide. It states, “*Study sessions* and board retreats are just two examples of board gatherings *subject to the OPMA.*” CP 1712 (School Board Guide at 7) (emphasis added). However, CFJ proceeds with an analysis of why, in addition to the statements in the School Board Guide, the “study sessions” were “meetings” under the OPMA. The short answer is that “action” and sometimes “final action” took place at these study sessions, as reflected by the Bard’s own meeting minutes.

a) Study Sessions had “actions”

Repeatedly in the Board’s meeting minutes, if not on every occasion, the normal regular meeting minutes state, after listing the events of the “study session,” that “no action was taken” or something to that effect. See CP 1086-1120 at ¶¶8-59. If this were true, then there would be no need to comply with the OPMA since the statute only applies to the meetings of governing bodies, and without “action” there can be no “meeting.” See RCW 42.30.020(4).

However, by the plain terms of the OPMA, and from what is indicated in the meeting minutes, it is indisputable that the study sessions held by the Board constituted “meetings” because “action” took place. The Board’s study session minutes repeatedly use terms like “discussed,”

“considered,” and “reviewed” of official business matters. See, e.g. CP 1086 at ¶8, CP 1151 (March 27, 2006 meeting minutes indicating that Board “discussed” proposed boundary revisions to elementary schools during study session); CP 1089-90 at ¶13, CP 1192 (July 10, 2006 meeting minutes indicating that Board asked questions about proposed personnel policy changes during study session); CP 1093-94 at ¶19, CP 1228 (October 23, 2006 meeting minutes indicating the Board “reviewed” board goals and priorities during study session). “Discussions,” “considerations,” and “reviews” are the very words used by the OPMA to define what is an “action” triggering the OPMA. See RCW 42.30.020(3).

These discussions, considerations, and reviews related to the “transaction of official business” of the District (another part of the definition of “action” in RCW 42.30.020(3)). For example, the minutes show the discussion, consideration, and review of proposals related to policy, school courses, management plans, bond measures, training exercises, and budget planning, to name a few. See, e.g., CP 1098, CP 1286 (proposed courses); id., ¶31, CP 1349 (reviewing school directors’ association recommendations to policies). It cannot be disputed that “action” occurred at these study sessions within the context of the OPMA, and they are thus “meetings” under the broad definition of the OPMA. See **Organization to Preserve Agr. Lands**, 128 Wn.2d at 883 n.2 (“The

plain language of the statute does not support this distinction between action and discussions short of action, as the definition of ‘action’ includes ‘discussion.’”).

b) “Study sessions” had “final actions”

Any claim by the District that because a formal vote was not taken at the “study sessions” or that because final action allegedly did not occur, the sessions are not “meetings” is without merit and inconsistent with the broad definitions within the OPMA. As stated above, a “meeting” under the OPMA includes a “final decision” which includes “[r]eaching a consensus on a position to be voted on at a *later* meeting qualifies as a collective decision and, consequently, as ‘final action.’” DESKBOOK, §21.3, at 21-5–21-6 (citing **Miller**, 138 Wn.2d at 331; **Eugster**, 110 Wn. App. at 225) (emphasis added). The Board did exactly this on numerous occasions. For instance, the minutes for the study session held on September 24, 2007, state: “Members of the Board requested minor adjustments to a few of the policies. Those changes will be made and these policies will be presented for first reading at the next meeting.” CP 1110 at ¶44, CP 1463.

In other instances, the Board did not even wait to take formal action at a later open meeting—it took final action at the “study session.” For example, there are instances where the Board reviewed proposed

policy changes and made two amendments to two of those policies. See CP 1104-05, CP 1381 (minutes from May 29, 2007 study session where “Board members discussed the policies one-by-one and agreed upon a few minor adjustments”); CP 1106, CP 1403 (minutes from July 9, 2007 study session where “[t]he Board of Directors discussed changes for a few of the policies. The changes will be made before the next Board meeting[.]”).

5. “Study Sessions” Were Inadequately Noticed Regular Meetings

The District operated on a schedule whereby it held study sessions that were recurring at regular intervals, and during 2007 the Board held study sessions on the identical schedule as normal regular meetings. These study sessions were not publicly noticed as a regular meeting, but instead were only noticed as contained in a “Board Packet” that was sent to Board members and almost uniformly to Kirk Boxleitner (The Arlington Times) and Erik Stevrick (The Everett Herald). See CP at 1095-1120 ¶¶ 22-59. See RCW 42.30.080; see also CP 1630-1634 (Board’s Policy No. 1400 showing regular meeting schedule). As analyzed above, the notice requirements for special meetings are somewhat more demanding, since the presumption is that the public should not be expecting them, and requires notice in specified formats (in person, mail, fax, or email) to each member of the governing body and any media outlet

requesting such notice (specifically newspapers of local circulation, or television or radio stations that has filed a written request for notice). See RCW 42.30.080. However, there is no requirement for the media to actually publish the special meeting notices.

Given that special meeting notices need not be provided to the public, the public receives far less notice of a special meeting than they do for a regular meeting. For a regular meeting, the schedule of meetings is published by resolution or ordinance.

The “study sessions” held by the District constitute unnoticed regular meetings under the OPMA. The OPMA provides that “regular meetings” are “recurring meetings held in accordance with a periodic schedule declared by statute or rule.” RCW 42.30.075. The School Board Guide agrees that its regularly-scheduled study sessions should be properly noted as regular meetings. It states:

If the Board has regularly scheduled study sessions, *those should be noted in the board’s regular meeting policy*, so the district need not go through special meetings notices each time the study session is held. If the study sessions are more infrequent, then the district must go through the special meeting notice process”

CP 1712 (School Board Guide at 7) (emphasis added). Further, the MRSC OPMA chapter states “a special meeting is any meeting that is not a regular meeting. In other words, special meetings are not held according

to a fixed schedule.” CP 1681. The Board’s study sessions, however, are held according to a fixed schedule—it is simply a schedule that is not revealed to the public by resolution or ordinance or more than a day or two in advance.

Given that regularly scheduled study sessions may be noticed in the Board’s regular meeting policy, it is puzzling why the Board would go through the more onerous process of giving notice of study sessions as special meetings—except for the fact that special meetings do not require public notice. Again, special meetings only require 24 hours notice and notice need only be given to members of the board and members of the media (not the public) who have previously requested notice. See RCW 42.30.080.

In the immediate case, the “study sessions” are in fact recurring meetings, and occurred in almost all instances immediately prior to the scheduled regular meetings during the relevant time frame. See, e.g., CP 1086-1120. However, the schedules for the study sessions are not established by any particular law, ordinance or policy that would provide constructive notice to the public of their existence.¹⁴ Simply put, there is

¹⁴ As noted above, instead of an “ordinance,” school districts apparently use formally enacted “policies” to pass measures. Plaintiff does not challenge the use of District “policies” in lieu of “ordinances”; they appear to be the same thing.

no enacted Board policy or other enactment establishing a regular meeting schedule for the study sessions.

The meeting schedule for the Board is contained in Board Policy No. 1400, which is entitled “Meeting Conduct, Order of Business and Quorum.” See CP 1630-1634. This policy states that normal regular meetings are to be held on the second and fourth Monday of each month, at 7:00 p.m., in the District Board Room. See also CP 1105-06 at ¶¶35-37, CP 1384-1405 (showing Board Policy and amendments made to it). Neither the current, nor the schedule before the State Auditor’s warning, mentions study sessions whatsoever. Board Policy No. 1400 only mentions regular meetings, special meetings, and emergency meetings; it does not mention study sessions. See CP 1630-1634. The only mention of the study sessions is a sentence on the main Arlington School Board meeting website, stating: “Board meetings begin at 7:00 pm, with study sessions held prior to meetings as necessary.”¹⁵ This means that the public is only aware of the regular meetings held at either 7:00 or 7:30 p.m., on the second and fourth Monday of each month—but would have no idea that the Board had actually met and had been taking action at least an hour

¹⁵ Available at <http://www.asd.wednet.edu/education/components/scrapbook/default.php?sectiondetailid=18584&linkid=nav-menu-container-1-4009&PHPSESSID=be0bf48c3faa2e1f88b226f91d820e7f>. (last visited July 9, 2009).

prior in the “study sessions.”¹⁶ This is why these OPMA violations matter. The public has no idea public business is being conducted at the “study sessions” and does not know they may attend.

The fact that the study sessions were mentioned in agendas published prior to the meetings is inadequate. These study sessions were in effect regular meetings as they occurred regularly, and legally required the same level of notice as other regular meeting. Anything less is inconsistent with the OPMA mandate that “All meetings must be open to the public.” RCW 42.30.030. Again, even if the Board gave proper notice of the study sessions as special meetings—CFJ does not believe it did, but has chosen not to appeal this issue—the public was not afforded notice of any of the study sessions.

The District might argue that a member of the public could stumble on to the study sessions. It is absurd to think that because a member of the public could conceivably wander into the meeting room in which the study sessions were taking place, or because the meeting room doors were not locked, the study sessions were “open to the public.” For a meeting to be open to the public, it must be more than physically open—the public must have notice that it occurs at a specific time. To attend a

¹⁶ Further, members of the public present at the end of a regular meeting would hear only the announced time and date for the next regular meeting—with no mention of a pre-meeting “study session.”

meeting, a member of the public must know the time and place; knowing just the place but not the time does the public little good. The OPMA must be “liberally construed” in favor of allowing the public to observe the Board’s conduct of official business. RCW 42.30.910. Arguing that the notice provisions for regular meetings have been met because members of the public could stumble into meetings (an hour before the noticed a meeting was taking place) is not “liberally construing” the OPMA as required by RCW 42.30.910. Similarly, arguing that a meeting was publicly noticed because members of the media, who have no obligation to publish the notices, were given a “Board packet” a day prior to the study sessions taking place, is not “liberally construing” the OPMA.

The Attorney General’s Open Government Manual is instructive on this issue, stating:

The OPMA does not allow for “*study sessions*”, “*retreats*”, or similar efforts to discuss agency issues without the required notice. *Notice must be given just as if a formally scheduled meeting was to be held.*

Att’y Gen. Open Gov’t Manual, §3.4(B) (emphasis added). As regularly occurring meetings, the Board’s study sessions must comply with same notice requirements of a regular meeting. The School Board Guide accurately reflects this fact, stating that study sessions should be included in the regular meeting schedule if they are held regularly. CP 1712 (School

Board Guide at 7). The study sessions occur regularly—in fact, nearly uniformly before each normal regular Board meeting. The District failed to follow the notice requirements for regular meetings in RCW 42.30.070.

Accordingly, the regularly recurring “study sessions” occurring at regular intervals prior to 43 of 46 regular meetings were “regular” meetings and held in violation of the regular meeting notice provisions of the OPMA.

D. Fees Awarded Inconsistent with Granting Motion for Summary Judgment

The trial court's award of attorney fees under a statute or contract is a matter of discretion, which will not be disturbed absent a clear showing of abuse of discretion. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987). However, this does not give the trial court the freedom to employ a flawed method for calculating attorney fees. The State Supreme Court “has overturned attorney fees awards when it has disapproved of the basis or method used by the trial court, or when the record fails to state a basis supporting the award.” Brand v. Department of Labor and Industries of State of Wash., 139 Wn.2d 659, 665, 989 P.2d 1111 (citing Progressive Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 688-89, 790 P.2d 604 (1990)). Here, the trial court employed a flawed method of calculating fees.

CFJ alleged a total of 144 violations of the OPMA. This number was compiled, in part, by alleging 3 separate violations of the OPMA for 32 executive sessions: (1) for failure to begin in an open public meeting prior to convening into an executive session; (2) for failure to announce a proper purpose for convening to executive session; and (3) for failure to announce a proper ending time prior to convening in executive session. See CP 1741-1749 (Motion for Summary Judgment alleging OPMA violations pertaining to executive sessions); and CP 1614-1628 (Chart submitted with Appellant's Motion for Summary Judgment organizing the alleged OPMA violations by meeting date). CFJ alleged only two violations (failure to announce proper purpose and failure to announce an ending time) for a 33rd executive session. See CP 1616 (October 9, 2006, Meeting).¹⁷

CFJ obtained summary judgment on two of three separate OPMA violations for 21 executive sessions—for (1) failure to begin in an open meeting prior to convening an executive session and, (2) failure to announce a proper purpose for the executive session. See CP 965-969 (Order Granting Plaintiff's Motion for Summary Judgment in Part); and CP 54 (Order on Attorney's Fees).

¹⁷ CFJ did not prevail on claims for this executive session, therefore the fact that only two violations were alleged does not factor into the below discussion.

The three separately alleged types of violations were counted as separate violations to obtain the total of 144 claimed violations of the OPMA—namely executive sessions upon which CFJ prevailed comprised 63 alleged violations of the OPMA. Because CFJ prevailed on two of the three alleged violations for the 21 executive sessions CFJ prevailed on, CFJ prevailed on 42 out of the 144 alleged violations. However, when awarding attorney fees the trial court did not take into account the fact that CFJ prevailed on two of three violations for the 21 executive sessions upon which it prevailed. By only counting half the victories, the trial court therefore erroneously concluded that CFJ had a success rate of half of its actual success rate. This flawed math deprived CFJ of a significant amount of attorney fees to which it was entitled.

For reasons described above, CFJ prevailed upon 29.2% (42 out of 144) of its claims, yet was only found to have prevailed on 14.6% (21 out of 144) of its claims.

These flawed calculations constitute an improper method for the trial court to reduce CFJ's attorney fee award, and this Court should correct the lower court's flawed calculation.

E. Fees and Costs on Appeal

If this court finds that the Board violated the OPMA, CFJ requests attorney's fees and costs incurred in bringing this appeal pursuant to RAP

18.1 and RCW 42.30.120(2) (mandating the award of all costs including reasonable attorney fees to a party who prevails against an agency under the OPMA). Further, if this court finds for CFJ on any grounds, CFJ requests reasonable expenses incurred in bringing this appeal pursuant to RAP 14.3.

VI. CONCLUSION

Based on the foregoing, this Court should find that the Arlington School District's longstanding practice of holding regularly recurring meetings it terms "study sessions" prior to holding its normal regular meetings were improperly noticed in violation of the PRA. The Board treated these meetings as "special meetings" but, the OPMA does not provide for public notice of special meetings. Therefore, the Board has been able to conduct regular meetings, occurring with nearly the same regularity as its normal regular meetings, but with no requirement of public notice.

Further, this Court should overturn the trial Court's miscalculation of attorney fees and award Appellant its additional fees.

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Respectfully submitted this 30th day of September, 2011.

By: Greg Overstreet
Greg Overstreet, WSBA #26642
Chris Roslaniec, WSBA #40568



CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 30, 2011, I caused the delivery by U.S. Mail and by email pursuant to agreement of a copy of the foregoing Brief of Appellant to:

David Hokit
Andrea Schiers
555 W Smith St
PO Box 140
Kent, WA 98035-0140

Dated this 30th day of September, 2011 at Seattle, Washington.



Chris Roslaniec