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NO. 67263-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CENTER FOR JUSTICE,

Appellant,

v.

ARLINGTON SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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I. RESPONDENT'S STATEMENT OF THE CASE

A. Introduction

Appellant Center for Justice (“CFJ”) fashions this case as an action to enforce the Open Public Meetings Act (“OPMA”). If that was ever its purpose, given the circumstances of how this case came to be filed, that purpose was forgotten long ago. This case was one of five filed simultaneously by CFJ, a Spokane law firm, by Allied Law Group, its Seattle counsel for these actions, against public agencies across the state in Yelm, Longview, Ridgefield, and Spokane. Those five agencies were identified through the audit process conducted by the Washington State Auditor’s Office (“SAO”) for the 2005-2006 period, as having offended the provisions of the OPMA to one degree or another. Months after the SAO had communicated those audit results to the public agencies, and the Respondent Arlington School District (“the District”) had addressed and remedied them, CFJ filed suit for the already corrected deficiencies, seeking to collect penalties and attorneys’ fees.

CFJ’s case against the District included two categories of claims: the first for deficiencies in how the District’s Board of Directors (“the Board”) had been entering into executive session, which was the issue identified by the SAO; the second for an alleged failure to provide notice of special

meetings of the Board. This latter claim was not piggy-backed off the SAO's OPMA audit of the District. The District did not contest the executive session claim and admitted the allegations in CFJ's complaint as to it. The District did contest the special meetings notice claim.

CFJ was unsuccessful on the special meetings notice claim, which the trial court dismissed on the District's summary judgment motion. CFJ's theory on that claim changed repeatedly in response to its discovery of unfavorable evidence. First, it accused the District of not giving notice of those sessions as special meetings. Later, after it learned the District had in fact given such notice, it argued the notices were defective under the OPMA. Then, it argued the study sessions were not special meetings after all, but regular meetings and the District should have listed them in its policy describing its regular meeting schedule, rather than following the statute's requirements for special meeting notice. The trial court disagreed, and found the District had complied with the statute in giving notice of the sessions as special meetings.

CFJ now asks this Court to find the District's compliance with the more demanding notice provisions nevertheless offended the statute. This Court should decline the invitation and affirm the trial court's order. CFJ also complains the trial court did not award it enough attorneys' fees for the

narrow success it achieved below, but fails to show any abuse of discretion in the court's calculation. Thus, this Court should also affirm the order on fees.

B. Issues Presented

1. Whether the trial court erred in granting partial summary judgment in favor of Arlington School District when there were no genuine issues of material fact that the District complied with the OPMA by providing special meeting notices for the study sessions held by the District's Board of Directors.
2. Whether the trial court abused its discretion when it used the lodestar method to award Center for Justice an amount of attorneys' fees that reflected the degree of success achieved at summary judgment.
3. Whether Arlington School District is entitled to attorneys' fees on appeal.

C. Facts

1. Background

The District is located in Snohomish County. Five citizens sit on its Board. Clerk's Papers ("CP") 2402 at ¶3. As the governing body of a public agency of this state, the Board's meetings are subject to Chapter 42.30 RCW, the OPMA. It holds its regular meetings, called "business meetings," pursuant to the schedule delineated in Board Policy 1400. CP 2402-03 at ¶7; CP 2409-11. As CFJ notes, the Board's policies are available online. Br. of Appellant at 8, n. 4. A member of the public looking for the regular meeting schedule would navigate several web pages to find the schedule listing the days of each

month and the time the Board holds its regular meetings. The Board also holds “study sessions,” which, during the times relevant to this lawsuit, it and the trial court considered special meetings as that term is defined in the OPMA. CP 2402 at ¶7; CP 967 at ¶4; CP 971 at ¶1. Additionally, the Board occasionally convenes in executive session. The OPMA governs all three types of gatherings.

Prior to spring 2007, whenever the Board held an executive session as well as a regular business meeting or a study session, or both, on the same day, its practice was to convene in executive session first, then hold its study session and/or regular business meeting after. CP 2406-07 at ¶17. The District believed this schedule would be most convenient for members of the public who wished to attend either or both open meetings, as they would not have to sit and wait for the Board to conduct a closed executive session in the middle of the open session. *Id.* Consequently, the Board did not make any public announcement that it was starting an executive session because no members of the public were present when the Board began it. *Id.*

2. The Audit Report

In May 2007, the District received a report describing the audit the SAO completed of the District for the period between September 1, 2005 and

August 31, 2006. CP 2406 at ¶16. That report noted in an “exit item”¹ that during the SAO’s review of the minutes of the Board’s meetings, the SAO

... found various instances where the board entered into an executive session prior to the regular board meetings. We also found that the description for the reason they entered into an executive session was often to discuss personnel matters or real estate. We recommend that the District enter into an open public meeting prior to entering into an executive session. We also recommend that the District provide additional detail for the reason the board entered into an executive session.

CP 2634.

When the District received this audit report, it immediately changed its practice and began holding the Board’s executive sessions during its regular or special meetings. CP 2407. The Board amended its Procedure 1400P accordingly, effective July 2007. CP 1790 at ¶207; CP 1767-68 at ¶1.1; CP 1802 at ¶1.2. The exit item pertaining to the Board’s method of convening in executive session was the only mention of OPMA-related issues in the SAO report. CP 2621-2637. The SAO’s files supporting the audit report specify that, with the exception of the exit item quoted above, “[b]ased on our review we have determined that the District is in compliance with the Open Public Meetings Act[.]” CP 2659, 2653.

3. The Lawsuit

In March 2008, nine months after the SAO issued its report and seven

¹ Exit items are “less serious issues informally conveyed to the District.” CP 2624.

months after the District had remedied the executive session issue noted therein, CFJ, a law firm located in Spokane, sued the District under the OPMA for the District's previous method of convening in executive session. CP 1809-1824, 1829-30. This lawsuit was one of five that CFJ filed against public entities during the same week in March 2008. It filed the five lawsuits in partnership with its attorneys (Allied Law Group), under the auspices of CFJ's "Open Government Audit Project." CP 583, 585. All five lawsuits were based on alleged violations of the OPMA. CP 583, 592. To find defendants to sue, CFJ and its counsel examined an SAO "compilation report," an internal document summarizing the OPMA-related issues the SAO had noted in its audit reports issued in 2007, looking for entities the SAO had notified of OPMA issues to one degree or another. CP 585, 587-88, 592-94, 608-10, 2646-47. Together, CFJ and counsel selected five of those entities and sued them for OPMA violations based on the issues raised by the SAO, seeking to be paid penalties and attorneys' fees. CP 583, 585, 587-588, 592-94. They chose their defendants by picking the agencies whose violation "factually appeared to be beyond dispute." CP 592.

The lawsuit against the District reached back two years, the time covered by the OPMA's limitations period, and alleged violations as to 21 executive sessions dating back to March 2006. CP 1809-1824, 1829-30. The

allegations as to each of the 21 executive sessions mirrored the language of the SAO's exit item quoted above: namely, CFJ alleged that, for each session, the District did not 1) begin the executive session in an open public meeting; or 2) publicly announce the purpose for the session before convening in it. *Id.* CFJ also alleged that the District "continues to violate its amended policy" as to convening in executive session. CP 1827 at ¶209. In its answer, the District admitted the allegations as to each of the executive sessions encompassed in the complaint. CP 1801-02 at ¶1.2; CP 1802-03 at ¶1.8.

In addition and separate from the executive session claims, CFJ alleged that, between March 2006 and February 2008, the District did not provide advance notice of numerous special meetings in accordance with the OPMA. CP 1809-1832. During that period, the Board held special meetings for different purposes. Most at issue in this case were the Board's study sessions. *Id.* CFJ also alleged that the District "continues to hold unannounced Study Sessions prior to the Start [sic] of its regular meetings." CP 1832 at ¶265; *see also* CP 1835 at ¶289. The District denied the allegations regarding failure to give notice of these meetings because, as is discussed in further detail below, the District provided proper notice of them. CP 1802 at ¶1.3.

As remedies, CFJ sought nullification of all the decisions made by the

Board in violation of the OPMA, civil penalties against the individual Board members, attorneys' fees, and an injunction against future violations of the statute. CP 1836 at ¶¶2-5.

To find the 21 executive sessions listed in the complaint, after reviewing the summary of the SAO's audit reports, CFJ only had to determine the dates on which the Board held executive sessions during the relevant limitations period and then list those dates with the attendant allegations of OPMA violations in the complaint. The pre-filing investigative efforts CFJ undertook regarding its other claim, that the District did not provide advance notice of its special meetings, proved to be even less substantive, as revealed by the chronology of events after the lawsuit was filed.

On April 28, 2008, shortly after this case was filed and the District reviewed CFJ's complaint, counsel for the District contacted CFJ's counsel to discuss scheduling a CR 30(b)(6) deposition covering the basis for CFJ's claims and what it did to investigate them before filing the lawsuit. CP 2304 at ¶2. CFJ's counsel objected to the deposition, claimed the District was not entitled to conduct that discovery, and stated CFJ would seek a court order to prevent it. CP 2313. She sent a confirming letter the same day. CP 2307-08.

The very next day, CFJ's counsel sent a Public Record Act request to

the District, seeking special meeting notices the District sent from January 1, 2006 to the date of the request, and all records showing who had requested notice of special meetings of any kind for the time period January 1, 2005 to the date of the request. CP 2310-11. The District provided those records, and, as is explained in further detail below, they demonstrated that contrary to CFJ's allegations, the District in fact had provided notice of its special meetings in compliance with the OPMA.

In June 2008, the District deposed CFJ's executive director and supervising attorney for this lawsuit, Breean Beggs. Among other things, Mr. Beggs was asked to explain CFJ's position regarding the study session allegations in the complaint. He made no mention that it was CFJ's position those sessions were regular meetings or should be treated as such in the District's policy. Instead, he said that special meeting notices were required for those sessions and that it was CFJ's position that they were not provided.

Q. The lawsuit against the Arlington School District contains a claim which I'll label as a recurring allegation -- you can correct me if you think that's wrong -- a recurring allegation that the Arlington School District did not provide the notices of special meetings of the school board required by the Open Public Meetings Act. Is my understanding correct?

A. I think that's a general -- accurate general description of the -- that -- those claims on different dates in the complaint.

- Q. All right. Is that still the Center for Justice's position today, that the school district did not give the notices of special meetings required by the Open Public Meetings Act?
- A. It's the Center's position that they did not provide notices that were fully compliant with Open Public Meetings Act.
- Q. All right. And in what respect were they not fully compliant?
- A. As we read the Open Public Meetings Act, if there's going to be a special meeting, there needs to be a special notice that goes out ahead of time. In looking at the Web site and the public records requests to date and the discovery received to date, it does not appear that there are what we would consider special notices. My understanding – and I haven't looked at your latest discovery responses in detail and examined them – is that there might be a board packet that goes out that has some information about the *special meeting*, but it's not framed or highlighted as a notice that would put the public on notice and the required recipients on notice of the *special meeting*.

CP 597 (emphasis added).

Beggs was clear that the Board's study sessions were special meetings requiring special meeting notices.

- Q. Right. And I'm focusing right now on the ones in regard to the *notices for special meetings*. Which notices were not provided?
- A. I'm not in a position to be able to answer specifically every meeting or not meeting. But, in general, *my recollection is that most of what we're talking about are what the district calls study sessions that occur*

before the regularly scheduled meeting on the same day. And in looking at the minutes of those meetings, they vary by topic. Afterwards we can read those minutes and see what was discussed at those special -- at those study sessions.

CP 598 (emphasis added). Beggs further testified that CFJ's analysis of the special meeting claim "was that there were not [sic] notices even being created, let alone sent." CP 606.

That is, when CFJ filed its complaint, it considered the District's study sessions to be special meetings, and believed the District had not given any advance notice of those sessions. It had not asked the District for those notices prior to filing the lawsuit. It did not request that critical information until the day after the District's counsel told CFJ's counsel he intended to explore the factual basis for CFJ's claims, nearly two months after CFJ filed this lawsuit.

In June 2009, CFJ filed an amended complaint, but did not enumerate additional claims regarding the District's executive sessions or its advance notice of study sessions. CP 1771-1800.² The District filed an amended answer consistent with its earlier responses to those claims. CP 1767-68 at ¶¶1.1-1.2.

² The amended complaint added a special meeting notice claim as to a Board dinner. CP 1793-94 at ¶¶244-248. That claim is not at issue in this appeal.

4. The Summary Judgment Motions

In July 2009, the parties filed cross-motions for summary judgment. CP 1728-1766; CP 2726-2741. The District sought dismissal of the special meeting notice claim and requested CR 11 sanctions for CFJ's failure to investigate that claim adequately before bringing it. CP 2727. The District also sought dismissal of CFJ's claim for civil penalties against the individual Board members. *Id.*

CFJ asked the trial court to grant it summary judgment on all its claims and requested remedies. CP 1731. CFJ increased the number of those claims from its amended complaint to its motion, relying on the allegations of the District's "continued" violations as to the executive session and special meeting notice claims. CP 994; RP Oct. 23, 2009 at 69-71. Specifically, while the amended complaint enumerated 21 executive sessions, CFJ sought summary judgment for 33 sessions. CP 1772-1787, 1792-93; RP Oct. 23, 2009 at 68; CP 1614-1628. While the amended complaint enumerated 38 special meetings, CFJ sought summary judgment for 47 meetings.³ CP 1772-1796; CP 2356; CP 1614-1628. CFJ culled some of these additions from the

³To count the number of study sessions at issue on appeal, CFJ appears to use the materials it submitted in its summary judgment pleadings rather than the amended complaint. Br. of Appellant at 2, 4, 5-7, 14, 34. However, the only sessions on which the trial court ruled, and, consequently, the only ones before this Court, are those study sessions listed in the amended complaint. CP 967 at ¶4; CP 971 at ¶1.

District's discovery responses; for others, CFJ simply put them on a chart entitled "Violations of the OPMA" it submitted with its summary judgment pleadings. CP 2360, 2361 at n. 6; CP 1614-1628.

As to the District's study sessions, for the first time, after more than one year of litigation, CFJ argued on summary judgment that the sessions constituted regular meetings rather than special meetings, and that the District violated the OPMA by failing to include them in its regular meeting schedule. CP 1754-1757. It also reiterated its original position that the study sessions were special meetings, but labeled that an "alternative" argument and challenged the content of the notices rather than arguing, as it had up to that point, that the District did not provide notice of them at all. CP 1754, 1757-58.

To calculate the number of penalties it alleged should be assessed against the individual Board members, CFJ presented the violations chart described above, which delineated 144 violations of the OPMA. CP 1614-1628. That chart listed the date of each meeting CFJ alleged violated the OPMA and each specific reason why. *Id.* As noted above, the chart lists meetings that were not included in CFJ's complaint or amended complaint. CP 1614-1628; CP 1808-1836; CP 1771-1800. For the District's executive sessions, the chart describes three types of violations: those sessions 1)

without beginning in an open public meeting; 2) where the Board failed to announce a proper, or any, purpose before the session; and 3) where the Board failed to announce an ending time for the session before convening in it. *Id.* CFJ did not allege the third type of violation in its complaint or amended complaint. CP 1809-1824, 1829-30; CP 1772-1787, 1792-1793.

The trial court granted the District's motion as to the special meeting notice claim regarding the study sessions listed in the amended complaint. CP 971 at ¶1, 972 at ¶1; CP 967 at ¶4. It concluded the sessions were special meetings and the District provided notice of each of them. CP 971 at ¶1; CP 967 at ¶4. As to the new "regular meetings" argument, the court explained in its oral ruling:

... I think that the Center's theory on [the study sessions] has been somewhat of a moving target. I think it is fairly clear from looking at the pleadings that the initial theory upon which the Center was proceeding was that the study sessions were special meetings and that the defendant failed to give notice of them. I think it's pretty clear that that was the initial theory and it obviously was not very thoroughly investigated, because if it had been thoroughly investigated, it is equally clear that, assuming those were considered special meetings, that there was notice given under the OPMA of each and every one of those.

Now, the theory has changed somewhat to encompass the thought that because the study sessions usually occurred prior to the regular public meetings, that they don't constitute special meetings but they constitute regular meetings that should have been referenced under the OPMA in ... their policies and procedures. It's an interesting theory, because

arguably, the requirements of the OPMA are more onerous and specific if something is considered a special meeting. So it's interesting that an entity that is considering itself a watchdog to make sure that agencies are not conducting meetings without the public being fully informed is complaining about the District having procedures which actually required more notice, because each and every one of them had to go out in the newspaper and to all Board members as opposed to just being contained in the policies of the District. I find that an interesting position to be taking.

...

And in terms of the argument that they were occurring with such regularity that they're regular sessions and not special sessions, it's also an interesting argument because, really, it's one that could only occur after the fact unless there is some claim that there is some evidence to show that the District knew in advance that it was going to have study sessions at every meeting as opposed to seeing that in retrospect they often or usually had study sessions in advance of their regularly scheduled public meetings. And since you could only determine that, apparently, in hindsight, and I believe that's a legal test and a not a factual test, I just don't believe that there really are any facts to support that these are regular meetings and therefore, because of what I would call lesser notice requirements of being in the Board's policies, that that is somehow a violation of the OPMA.

RP Oct. 23, 2009 at 72-74.

The court granted the District dismissal of CFJ's claim for the imposition of civil penalties against the individual Board members, except as to a few remaining meetings, all of which were later voluntarily dismissed. CP 972-73 at ¶2; CP 12-13. The trial court denied the District's request for CR 11 sanctions, although the court explained that there were "aspects of the

[study sessions] claim that were troublesome to the Court as well.” CP 973 at ¶3; RP Oct. 23, 2009 at 76. The court also denied the District’s summary judgment motion as to a few remaining meetings, all of which were later voluntarily dismissed. CP 971-72 at ¶¶2-4; CP 12-13.

The trial court granted CFJ’s motion as to the 21 executive sessions listed in the amended complaint because the District had admitted the facts underlying those claims in both its answer and amended answer. CP 966-67 at ¶¶1-2; RP Oct. 23, 2009 at 71-72. The court specifically denied summary judgment as to any additional executive session claims that CFJ included in its motion but did not plead in its complaint or amended complaint. CP 967 at ¶3; RP Oct. 23, 2009 at 72. The court denied CFJ’s motion as to all other claims. CP 969 at ¶3.

CFJ eventually dismissed all claims remaining after the trial court’s summary judgment rulings. CP 12-13.

5. The Attorneys’ Fees Motion

In January 2010, CFJ filed a motion for attorneys’ fees and costs available under the OPMA in connection with the summary judgment proceedings. CP 935-961. In that motion, CFJ did not identify the amount of fees it expended or requested. CP 2274. It submitted, among other things, redacted billing records that made it impossible to discern the work CFJ’s

counsel had performed and on which claims. CP 725-818. After the District filed its response, CFJ struck its motion and re-set it for nearly a month later.

In its re-filed motion in February 2010, CFJ requested approximately \$180,000 in fees, and provided unredacted billing records. CP 683-717; CP 200-376. The District primarily responded that CFJ was entitled to recover fees only for time spent on the successful claim (i.e., the executive session allegations listed in the complaint), and that the amount of any fee should reflect CFJ's limited success. CP 2065-2100. The trial court awarded CFJ \$23,842.50 in fees. CP 56.

CFJ now appeals the trial court's order on summary judgment dismissing the special meeting notice claim as to the District's study sessions, and the trial court's calculation of the attorney fee award. CP 1.

II. ARGUMENT

A. The trial court did not err in granting summary judgment in favor of Arlington School District.

Appellate courts review orders of summary judgment *de novo*, performing "the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, *reconsideration denied* (2002). Summary judgment is appropriate if the papers submitted demonstrate there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

Although CFJ presents on appeal only one of the numerous issues it raised before the trial court as to the Board's meetings, it still submits copious briefing that is long on reciting statutory definitions and pronouncements on the OPMA, much of which is not, and never has been, disputed or at the heart of the controversy. For example, CFJ devotes numerous pages to establishing that the District's study sessions are meetings subject to the OPMA. The District does not maintain otherwise, and it never has. CFJ's opening brief is notably short on analyzing what is actually at issue: what it considers violations of the OPMA.

This could be because CFJ cannot escape the fact that the District complied with the statute. Its continuing attempt to trap the District in a violation of the OPMA, even after its belated discovery that the District had provided notice of each and every meeting at issue, reveals that CFJ has lost sight of the entire purpose of the statute, which is to ensure the public is able to "observe all steps in the making of governmental decisions." *Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380, review denied, 147 Wn.2d 1021, 60 P.3d 92 (2002) (citing *Cathcart v. Andersen*, 85 Wn.2d 102, 530 P.2d 313 (1975)). This the District did by providing advance notice of its study sessions as required by the OPMA for special meetings. Consequently, the trial court granted the District's summary judgment motion for that claim.

This Court should affirm the trial court's ruling for the following reasons.

1. The District gave notice of all its study sessions at issue in compliance with the OPMA.

Under the OPMA, the governing body of a public agency must hold its meetings open to the public, except as otherwise provided, and give notice of those meetings. *See* RCW 42.30.030; RCW 42.30.070; RCW 42.30.080. It is undisputed that the statute applies to meetings of a public school district's board of directors, such as the Board's study sessions here. "Regular meetings" are those held in accordance with a set schedule provided in an ordinance, resolution, bylaws, or whatever other rule is required to conduct the business of the entity. RCW 42.30.070. For public school districts, this schedule of regular meetings is often contained in board policies and/or procedures, as is the case with the District here. CP 2402 at ¶6; CP 2409.

"Special meetings" are those held at any time outside the regular meeting schedule. The public agency must give notice of the time, place, and business to be transacted at the meeting at least 24 hours in advance. RCW 42.30.080. It must provide this notice to each member of the governing body (here, the Board), and to each local newspaper of general circulation and each local radio and TV station that has filed a written request with the agency for such notice. *Id.* The purpose of the notice requirement is obvious: to let the recipients know when and where the Board is meeting and the issues it will

be addressing.

Here, the District provided notice of its study sessions at issue consistent with the OPMA's requirements for special meetings outlined above.⁴ It notified Board members by sending them the agenda for the meetings.⁵ See CP 2402 at ¶¶4, 7-9; CP 2412-2509; CP 2638-39 at ¶3; CP 2640-41 at ¶3; CP 2399-400 at ¶3; CP 2397-98 at ¶3; CP 2395-96 at ¶3.

At all times relevant to these proceedings, no radio or television stations had filed requests for notice. CP 2404-05 at ¶11. One newspaper, the Everett Herald, had filed such a request on January 4, 2007. *Id.*; CP 2511. After that date, the District gave notices of all its special meetings, including the study sessions, by sending the agendas to the newspaper. CP 2405 at ¶12; CP 2512-2614. In April 2008, after CFJ filed this action, the Arlington Times newspaper filed a request for notice of the District's special meetings, and the District likewise gave that newspaper such notices from that point on. *Id.* In fact, the District routinely notified both newspapers that board packets, including agendas listing the time, place and business to be conducted at special meetings, were available for them at the District offices in advance of

⁴ The notice the District gave of the Board's retreats is not at issue on appeal.

⁵ For one study session, on January 7, 2008, the District notified the Board members telephonically and each member attended the meeting on that date. CP 2402 at ¶¶ 8, 10; CP 2510. Written notice of special meetings "may be dispensed with as to any member who is actually present at the meeting at the time it convenes." RCW 42.30.080.

the meetings, even before it received the written requests. CP 2405 at ¶13.

The agendas the District sent to the Board members and newspapers listed the time and place of the study sessions and the business to be conducted at them. CP 2412-2509, 2512-2614. The agendas show all scheduled board meeting activity on the given date. For example, if the Board was holding its regular business meeting, it is listed with the meeting's start time and the agenda items. The start time and business to be conducted in study sessions are listed separately. The recipients are clearly notified of the time, place and business to be conducted at the special meeting, which is the purpose of the notice requirement of RCW 42.30.080.

Therefore, summary judgment dismissing CFJ's claims as to the study sessions was appropriate because the evidence established the District gave the notice of each of those meetings that the OPMA requires for special meetings. To defeat the District's motion, CFJ was required to "present the court with facts ... not just mere speculation, not wishes, not thoughts, but facts that would be admissible at trial." *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 736, 218 P.3d 196 (2009)(internal quotations omitted). This CFJ failed to do. Consequently, this Court should affirm the trial court's order granting summary judgment in the District's favor.

2. The regular meeting argument does not withstand any scrutiny.

Throughout this litigation, up to the point of its summary judgment motion, CFJ maintained that the District's study sessions were special meetings and that the District did not provide notice of them. It sued the District on that claim and theory without ever requesting, receiving, or reviewing the notices for each of those meetings. It waited until after suing the District to explore the truth of its allegations that the District did not provide special meeting notices.

Once it received those notices, rather than dismiss the claim, CFJ next argued that the notices were defective. It lost that argument on summary judgment, and does not repeat it on appeal. Then, CFJ changed horses altogether and argued the study sessions were not special meetings after all, but were instead regular meetings. It made this argument for the first time in its summary judgment motion, arguing that the District violated the OPMA by not including the study sessions in its regular meeting schedule.

This transparent attempt to rescue the sinking special meetings notice claim with a new legal theory rightfully did not succeed. As noted above, the trial court saw through it:

Now, the theory has changed somewhat to encompass the thought that because the study sessions usually occurred prior to the regular public meetings, that they don't constitute

special meetings but they constitute regular meetings that should have been referenced under the OPMA in ... their policies and procedures. It's an interesting theory, because arguably, the requirements of the OPMA are more onerous and specific if something is considered a special meeting. So it's interesting that an entity that is considering itself a watchdog to make sure that agencies are not conducting meetings without the public being fully informed is complaining about the District having procedures which actually required more notice, because each and every one of them had to go out in the newspaper and to all Board members as opposed to just being contained in the policies of the District. I find that an interesting position to be taking.

RP Oct. 23, 2009 at 72-73.

CFJ now reprises this argument on appeal, doubling-down on its stance that the District broke the law when it gave more notice than, according to CFJ, it was required to give. This Court should likewise reject that position.

As before, CFJ begins by defining "regular meetings" as "recurring meetings held in accordance with a periodic schedule declared by statute or rule. RCW 42.30.075." Br. of Appellant at 20. However, that definition and statutory section apply to state agencies, not public agencies such as a school district.⁶ CFJ recognized as much in its pleadings below.⁷ The provision

⁶ See RCW 42.30.075 ("State agencies which hold regular meetings..."); Cf. RCW 42.30.070 ("The governing body of a public agency shall provide the time for holding regular meetings ...").

⁷ CP 995 n. 9 ("Defendant correctly notes that the RCW 42.30.075 definition of 'regular meeting' applies to state agencies, not school districts. Plaintiff was mistaken and acknowledges so.").

applicable to school districts provides that “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 of that body.” RCW 42.30.070. That section does not define regular meetings.

The Attorney General, in an opinion published shortly after the OPMA was enacted in 1971, noted that the section applicable to public agencies does not require all governing bodies to hold regular meetings. AGO 1971 No. 33, p. 16. To the extent that they do, however, they must identify the date and time of those meetings as provided in RCW 42.30.070. *Id.* School districts routinely do this by listing the regular meeting schedule in board policy or procedure, as the District did here. CP 2402 at ¶6; CP 2409. The Attorney General also noted that the statute does not provide a sanction for the failure to establish a regular meeting schedule:

In this connection it is notable that there is no sanction in the act for a failure to establish a regular meeting schedule. However, it is to be understood that the consequences of failing to do so is to make all meetings of the agency’s governing body ‘special’ meetings subject to the notice requirements of [the OPMA].

AGO 1971 No. 33, p. 16.

The secondary sources CFJ cite do not suggest otherwise. It quotes a passage from a guide published by the Washington State School Directors Association for the proposition that the District’s “regularly-scheduled study

sessions” must be included in the regular meeting schedule.⁸ Br. of Appellant at 29, 33. However inconvenient for CFJ, the passage does not say that. It says:

School boards call their meetings all sorts of things, *most of which do not have a legal impact under the OPMA*. Study sessions and board retreats are just two examples of board gatherings subject to the OPMA. 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 meeting notices each time the study session is held*. If study sessions are more infrequent, then the district must to through the special meeting notice process.

CP 1712 (emphasis added). Here, for its study sessions, the District followed the special meeting notice process as described above. This passage does not state, or even suggest, that an agency violates the OPMA by doing so.

Similarly, CFJ quotes a passage from the Attorney General’s Open Government Internet Manual as support of its position that study sessions, categorically, must be included in a regular meeting schedule. Br. of Appellant at 33. That passage says:

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

⁸ CFJ points to this guide as proof the District had “at least constructive knowledge” that it should have included its study sessions in the regular meeting schedule. Br. of Appellant at 21. This overstates the facts surrounding the manual. Although it sounds better for CFJ’s argument to suggest the manual is a school district or a board guide, it is not. The booklet was distributed at a conference attended by one board member. The District retrieved it from that board member’s possession and provided it to CFJ in response to a discovery request for all materials that any board member had ever received from any source, regardless of whether it was during their time of serving on the District’s school board. CP 2344-45 at ¶3.

meeting was to be held.

CP 1639. The District agrees. It treated its study sessions as special meetings and followed the statute's more demanding notice requirements for them. Neither the passage, nor the manual from which CFJ quotes it, suggests the term "notice" means "*regular meeting* notice." Rather, the materials support the District's position: notice in the form of *either* the regular meeting schedule *or* the individual notice of special meetings must be provided. CP 1641-43. Here, the District did the latter. CFJ's form-over-substance position is further evidence that it has lost sight of the OPMA's purpose.

While CFJ acknowledges that giving notice of special meetings is more demanding than treating them as regular meetings,⁹ it stresses that because the District held study sessions before most of its regular meetings, this fact alone qualifies the study sessions as regular meetings that must be included in the District's regular meeting schedule in Policy 1400.

This position illustrates how thoroughly CFJ misses the point. The OPMA promotes "public access to and participation in the activities of their representative agencies." *Mead School Dist. No. 354 v. Mead Ed. Ass'n (MEA)*, 85 Wn.2d 140, 145, 530 P.2d 302 (1975). Regardless of whether an agency describes its meetings as "regular" or "special," the OPMA requires

⁹ Br. of Appellant at 28, 30.

that the agency give notice of them, to allow the public access to the entities it created. If the meeting is at any time other than those listed in the regular meeting schedule, the agency must give special meeting notice. RCW 42.30.080; CP 1712. If the District held a study session on every occasion it held a regular meeting, without exception, it would have the option of modifying its regular meeting schedule to encompass those study sessions. It would also have the option of sending special meeting notices for those study sessions. *See* AGO 1971 No. 33, p. 16; RCW 42.30.080. The District would have to do one or the other, but could not fail to do both.

It is undisputed that the District did not hold a study session every time it held a regular meeting. CP 2345 ¶4; Br. of Appellant at 5-7. The District also held study sessions on occasions it did not have a regular meeting. CP 2426, 2510. That being the case, it would make little sense for the District to amend its regular meeting schedule to incorporate study sessions that do not always happen, or occasionally happen on days other than those listed in the regular schedule. The District is not required to incorporate the study sessions into the regular meeting schedule, as long as it otherwise provides notice of them as special meetings. RCW 42.30.080; CP 1712. The OPMA does not regulate what a public agency calls its meetings; it regulates whether the agency provides notice of them. The District did precisely that,

and thereby complied with the statute.

Amending the District's policy to treat its study sessions as part of its regular meeting schedule would have the ironic effect of reducing the notice the District provides of those meetings.¹⁰ No longer would the District have to send individual notices for each study session to the Board members or to the newspapers, which would presumably result in the newspapers no longer publishing them. The public would end up with less notice, not more. This result seems contrary to the spirit, if not the letter, of a statute designed to keep the public informed and engaged in its government's operations. As the trial court noted, this is an "interesting position" for an entity to take while it claims to be enforcing the "transparency requirements of the OPMA." RP Oct. 23, 2009 at 72-73; Br. of Appellant at 12.

Blindly, CFJ persists that the public receives no meaningful notice,¹¹ or no notice at all,¹² if the District complies with the special meeting notice requirements for its study sessions. According to CFJ, to give the public "constructive notice" of those meetings the District should instead include the

¹⁰ Additionally, the Board would be able to take action on topics it had not given the public any notice of in advance. The OPMA restricts a governing body from making "final disposition" on any matter that is not described as the "business to be transacted" in the special meeting notice. RCW 42.30.080. It does not so restrict the Board's actions in a regular meeting.

¹¹ Br. of Appellant at 1, 2, 29.

¹² Br. of Appellant at 1-2, 14-15, 22, 32.

study sessions in its regular meeting schedule, which appears only in the Board's policy. Br. of Appellant at 30. But CFJ did not bring this argument to the trial court's attention; therefore, this Court should disregard it. RAP 2.5(a); *Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn. App. 293, 312, 234 P.3d 236 (2010).

Even if this Court does consider CFJ's contention, this position deliberately ignores the fact that the District provided actual notice of the study sessions at issue here. Not only did the District send notice of each to the Everett Herald as required under RCW 42.30.080, but the newspaper, unsurprisingly, published them.¹³ CFJ's blank statement that "the public was not afforded notice of any of the study sessions" is simply false. Br. of Appellant at 32. Moreover, how a schedule of meeting times and location contained in a Board policy gives the public more "meaningful" notice of the District's study sessions than do individual notices that describe the particular topics the Board will address and are published in the local newspaper defies comprehension and CFJ noticeably fails to explain it.

From its argument that the study sessions must be considered regular meetings, CFJ leaps to the illogical conclusion that if they are not, the

¹³ CP 1147, 1154, 1162, 1170, 1179, 1188, 1195, 1203, 1210, 1221, 1226, 1231, 1244, 1256, 1271, 1276, 1295, 1308, 1319, 1522.

meeting will not be open to the public.¹⁴ This argument is reasonable only if one completely ignores the special meeting notices the District gave in this case. To ignore those and then suggest the only manner in which the public might find out about a study session is if they unknowingly stumble upon one is disingenuous at best.

If CFJ is troubled by the lack of an OPMA provision requiring a newspaper to publish the special meeting notices it receives,¹⁵ this Court is not the appropriate forum to address those concerns; the Legislature is. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 561-62, 27 P.3d 1208 (2001); *see also Sator v. State Dept. of Revenue*, 89 Wn.2d 338, 344, 572 P.2d 1094 (1977); *Peninsula Development Co. v. Savidge*, 163 Wash. 36, 39-40, 299 P. 654 (1931). It is even less appropriate to launch an appeal based on the false premise that the public receives no notice of special meetings; as demonstrated above, the opposite is true. Rather than leave the public to navigate through the District's web site for the dates and times of both its regular business meetings and study sessions, the District sent particular

¹⁴ *See* Br. of Appellant at 32-33 (“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, that 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 the 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.”).

¹⁵ Br. of Appellant at 1-2, 29, 30, 33.

notices of the study sessions that described the specific business to be conducted at them, and the notices promptly appeared in the local newspaper.

CFJ's continued attempt to paint the District as a devious violator of the OPMA fits neither the law nor the facts of this case. Nor does it serve the goals of the statute CFJ claims to champion. In an effort to resuscitate its dying study sessions claim, CFJ invites this Court to adopt a theory that would relieve the District of complying with the more demanding notice requirements of the OPMA, and would leave the public less informed and ostensibly less engaged. Despite CFJ's many protestations to the contrary,¹⁶ that cannot be the result the Legislature intended when it declared the statute's provisions must be "liberally construed" in favor of "public access to and participation in the activities of their representative agencies." *Mead School Dist.*, 85 Wn.2d at 145; RCW 42.30.910. This Court should decline CFJ's entreaty and affirm the trial court's order granting summary judgment in favor of the District.

B. The trial court did not abuse its discretion in calculating the attorney fee award.

Appellate courts review the determination of attorneys' fees for a "manifest abuse of discretion." *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*,

¹⁶ Br. of Appellant at 14-15, 33.

115 Wn.2d 364, 375, 798 P.2d 799 (1990), *modification denied*, 804 P.2d 1262 (1991). A trial court abuses its discretion only if “its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *Eugster*, 110 Wn. App. at 231. A trial court’s decision

is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

CFJ complains that the trial court awarded it fees for only “half the victories” it achieved at summary judgment. Br. of Appellant at 36. That “victory” pertained to the claim regarding 21 executive sessions listed in the amended complaint for which CFJ alleged that the District did not 1) begin in an open meeting; or 2) publicly announce the purpose of the session before convening in it. CP 966-67 at ¶¶1-3. As noted above, minimal work was necessary to establish those facts. CFJ admittedly used the SAO’s summary of its statewide OPMA audit to find the executive session issue, and then used the SAO’s work to sue the District for attorneys’ fees and penalties after the District had addressed and remedied its identified practice. CFJ only had to find the dates the District held executive sessions within the last two years

of when it planned to file the complaint, and then list those dates and allegations in it. There was little litigation necessary, as the District admitted the facts supporting those allegations from the outset. CP 1801-02 at ¶1.2; CP 1802-03 at ¶1.8; CP 1767-68 at ¶¶1.1-1.2; CP 966 at ¶1. Based on those admissions, the trial court granted CFJ summary judgment as to the 21 executive sessions. CP 966-67 at ¶¶1-2; RP Oct. 23, 2009 at 71-72.

CFJ first began stacking violations at the summary judgment stage of this litigation, when for the purpose of maximizing the civil penalties it was seeking against individual Board members it calculated the failure to convene into executive session from an open meeting, and at that time announce the purpose of the executive session, as two separate violations rather than one failure to properly convene into an executive session. CP 1628. On appeal, it has switched its rationale and has used those numbers to argue it is entitled to more attorney fees than the trial court awarded. CFJ now contends that the trial court's fee award should have reflected not 21, but 42 victories: one for each type of alleged violation per executive session for which the court granted it summary judgment. However, it cites no authority for this calculation and entirely fails to demonstrate that the court abused its discretion in determining the fee award amount.

1. The trial court was not required to count each alleged violation.

As it did before the trial court, CFJ simply concludes that it may recover for each alleged violation of the OPMA, rather than for each executive session that ran afoul to the statute. It cites no authority for this position; as such, this Court should disregard it. RAP 10.3(a)(6); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 84, 180 P.3d 874 (2008).

Even if this argument is entertained, CFJ's position fails. The OPMA does not specify the method by which violations of its provisions should be counted. The purpose of the statute is to "permit the public to observe all steps in the making of governmental decisions." *Eugster*, 110 Wn. App. at 222. A trial court's decision regarding attorney fees depends on "whether a proscribed *meeting* took place within the meaning of the OPMA." *Id* at 228 (emphasis added).

The statute itself provides that "[a]ll *meetings* ... shall be open and public and all persons shall be permitted to attend any *meeting* of the governing body[.]" RCW 42.30.030 (emphasis added). Additionally, individual members of a governing body risk being assessed civil penalties if they attend "*a meeting* of such governing body where action is taken in violation of *any provision of this chapter* applicable to [them], with knowledge of the fact that *the meeting* is in violation thereof[.]" RCW

42.30.120(1) (emphasis added). The attorney fees provision states that any “person who prevails against a public agency in any action in the courts for a violation of” the OPMA is entitled to recover the fees incurred in connection with the lawsuit. RCW 42.30.120(2). There is no indication the Legislature intended this language to allow the sort of “stacking” of violations per meeting CFJ proposes so it can increase its attorneys’ fee award.

In an analogous context, Washington courts have addressed the calculation of penalties under the Public Records Act, specifically whether fines should be assessed for each day a public agency improperly withholds records, or whether the fine should be assessed for each record withheld each day. Appellate courts have consistently held that trial courts do not abuse their discretion in assessing fines per day, not per individual record withheld each day. See *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 433-36, 98 P.3d 463 (2004); *Soter v. Cowles Publishing Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007); *West v. Port of Olympia*, 146 Wn. App. 108, 124, 192 P.3d 926 (2008), *review denied*, 165 Wn.2d 1050, 206 P.3d 657 (2009); *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010); *Bricker v. State, Dept. of Labor and Industries*, 2011 WL 4357760 at *4, – P.3d – (Sept. 20, 2011).

Likewise, here, the trial court did not abuse its discretion in using the number of executive sessions for which it granted CFJ summary judgment,

rather than the number of each alleged violation, to arrive at the attorney fee award. CFJ entirely fails to demonstrate otherwise.

2. The trial court's award was manifestly reasonable.

Under the lodestar method of calculating an attorneys' fees award, the trial court multiplies "a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-150, 859 P.2d 1210 (1993) ("*Scott Fetzer II*") (emphasis in original). To make an award, trial courts must be able to determine the "reasonable number of hours" counsel expended in "securing a successful recovery for the client." *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, *reconsideration denied*, 966 P.2d 305 (1998); *see also Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). This determination "necessarily requires that the court exclude any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims[.]" *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 282, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024, 230 P.3d 1038 (2010); *see also Mahler*, 135 Wn.2d at 434. Where a plaintiff does not prevail on a claim distinct from the successful one, "the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933

(1983). Moreover, Washington courts regularly consider the factors enumerated in the Rules of Professional Conduct 1.5(a)¹⁷ to guide their determination of reasonable attorneys' fees. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 595-96, 675 P.2d 193 (1983); *Allard v. First Interstate Bank of Washington*, 112 Wn.2d 145, 149-50, 768 P.2d 998, *amended in* 773 P.2d 420 (1989); *Mahler*, 135 Wn.2d at 434 n. 20; *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 75, 223 P.3d 1276 (2010).

Here, the trial court granted CFJ's summary judgment motion as to the 21 executive sessions listed in the amended complaint precisely because the District admitted to the underlying facts supporting that claim. CP 966-67 at ¶¶1-2; RP Oct. 23, 2009 at 71-72. That is, it only prevailed on the claim that the SAO investigated, that the District never contested, that pertained to a past practice remedied long before CFJ filed suit, and that even the SAO

¹⁷ Those factors are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; and (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices. RPC 1.5(a).

regarded as minor.¹⁸ That “victory” must be viewed in the context of the litigation as a whole, which was consumed by the contested special meeting claims and claims for individual penalties against school board members – claims CFJ lost before the trial court. In short, CFJ lost every claim in this case that was contested. In light of such limited success, the court was required to “award only that amount of fees that is reasonable in relation to the results obtained.” *Hensley*, 461 U.S. at 440.

CFJ asked the trial court to award it \$180,000. CP 717. Incredibly, it said of that total, the amount attributable to the uncontested executive session claim was \$137,000. *Id.* It was clearly within the trial court’s discretion to decide how best to award a reasonable amount of fees and not to take the amount CFJ requested at face value. *Deep Water*, 152 Wn. App. at 282 (explaining trial courts “must take an *active* role in assessing the reasonableness of fee awards,” and should “not simply accept unquestioningly fee affidavits from counsel.”)(quoting *Mahler*, 135 Wn.2d at 434-35) (emphasis in original); *Scott Fetzer II*, 122 Wn.2d at 152-53 (Supreme Court sharply reducing a “patently unreasonable” fee award using lodestar method considerations).

The detailed order reflects that the trial court exercised its discretion

¹⁸ See CP 2624 (SAO audit report describing exit items as “less serious issues informally conveyed to the District.”).

according to the appropriate legal standards described above. Specifically, the order explains the court used the following factors to calculate the award:

1. The executive session claims were not novel or complex, nor did they require a high degree of legal skills to successfully prosecute.
2. Any fee should reflect [CFJ's] limited success.
3. Duplicative and excessive time should be excluded.
4. Non-legal services performed by staff are not recoverable as fees.
5. Fees and costs incurred on the CR 11 motion are not recoverable as [CFJ] did not prevail on its claims in that motion.
6. A contingency premium is not appropriate in this case given the non-contested nature of the underlying facts in the 21 executive session claims.
7. The work on the executive session claims can and should be separated from the work on the other claims.
8. The court has utilized the lodestar method, multiplying a reasonable hourly rate ... by the number of hours reasonably expended on the matter[.]

CP 54-55. CFJ does not assign error to any of these factors.

To calculate a reasonable number of hours, the court determined CFJ's relative degree of success was 14.6 per cent, dividing the total number of claims CFJ alleged it brought (144) by the number it prevailed on (21). CP

54. Despite CFJ's suggestion to the contrary,¹⁹ the trial court applied that percentage only twice: first, to the number of hours CFJ alleged its attorneys spent on the summary judgment cross-motions, and then to "other time spent on the case" to reach a "reasonable amount of hours" spent in each respect. CP 55. It did not apply that percentage across the board. To the extent that CFJ argues the trial court should have doubled the degree of success to 29 per cent, it appears such an increase would apply only to those two aspects of the court's order, not to the entire fee award.

However, measured against the fact that the only success CFJ achieved was on the claim it performed minimal work on and the District never contested, the success rate the trial court used was eminently reasonable. Its method of calculating the fee award was entirely consistent with the lodestar standard. As such, the court did not abuse its discretion. *See Pham*, 159 Wn.2d at 538-40 (trial court did not abuse its discretion in awarding reduced amount of fees requested using lodestar method); *AGM*, 154 Wn. App. at 75, 79 (trial court did not abuse its discretion in awarding reduced amount of fees requested using RPC 1.5(a) factors and lodestar method); *West*, 146 Wn. App. at 124 ("Clearly, the trial court considered the various [lodestar method] factors ... Hence, we cannot say that the limitation

¹⁹ Br. of Appellant at 10 ("The trial court multiplied the attorney fees by 14.6%.").

imposed on attorney fees was an abuse of discretion.); *Sargent v. Seattle Police Dept.*, 260 P.3d 1006, 1018 (2011) (trial court did not abuse discretion where it “applied the lodestar method ... and awarded fees for the hours it found to be justified”).

Contrary to CFJ’s position that the trial court used “a flawed method of calculating fees,” the court simply followed the law and declined to adopt CFJ’s method. Br. of Appellant at 34. That is perhaps disappointing to CFJ, but it is not an abuse of discretion. Accordingly, this Court should affirm the trial court’s fee award.

C. Arlington School District is entitled to attorneys’ fees.

RAP 18.9(a) authorizes this Court to award the District the attorneys’ fees it incurred in responding to this appeal. An appeal is frivolous “when there are no debatable issues on which reasonable minds can differ, when the appeal is so devoid of merit that there is no reasonable possibility of reversal, or when the appellant fails to address the basis of the lower court’s decision.” *AGM*, 154 Wn. App. at 83.

CFJ’s arguments on appeal as to the study sessions fit that description. Without addressing the basis for the trial court’s decision, it merely repeats the arguments the court rejected, and seeks to take the District to task for complying with the special meeting notice provisions of the OPMA. On

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appeal, CFJ adds insult to injury and says the public received no notice of the District's study sessions when, in truth, it did. This continued conscious disregard of the facts and campaign for an odd legal result qualifies this appeal as frivolous. *See Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)(awarding fees under RAP 18.9(a) because the law was clear, appellant failed to cite contrary authority and its circuitous arguments ignored the facts in the record); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987); *Andrus v. State Dept. of Transportation*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005, 136 P.3d 759 (2006); *AGM*, 154 Wn. App. at 83-87.

As to its argument regarding the attorney fee award, CFJ cites no authority for its position and cannot show the trial court abused its discretion in calculating the award amount. Rather, the record clearly shows that the trial court considered the facts, including CFJ's limited success, and applied the pertinent legal standards. CFJ offers no reasonable basis to conclude otherwise. Therefore, the District is entitled to recover the fees it incurred on appeal. *AGM*, 154 Wn. App. at 86-87; *see also Johnson v. Jones*, 91 Wn. App. 127, 138, 955 P.2d 826 (1998)(awarding fees pursuant to RAP 18.9(a) because "there was no reasonable basis to argue that the trial court abused its discretion[.]")

III. CONCLUSION

The trial court did not err in granting the District summary judgment dismissal of the study session notice claim. It correctly determined the amount of fees CFJ was entitled to recover. CFJ offers no binding or persuasive argument on either issue to the contrary. Its appeal is frivolous. Consequently, this Court should affirm the trial court's order granting the District's summary judgment motion, affirm the trial court's order on attorneys' fees, and award the District the fees it incurred to respond to this appeal.

Dated this 31 day of October, 2011.



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CERTIFICATE OF SERVICE

I certify that on the date stated below, I caused a true and correct copy of this Brief of Respondent to be served on the following individuals in the manner indicated below:

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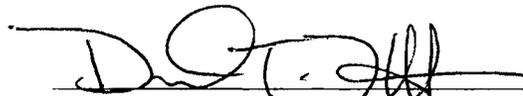
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APPENDIX TO RESPONDENT'S BRIEF

AGO 1971 No. 33 24, 27

Wash. AGO 1971 NO. 33 (Wash.A.G.), 1971 WL 122904 (Wash.A.G.)

Office of the Attorney General

State of Washington
AGO 1971 No. 33
October 29, 1971

MEETINGS -- PUBLIC -- APPLICABILITY OF OPEN PUBLIC MEETINGS ACT TO STATE AND LOCAL GOVERNMENTAL AGENCIES.

*I Applicability of open public meetings act of 1971 to state and local governmental agencies; agency actions or activities covered by the act; notice and other procedural requirements; sanctions or penalties for noncompliance; exemptions.

Honorable King Lysen
State Representative, 31st District
12040 Standing Court S.W.
Seattle, Washington 98146

Dear Sir:

By letter previously acknowledged, you have requested our opinion on the scope of the new open public meetings act - chapter 250, Laws of 1971, 1st Ex. Sess. You have particularly inquired as to whether, and to what extent, this act applies to

"... informal gatherings, briefing sessions, informal discussions, and other meetings where no formal vote is taken..."

We shall attempt to provide you with an answer to this question in the analysis below; and, in so doing we shall also seek to cover a substantial number of related questions involving this new law which we have received in one form or another during recent weeks. In this manner, hopefully, we can by this single opinion provide as complete a coverage as is possible of the many legal ramifications of the act.

ANALYSIS

I. Preliminary Remarks:

By its enactment of chapter 250, Laws of 1971, 1st Ex. Sess., the legislature basically replaced our earlier, 1953, public meetings act¹ with a comprehensive new act dealing with this subject. This new act was patterned closely after a California statute, commonly referred to as the "Brown Act";² and it also is somewhat similar to an open public meetings act which was passed several years ago in Florida.³ Fortunately, both of these comparable statutes have received a good deal of interpretive attention from both the courts and the attorneys general of their respective states, and we will refer to and, where appropriate, be guided by these interpretations throughout this opinion. Accord, *Jackson v. Colagrossi*, 50 Wn.2d 572, 313 P.2d 697 (1957), and authorities cited therein.

Before examining the provisions of the new act let us first, for comparative purposes, note the general thrust of the earlier law which it has replaced. Prior to August 9, 1971, when chapter 250, *supra*, became effective, the meetings of public agencies in this state - both state and local - were governed by chapter 216, Laws of 1953, a three section act codified as RCW 42.32.010 - 42.32.030. The first section of that act required that the adoption of any ordinance, resolution, rule, etc., be done at a meeting open to the public. If the date of that meeting was not fixed by law or rule, then in advance of the meeting there was to be notification to the press, radio and television in the county in which the meeting was to be held. The second section, RCW 42.32.020 specifically permitted the public agency to hold executive sessions and to exclude the public therefrom for all purposes other than "final adoption" of an ordinance, rule, regulation, etc. The third section, RCW 42.32.030, required that minutes be kept of all regular and special meetings, except executive sessions, and further required that those records be open for public inspection.⁴

*2 Under this **prior legislation** it was quite possible for a public agency to take all of the preliminary steps toward action, save only the **final act of formal** adoption of the rule or other directive, in sessions which were closed to the public. It is important that this be understood, because a legislature which enacts a new law such as that we are here considering must be presumed to have been aware of the scope and effect of its prior law on the subject and to have intended to accomplish a change therein. *Dando v. King County*, 75 Wn.2d 598, 452 P.2d 955 (1969).

With this in mind, we finish these preliminary remarks by making note of the legislature's own declaration as to the philosophy of the new act, which is concisely stated in § 1, as follows:

“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.”

II. The Act in Brief Outline:

The basic substantive requirements of chapter 250, supra, are set forth in §§ 3 and 6 thereof, as follows:

“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.” (Section 3.)

“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.” (Section 6.)

All of the key terms used in these two sections are expressly defined by § 2, as follows:

“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.

*3 “(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.”

Sections 4 and 5, together with §§ 7-10, largely detail the procedures to be followed both in calling and in conducting a public meeting under the act; § 11 deals with executive sessions; §§ 12 and 13 provide the remedies for violations of the act; and § 14 enumerates certain exceptions from the act's applicability, all as more fully described below in connection with the various specific questions to be considered in this opinion.

Section 15 contains the repealer of RCW 43.32.010 and 43.32.020, *supra*; § 16 gives the act its title - the "open public meetings act of 1971"; and § 17 contains an amendment to RCW 34.04.025, the notice requirement section of the state administrative procedures act, which will be noted further below.

Finally, § 18 sets forth the following significant statement with respect to the act's construction:

"The purposes of this 1971 amendatory act are hereby declared remedial and shall be liberally construed."

III. Questions to be Considered:

As stated at the outset we will, herein, cover not only the particular question which you have raised but, in addition, a number of related questions that have arisen under the new open public meetings act. For organizational purposes, these questions will be discussed under the following five major subject headings:

- A. What agencies are covered by the act?
- B. To what agency actions or activities is the act directed?⁵
- C. The procedural requirements of the act.
- D. The sanctions or penalties for noncompliance.
- E. The specific exemptions which the act contains.

We will proceed through these subjects in the order listed - posing and responding to each question to be considered within the body of the remainder of this opinion.

A. What Public Agencies are Covered?

Question (1):

Under the definition of "public agency" in § 2 (1), it is clear that chapter 250, *supra*, applies to both state and local governmental units. The first question to be considered, however, is whether an agency headed by a single individual is subject to the act.

Answer:

While the act defines "public agency" very broadly, all of the references in the operative sections of the act (§§ 3-13) refer to the "governing body" of a public agency. That term defined in § 2 (2) is as follows:

*4 "Governing body" means the multimember board, commission, committee, council or other policy or rule-making body of a public agency."

We have no doubt that the adjective "multimember" modifies all the nouns which follow it in this definition. In our opinion neither the structure nor the context of the statute permits any other construction. Furthermore, this is logical and consistent with the over-all purpose of the act, because only a multimember governing body can possess the capability of engaging in and taking the collective sort of "action" which is defined in subsection (3) of § 2, *supra*.

Thus, we conclude that the act applies to multimember state boards and commissions such as the liquor control board, utilities and transportation commission, highway commission, public employees' retirement board, and the like.⁶ At the local

level it applies to such groups as boards of county commissioners, city councils, school boards, public utility district boards, etc. On the other hand, where the law governing a particular public agency vests the full responsibility and authority for the agency's decisions in a single individual (e.g., state director of revenue, employment security, social and health services, etc.) the act does not apply, since such individual is not a "governing body," within the definition of the act.⁷

In connection with this conclusion we should, however, add the following two cautionary notes:

First, some agencies which are headed by a single officer may have "subagencies" within the meaning of § 2 (1) (c), as quoted above - which subagencies may, themselves, have a multimember governing body. In that event, the governing body of the subagency would be subject to the act even though the principal agency would not.

Second, we should point out that those state agencies subject to the provisions of the Administrative Procedures Act, chapter 34.04 RCW, are required to give notice in accordance with the open meetings act of the adoption of rules and regulations (see, § 17, discussed below, which amended RCW 34.04.025). This notice requirement applies to any agency irrespective of whether it is headed by a multimember governing body or a single member.

Question (2):

Are advisory committees, boards and commissions subject to the provisions of the open meetings act?

Answer:

There are in this state a multitude of various statutory and ad hoc advisory committees and groups. We have seen that in order to be subject to the provisions of the act any such body must be a "public agency" with a "governing body." With regard to the first of these requirements, any state board or commission created by or pursuant to statute is clearly a "public agency" under § 2 (1) (a), supra, and this term also includes 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,..." (Section 2 (1) (c), supra.) We read the phrase "by or pursuant to statute..." in these two subsections as meaning that a statute or ordinance has actually created the committee or has specifically authorized its creation. Therefore, we do not believe that this definition would include those discretionary ad hoc groups which may be formed pursuant to a general, implied executive authority instead of a specific statute or ordinance.

*5 As for the matter of a governing body, we note that the definition in § 2 (2) speaks of boards, commissions, committees, councils or other policy or rule-making bodies of a public agency. The clear inference to be drawn from the word "other" in this context is that the phrase "policy or rule-making" modifies those terms which precede it as well as those which follow. See, State v. Henrich, 93 Wash. 439, 161 Pac. 70 (1916), and cases discussed therein, involving an application of the doctrine of construction commonly referred to as ejusdem generis. Thus, even if a particular advisory committee is "created by or pursuant to" a statute or ordinance, it will still not be governed by the act unless it possesses some aspect of policy or rule-making authority. In other words, its "advice," while not binding upon the agency with which it relates (otherwise it would not be an advisory committee at all), must nevertheless be legally a necessary antecedent to that agency's action; e.g., as in the case of a planning commission which, we note, is expressly included as a "public agency" in § 2 (c), supra. See, AGO 1971 No. 8, copy enclosed, wherein we reviewed the relationship between a county planning commission and a board of county commissioners.

Question (3):

When a governing body of a public agency forms a subcommittee composed of members of the governing body, is this subcommittee subject to the provisions of the open public meetings act?

Answer:

Such a subcommittee is normally not created “by or pursuant to a statute, ordinance or other legislative act” and, therefore, it would not be included within the definition of a public agency. If it is not a “public agency,” then even though it has a multimember composition its activities would not be subject to the provisions of the act. However, if the subcommittee membership is such that it comprises a majority of the governing body, then the “subcommittee” would have to be considered as the governing body itself, under the act, and would then be subject to all of the notification and meeting requirements of the act. See, 32 Ops. Cal. AGO 240, and Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal.Rptr. 480, 486 (Ct. of App. 1968).

Moreover, we would caution against any attempts to avoid the requirements of the act by the delegation of agency functions to a nonstatutory subcommittee not constituting a majority of the members of the governing body. While this might produce an avoidance of the open meetings act, it could also well invalidate the agency's action under the principles of unauthorized delegation of agencies' powers. See, Roehl v. Public Utility Dist. No. 1, 43 Wn.2d 214, 261 P.2d 92 (1953). On the other hand, if the delegation is authorized then, in all probability, the agency to which the power to act for the governing body has been delegated will, itself, thereby become a “governing body” under the act - if it is multimember in composition.

*6 Question (4):

Does the exemption for the legislature also apply to legislative committees?

Answer:

The definition of “public agency” in § 2 (1), supra, specifically excludes from coverage “courts and the legislature.” The legislature is obviously a collective body consisting not only of the house of representatives and the senate, but also of the committees of each of those houses and various interim committees - some of which are joint in nature. The exemption for the legislature is only meaningful if it applies to these committees, both while the legislature is in session and during the interim periods, when in performance of the legislative functions with which they have been vested. See, State ex rel. Hamblen v. Yelle, 29 Wn.2d 68, 185 P.2d 723 (1947); State ex rel. Robinson v. Fluent, 30 Wn.2d 194, 191 P.2d 241 (1948). We therefore conclude that such legislative committees are exempt from the purview of the statute.

On the other hand, there are certain other committees which consist of both legislators and nonlegislators and which perform administrative or executive rather than legislative functions.⁸ Such committees cannot, in our judgment, be regarded as a part of the legislature merely because composed, in part, of legislators; therefore, they do not fall within the ambit of the exemption.

B. To What Agency Actions or Activities is the Act Directed?

We will begin our consideration of this general question with our response to the specific inquiry set forth in your opinion request, as follows:

Question (5):

Does the term “meeting” (as used in §§ 3 and 6, supra), include such things as

”... informal gatherings, briefing sessions, informal discussions, and other meetings where no formal vote is taken...”?

Answer:

The basic thrust of the new act is, of course, directed toward meetings of the governing bodies of public agencies. See, §§ 3 and 6. The term “meeting” is defined by § 2 (4) as “meetings at which action is taken.” Thus, if there is no “action” there is not a meeting within the ambit of the act, even though the members of the governing body may be physically in each other's presence. Section 2 (3) defines action as:

"... 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." (Emphasis supplied.)

Two principal observations must be made with regard to this definition. First, it explicitly states that "action" is not limited to the list of examples; hence, the list is clearly not all-inclusive. Second, each of the enumerated examples refers to some form of collective commitment, promise, or the like, for either the present or future transaction of official business.

*7 In posing your question you have directed our particular attention to the California open meetings statute⁹ and to the recent decision of the California Court of Appeals in Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, *supra*. In that case, the court answered in the affirmative a question quite similar to that which you have asked us. We shall first review the decision itself, and then comment as to its pertinence with regard to the meaning to be given to the comparable (but not identical) Washington act.

The Sacramento case was precipitated by an informal luncheon meeting of the members of a county board of supervisors, together with certain other public officials and labor union representatives, for the purpose of discussing a pending strike by the county's social workers. The news media sought but was denied access to this meeting, and it thereafter obtained an injunction restraining the board of supervisors and its committees from holding any further closed meetings at which three or more of the five members of the board were present. The appellate court, in substantially affirming the injunction, broadly interpreted the California statute in favor of permitting public access to information - reasoning as follows:

"... Attempts to define 'meeting' by synonyms or by coupling it with modifying adjectives involve a degree of question-begging. Interpretation requires inquiry into the Brown Act's objective and into the functional character of the gatherings or sessions to which the legislature intended it to apply.

"There is nothing in the Brown Act to demarcate a narrower application than the range of governmental functions performed by the agency. Although the Brown Act artificially classifies it as a legislative body, a board of supervisors actually performs legislative, executive and even quasi-judicial functions. (Chinn v. Superior Court (1909) 156 Cal. 478, 481 [105 P. 580]; Fraser v. Alexander (1888) 75 Cal. 147, 152 [16 P. 757].) Section 54950 is a deliberate and palpable expression of the act's intended impact. It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either.

"To 'deliberate' is to examine, weigh and reflect upon the reasons for or against the choice. (See Webster's New International Dictionary (3d ed.)) Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. (Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 635 [12 Cal.Rptr. 671, 361 P.2d 247].) Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." (69 Cal.Rptr. 480, 485.)

*8 And, further on in its opinion, the court expressed itself as follows:

"In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board members designed for the

discussion of public business. The Elks Club luncheon, attended by the Sacramento County Board of Supervisors, was such a meeting.” (Page 487.)

Similar interpretations of the California statute have consistently been made by the California attorney general. See, e.g., AGO No. 59-180 (October 4, 1960), discussed further below, wherein it was concluded that consultations between a city council and the city attorney regarding the legal implications of proposals before the council must take place in open session. Likewise, in AGO No. 63-79 (September 24, 1963), it was concluded that council meetings with the city manager, planning director and city attorney must be treated as public meetings even though the council members may not have intended to act at the time they were conferring. And in AGO 63-82 (January 22, 1964), it was stated that luncheons attended by a city council and others to discuss items of interest to the city are subject to the California act.

Because the California act was not copied verbatim by the Washington legislature, neither the court decision in the Sacramento case nor the interpretation placed on that act by the attorney general comes squarely within the purview of the rule enunciated by our own court in Jackson v. Colagrossi, *supra*, that

“... the adoption of a statute of another state likewise carries with it the construction placed upon such statute by the courts of that state....“

However, these California authorities are, nevertheless, quite persuasive in view of the over-all similarities between our act and the California act. Initially to be noted is § 54950, the first codified section of the California act, which is identical to § 1, the “declaration of purpose” section of our act which is quoted at the beginning of this opinion. This section, it will be recalled, states, in material part:

“... It is the intent of this act that their [i.e., governing bodies] actions be taken openly and that their deliberations be conducted openly.” (Emphasis supplied.)

*9 Secondly, although the term “meeting” is not defined in California’s act, the term “action taken” is - as follows: “As used in this chapter, ‘action taken’ means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.”

The only difference between this definition and our definition of “action,” *supra*, is that ours includes, at the outset, the additional phrase “‘Action’ means the transaction of the official business of a public agency including but not limited to...” (Emphasis supplied) the list of activities set forth in the California statute. To this extent, it thus seems apparent that the definition of “action” in the Washington statute is broader than that in the California statute. The Washington definition is open-ended, in that it includes but is not limited to a list of examples. In contrast, the California statute makes a complete listing of what constitutes action.

Thirdly, although (as discussed further below) the California act does not purport to invalidate final agency actions which have been taken in violation of the act as does our § 6, *supra*, it does contain a penalty section comparable to our § 12 (also discussed below); see, § 54959, which provides:

“Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor.”¹⁰ (Emphasis supplied.)

Because the California court in the Sacramento case, *supra*, was merely reviewing an injunction action rather than a criminal prosecution under this section,¹¹ it might be suggested that the court did not there reach the question of whether the type of meeting against which the injunction was obtained was one “where action is taken” - thus rendering the case inapplicable in terms of assisting us in interpreting our own similar definition of “action” in § 2 (3), *supra*. However, this argument

overlooks the emphasis which the California court, in distinguishing the earlier case of Adler v. City Council of City of Culver City, 184 C.A.2d 763 [[184 Cal.App.2d 763]], 7 Cal.Rptr. 805 (1960), placed on the fact that the “action taken” definition had been added to the original (1953) act by a 1961 amendment. See, 263 C.A.2d at 46 [[263 Cal.App.2d 46]](69 Cal.Rptr. 480), where the court said:

“Although all five of the county supervisors were present at the Elks Club luncheon on February 8, 1967, and although the subject or discussion was a matter of county governmental interest, defendants contend that the trial court erred in viewing it as a meeting within the scope of the Brown Act. They rely upon Adler v. City Council of Culver City, *supra*, 184 Cal.App.2d at pp. 770-774, which held the statute applicable only to formal meetings for the transaction of official business, inapplicable to informal sessions. The Newspaper Guild, on the other hand, argues that the 1961 amendments of the Brown Act were designed to nullify the Adler decision. (See 42 Ops. Cal.Atty. Gen. 61 (1963); Comment, Access to Governmental Information in California, 54 Cal. L. Rev. 1650, 1653-1655 (1966); cf. Herlick, California's Secret Meeting Law, 37 State Bar J. 540 (1962).”

*10 In approving of the trial court's entry of the injunction the court of appeals, in effect, agreed with the plaintiff Newspaper Guild and rejected the defendant's reliance on the earlier (pre-1961) Adler case. In other words, even though the court in Sacramento was not reviewing a criminal proceeding under § 54959, *supra*, it nevertheless very clearly did base its decision that the informal meeting in question was violative of the act upon the proposition that by its addition of the broadly defined term “action taken,” the legislature had manifested an intent to overcome the Adler decision and to make the act applicable to such meetings.¹²

It is for all of these reasons that, while not binding (as aforesaid), we regard this California decision, along with the above-noted attorney general's opinions, as being quite persuasive in terms of the interpretation to be given to our own act. In addition, we note that the California result is very similar to that which has been reached in Florida under that state's open meetings act.

The Florida statute (Fla. Stats. § 286.11) requires that “all meetings... at which official acts are to be taken” must be open public meetings. Like that of California, the Florida courts have broadly read this statute so as to permit public access to the meetings of public agencies. In Times Publishing Company v. Williams, 222 So.2d 470 (1969), a Florida court of appeals expressed itself as follows:

“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 statute before us. 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. It follows that each such step constitutes an ‘official act,’ an indispensable requisite to ‘formal action,’ within the meaning of the act.

“We think then that the legislature was obviously talking about two different things by the use of these phrases, and we can't agree with appellee that ‘official acts’ are limited to ‘formal action,’ or that they are synonymous. Clearly the legislature must have intended to include more than the mere affirmative formal act of voting on an issue or the formal execution of an official document. These latter acts are indeed ‘formal,’ but they are matters of record and easily ascertainable (though perhaps ex post facto), notwithstanding such legislation; and indeed the public has always been aware sooner or later of how its officials voted on a matter, or of when and how a document was executed. Thus, there would be no real need for the act if this was all the framers were talking about. It is also how and why the officials decided to so act which interests the public. Thus, in the light of the language in Turk, *supra*, and of the obvious purpose of the statute, the legislature could only have meant to include therein the acts of deliberation, discussion and deciding occurring prior and leading up to the affirmative ‘formal action’ which renders official the final decisions of the governing bodies.

*11 “It is our conclusion, therefore, that with one narrow exception which we will discuss later, the legislature intended the provisions of Chapter 67-356 to be applicable to every assemblage of a board or commission governed by the act at which

any discussion, deliberation, decision, or formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body....”

The Florida Supreme Court in Board of Public Instruction of Broward Co. v. Doran, 224 S.2d 693 [[224 So.2d 693]], 699 (1969), has indicated essentially this same view, and the Florida attorney general has issued numerous opinions similar to those of the California attorney general; these include Florida AGO No. 071-59 (June 17, 1971) and No. 071-32 (March 3, 1971).

In the final analysis, we can simply discern no likelihood that our court, when called upon to consider the scope of the new Washington open meetings act, will take any narrower view than have the courts and attorneys general in California and Florida. The similarities between the respective acts, both in terms of policy and technical content, far outweigh such dissimilarities which exist.

Therefore, directing ourselves to your question as above set forth, it is our considered opinion that if a majority of the members of a governing body should meet, even informally, in order to consider matters which are within the ambit of the agency's official business, then there will occur a “meeting at which action is taken” under the Washington act. From this it follows that such informal meetings as you have described are subject to the provisions of the Washington open meetings act.

With this broad interpretation of “action” there will obviously be some concern expressed by members of the various governing bodies about their attendance at the same social functions. However, nothing in the act purports to regulate or condition strictly the attendance at such functions. A social function would only be reached under the act if it is scheduled or designed (at least in part) for the purpose of having the members of the governing body discuss official business either between themselves or with other interested parties. As stated by the California Court of Appeals in Sacramento Newspaper Guild, supra, in a footnote on page 50 (quoting from a comment appearing in 54 Cal. Law Rev. 1650-51):

“There is a spectrum of gatherings of agency members that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word “meeting.” Requiring all discussion between members to be open and public would preclude normal living and working by officials. On the other hand, permitting secrecy unless there is formal convocation of a body invites evasion.’ Although one might hypothesize quasi-social occasions whose characterization as a meeting would be debatable, the difference between a social occasion and one arranged for pursuit of the public's business will usually be quite apparent.” (Emphasis supplied.)

*12 Question (6):

Are consultations with legal counsel subject to the act?

Answer:

There is no specific exemption in the open public meetings act for consultations with legal counsel. However, the state of Washington does have a privileged communications statute, RCW 5.60.060, which provides in subsection (2):

“An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment.”

Subsection (5) provides:

“A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.”

Several years ago the California attorney general, in AGO No. 59-180 (October 4, 1960), supra, stated:

“City councils are engaged regularly in deliberating or acting upon ordinances, regulations, etc., where the legal implications of the subject matter are as important for a proper decision as factual or any other information in order to form an intelligent and proper decision. Thus, the city attorney may be called upon to explain the legality or legal implications of a proposal before the council. In such instances the public has a right to know all of the factors considered by the council, including the legal advice, if any, received. The public is entitled to know all of this in order to assure that the representatives are acting in what it considers to be the public good. It is the sense of the Brown Act that such types of meetings be open to the public.

“However, there is no indication in the language used in the Brown Act that its purpose is to grant in any fashion an advantage to an adversary of the people. It is one thing to require public meetings so that the public be informed about the deliberations as well as the actions of its representatives and quite another to deliberately give an advantage to an adversary of the people by extending the word ‘meeting’ used in the act to include every conference between a city council and its city attorney which, if open, would not be to the people’s interest but to the interest of the people’s adversary. It would seem that before interpreting the sections to include such a conference the Legislature should clearly say so in unequivocal language.”

The same conclusions were reached by the California court of appeals in Sacramento Newspaper Guild, *supra*, at p. 489, wherein the attorney-client privilege was discussed as follows:

“... The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed.... If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value. Considered in isolation from the Brown Act, this assurance is available to governmental as well as private clients and their attorneys.

*13 ”...

“... Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, *supra*, 255 A.C.A. at page 74, 62 Cal.Rptr. at page 821 [[255 C.A.2d 51, 62 Cal.Rptr. 819]]: ‘Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent’s presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.’

“Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by indiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney’s professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public’s ‘right to know’ compelled admission of an audience, the ringside seats would be occupied by the government’s adversary, delighted to capitalize on every revelation of weakness....” (Emphasis supplied.)

The Florida court of appeals in Times Publishing Co., *supra*, reached a similar conclusion on a different rationale.

In light of the privileges set forth in RCW 5.60.060, *supra*, and the interpretation of the California act which is substantially the same as ours, we would conclude that there remains a modified attorney-client privilege for the governing body of a public agency in this state. This privilege cannot be asserted by the body for all legal advice which it receives, particularly that which fits within the concept of deliberations of the body. However, those sensitive areas of legal advice, particularly

with reference to pending or contemplated litigation, settlement offers and similar matters, can, in our opinion, be discussed between the governing body and its attorney in a closed session.

Question (7):

*14 Are labor negotiations subject to the provisions of the open public meetings act? ¹³

Answer:

If the collective bargaining negotiations are conducted by a body which is not a "governing body" as previously discussed in this opinion, then the act does not apply. For example, when one or two members of a five-member governing body are designated as a negotiating committee, then their activities in this capacity are not subject to the act. However, the final adoption or ratification of the collective bargaining agreement itself would, of necessity, be by the governing body - and thus, that adoption or ratification would have to be at a public meeting. The problem of negotiating in a "fishbowl" will, therefore, only be present when the negotiating group is a governing body or at least a majority thereof. Accord, the following discussion between Representatives Thompson and Grant during debate on final passage of Senate Bill No. 485 in the House of Representatives on May 10, 1971:

"POINT OF INQUIRY

"Mr. Thompson yielded to question by Mr. Grant.

"Mr. Grant: 'Mr. Thompson, for the purposes of the record and the journal, is there anything in this act as far as you can tell that would prohibit closed sessions for the purpose of negotiating contracts of any public body?'

"Mr. Thompson: 'Not, Representative Grant, if they are conducted by representatives of the governing body of a public agency. When, following the conclusion of negotiations, the recommendations of negotiators are brought to the governing body for approval, this should be done, under the provisions of this act, in public.'"

As will be noted further below in dealing with the act's exemptions, the legislature has provided no exemption for negotiations in collective bargaining in our act - although one was proposed during proceedings in the House of Representatives on April 20, 1971. ¹⁴ Furthermore, there is no provision in any other Washington law specifically creating any form of privilege for these collective bargaining negotiations. In both of these respects we are in the same situation as are Florida and California.

In the first of these two states we are aware of two authorities which have considered this question: (1) A trial court, and (2) the Florida attorney general. The first was the trial court opinion in Bassett v. Braddock, No. 71-1462, Cir. Ct. of 11th Judicial Dist., Dade County, Florida, dated March 25, 1971. In that case the court found that the conduct of collective bargaining negotiations in a public fishbowl would seriously undermine the entire process and would place the public agency and taxpayers at a distinct disadvantage in the process. Therefore, it permitted closed-door negotiations. During the same month the Florida attorney general, however, in opinion No. 071-32 (March 3, 1971), found that although there may be a need for closed-door collective bargaining, no provision had been made for it in the law and therefore it would require legislative action to permit such activity.

*15 The California attorney general, in AGO 68-77 (October 8, 1968), has concluded that collective bargaining negotiations which involve a conciliation proceeding may be conducted behind closed doors. The basis for that conclusion was that the California Labor Code, § 65, makes the records of a conciliation proceeding by the director of industrial relations confidential. The attorney general concluded that this confidentiality would apply even if a participant in the conciliation proceeding was a public agency governed by the open meetings act.

However, by the limited nature of this response it is apparent that the attorney general of California considered other collective bargaining negotiations by a governing body to be subject to the open meetings law. While we may question the

public policy requiring collective bargaining negotiations by governing bodies to be conducted in a fishbowl, nevertheless we believe that this conclusion is required by the existing law as passed by the legislature.

C. Procedural Requirements:

Question (8):

What is a regular meeting and what notification is required for regular meetings?

Answer:

We have earlier seen that § 6 of the open public meetings act provides that:

“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.”

To be read in conjunction with this section are §§ 7 and 8 dealing, respectively, with “regular” meetings of a governing body (“the date of which is fixed by law or rule”) and “special” meetings (“a meeting of which notice has been given according to the provisions of this act”). We shall deal, first, with § 7, which provides:

“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.”

In essence, this statute (along with § 6) defines a regular meeting as one “the date of which is fixed by law or rule” (§ 6) and with regard to which the governing body has provided “... the time for holding... by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of the business by that body....”

*16 Except to the extent required by § 9 (discussed below), relating to adjournments and by § 17 involving rule-making proceedings under the state Administrative Procedures Act (Title 34 RCW), the act contains no notice requirements for a regular meeting of the governing body of an agency. That omission is consistent with the prior statute, RCW 42.32.010, which only required notification of those meetings which were not held at a regularly scheduled time. It is in light of this exemption from specific notification requirements that the term “shall provide the time for holding regular meetings” appearing in § 7 is to be considered.

We do not read this provision as requiring all governing bodies of public agencies to hold regular meetings; instead, consistent with the terms of § 6, whether or not they do will be dependent upon the “law or rule” (including the agency's own rules) which governs each separate agency. What § 7 does mean, in our opinion, is that if 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.

In this connection it is notable that there is no sanction in the act for a failure to establish a regular meeting schedule. However, it is to be understood that the consequence of failing to do so is to make all meetings of the agency's governing body “special” meetings subject to the notice requirements of § 8 of the act, next to be considered.

Question (9):

What are the notice requirements for a special meeting?

Answer:

Section 8 of the act covers this subject as follows:

“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.”

*17 Under this statute there are two separate categories of notice; one involving notice to the members of the governing body itself, and the other relating to notice to certain news media. We will discuss these two categories in that order.

(a) Notice to the Members:

Section 8, supra, requires that a written notice be sent to each member of the governing body of a public agency at least twenty-four hours in advance of the time of a special meeting. Such notice must indicate the time and place of the meeting and the business there to be transacted. The description of the business to be transacted is important because, although the governing body may discuss other matters, it is specifically precluded by § 8 from making any final disposition of those matters which are not included within the description of the business to be transacted.¹⁵

Under § 8, this written notice to the members of the governing body may be waived in two ways: First, any individual member may, in writing at or prior to the time of the meeting, waive notification. This written waiver can either be for a specific meeting or for a continuing series of meetings. Secondly, a member who is actually present at a meeting when it convenes waives the written notification requirements of § 8, for we read this section as automatically resulting in a waiver by physical appearance.

(b) Notice to News Media:

The same notice as is to be given to the members of the governing body also must be given at the same time and in the same manner

“... 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....“

This sentence structure raises an ambiguity as to whether the condition of a written request for notification applies only to local television and radio stations, or to local newspapers as well. On the one hand, applying a technical rule of grammar and of statutory construction known as the “last antecedent” rule, a conclusion could well be reached that only the local radio and television stations are required to ask for notice, and that local newspapers are to receive it automatically. See, Davis v. Gibbs, 39 Wn.2d 481, 236 P.2d 545 (1951); Schneider v. Forcier, 67 Wn.2d 161, 406 P.2d 935 (1965). However, this rule is by no means conclusive, as the above authorities recognize. Moreover, were it to be applied here the result would be that each agency governed by the act would be put to the task, before every special meeting, of deciding which newspapers are “local” - and hence entitled to notice - and which are not. Should this term be construed to cover only the newspapers published in the immediate city or county in which the agency is located or should it be taken to cover those published in the

area in which the agency meeting is held? Or, possibly, would it include all local newspapers and radio stations within the state, or (even more broadly) a multistate region such as the Inland Empire?

*18 While arguments may be framed to answer these questions - perhaps in terms of the territorial jurisdiction of the particular agency, whether statewide or merely county, district or city-wide - the risk of error, primarily that of omission, leads us to reject this approach to the statute. Instead, it appears to us that the most reasonable way to resolve this ambiguity is to read the written request requirement as applying to all three categories of news media - radio, television and newspapers. By reading the statute in this manner, we avoid uncertainty as to which newspapers are entitled to notice of a meeting - concluding instead that any newspapers of general circulation in the area served by the agency, like any such radio or television stations, can obtain notice of those meetings in which they are interested by simply requesting it. Conversely, the agency involved can very easily maintain a file containing such requests and know with certainty who it must notify. Notification to those who have requested it can then be made almost automatically before each special meeting of the subject agency, and compliance with the notification requirements of § 8, supra, will not present a problem.

Lastly, it is to be noted that the written notification of special meetings can be dispensed with by an agency when there is "... 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."

Question (10):

Are the governing bodies required to give notice to persons other than the news media or members of the body?

Answer:

The act only requires that the governing body give notice of its special meetings to the newspapers and radio and television stations which have requested to be notified and to members of the governing body itself. There is no affirmative obligation to give notice to other persons or groups - although we would hasten to add that, conversely, there is nothing in the statute which would preclude the body from giving such notices.

In addition, depending upon what action the agency is planning to take at its meeting, there may be special notification requirements in other statutes or ordinances dealing with the particular body. Those notice requirements, of course, will still have to be complied with regardless of the requirements of the open public meetings act itself. For example, under the state Administrative Procedures Act, RCW 34.04.025 (which was amended by § 17, chapter 250, supra), all state agencies are required to mail a notice to all persons who have made a timely request for advance notification of rule making by the agency. There is a similar requirement under the higher education administrative procedures act, § 3, chapter 57, Laws of 1971, 1st Ex. Sess.

Question (11):

Are adjournments permitted? If so, what notification requirements are applicable?

*19 Answer:

Section 9, chapter 250, supra, expressly permits the agency to adjourn any of its meetings, regular or special, as follows:

"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.”

The notice requirements to be met under this section may be summarized as follows:

- (1) If the meeting was a regular or an adjourned regular meeting and was adjourned by the clerk or secretary of the governing body because all of the members were absent, the clerk or secretary is to give the written notice of the adjourned meeting to the members of the body and news media as is required by § 8, discussed above, with regard to special meetings; and
- (2) In addition, in the case of any adjournment (whether of a regular or special meeting), a copy of the order of adjournment must be posted immediately after the adjournment near the door where the meeting was being held, setting forth the time and place at which the meeting will reconvene.

Another provision relating to adjournments is to be found in § 5 of the act, dealing with disturbances and the removal of individuals who are disrupting a meeting; however, this statute is more germane to the question of exclusions of persons from a meeting and will be considered later in this opinion under that heading.¹⁶

Lastly, with regard to this question, note should also be made of § 10 of the act, dealing with the continuance of hearings, which provides as follows:

“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.”

*20 Question (12):

Are executive sessions permitted? If so, what are the notification requirements?

Answer:

Section 11 of the act deals with this subject, as follows:

“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.”

Thus, the act specifically permits the holding of executive sessions which are sessions closed to the public. However, the subject matter of those sessions is limited to the following:

- (1) Matters affecting national security;
- (2) The selection of a site or the purchase of real estate when publicity regarding such consideration would cause a likelihood of increased price;
- (3) 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.

If the subject matter to be considered by the public agency falls within one of these three categories, there can be an executive session of its governing body. However, this executive session can only be held "during a regular or special meeting." If an executive session is held in conjunction with a regular meeting it thus follows that there are no notification requirements since, as previously discussed, there are no notice requirements for the regular meeting itself. However, if the executive session is held in conjunction with a special meeting, then the notice requirements for special meetings are, in our judgment, applicable. Accord, California AGO 63-133 (February 18, 1964), wherein § 54957 of the California Government Code, which is virtually the same as § 11, chapter 250, supra, was considered.¹⁷ Nevertheless, since it would obviously defeat the purpose of this statutory permission for executive sessions if explicit notice was required as to what would be considered during such a session, we would conclude that it is sufficient that the agency simply state in the notice of the special meeting that it plans, for example, to consider the selection of a site, or the employment of an officer, etc., without giving further details. Unless it thus gives notice of the subject matter to be considered in executive session, the governing body will be precluded by § 8, supra, from taking any final action thereon.

*21 Question (13):

Can there be qualifications placed on the public's attendance at a public meeting?

Answer:

The general answer to this question is that there cannot be qualifications established for attendance at a public meeting. Section 4 of chapter 250, supra, specifically states that:

"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."

It is to be noted that this section is identical to § 54953.3 of the California Government Code, which was recently construed by the California Court of Appeals in Baron v. City of Los Angeles, 82 Cal.Rptr. 515 (1969). In that case the court concluded that there was no conflict between a lobbyist registration requirement and the California open meetings act. The court specifically recognized that registration could not be required for physical presence at a public meeting, but held that a lobbyist registration requirement involved a registration of those who are representing others to influence municipal action, and not merely a registration of lobbyists for their own physical presence at a public meeting.

Our legislature has also recognized that some individuals may attend a public meeting for the purpose of disrupting the public meeting. By § 5 of chapter 250, supra, it has provided that:

"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."

This section specifically recognizes the authority of a governing body to have individuals removed who are disrupting its meeting, and, if need be, to adjourn the meeting to another location. In the event of such an adjournment or continuance, representatives of the news media are to be permitted to attend unless they were among those participating in the disturbance. By virtue of § 5, supra, it is also clear that our 1969 criminal trespass statute (RCW 9A.83.080) can be invoked to protect meetings held under the open public meetings act.

Question (14):

Can the members of the governing body vote by secret ballot at a public meeting?

*22 Answer:

The open public meetings act states in § 1,

"... The people insist on remaining informed so that they may retain control over the instruments they have created."

A secret ballot would defeat the accountability of individual members of the governing body to the public since their vote would be an "anonymous" vote. We would therefore conclude that a secret ballot is not permissible and would note that this conclusion is in accord with the opinion of the Florida attorney general, opinion No. 071-32, issued on March 3, 1971.

D. Sanctions:

Question (15):

Are members of a governing body of a public agency personally liable for violations of the act of which they have knowledge?

Answer:

Some states having open meeting acts provide for both a criminal sanction and injunctive relief.¹⁸ The Washington act makes no provision for criminal sanctions; instead, our act only provides for the imposition of civil penalties against members of the governing bodies knowingly involved in a violation of its requirements. See, § 12, which reads as follows:

"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."

However, beyond this penalty itself it is important to note that, in order to provide an enforcement mechanism the legislature has provided in § 12 that if any person institutes an action to enforce the civil penalty therein provided for, and the court imposes this penalty, then the plaintiff shall be awarded the reasonable expenses of the suit, including attorney's fees. Furthermore, those members of the particular governing body found to be in violation will be personally liable for their pro rata share of those expenses.

Question (16):

Who has standing to commence a mandamus or injunction action under the act?

Answer:

Section 13 of the act clearly provides that:

"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."¹⁹ (Emphasis supplied.)

*23 Question (17):

What is the effect of action taken in violation of the act?

Answer:

Section 6, supra, provides:

"... Any action taken at meetings failing to comply with the provisions of this section shall be null and void." (Emphasis supplied.)

This section incorporates by internal reference all of the notification and public meeting requirements of the act. There is no comparable provision in the California act. Moreover, we are informed that the California legislature has, in the past, rejected such a provision.²⁰

The Florida open meetings law in § 286.011 (1) provides that if action covered by the act is taken at a nonpublic meeting, that action shall not "be considered binding." The attorney general of Florida in AGO 071-32 (issued on March 3, 1971), has concluded that this provision would render actions taken in violation of the act voidable but not void. In other words, it would require one to commence a court lawsuit in order to void the agency's act. Of course, as a practical matter this same result would occur under our act if the agency involved refused, itself, to acknowledge that its action was null and void; i.e., the action would be subject to being voided by the court, either in a direct or collateral attack.

However, if the final action taken by the public agency is in accordance with our open public meetings act requirements, then it would appear to us that this action would be defensible even though there may have been a failure to comply with the act earlier during the governing body's preliminary consideration of the subject. For example, if the members of the governing body had held an earlier meeting to discuss a certain proposal without complying with the act, but did comply in connection with the meeting at which the actual adoption of the proposal took place, the final action thus taken would be defensible.²¹

E. Specific Statutory Exemptions:

Section 14 of the act provides for three exemptions from its provisions, as follows:

"... 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."

These exemptions apply even if the body is a governing body and its activities would constitute action. By virtue of these exemptions, the governing body is not obligated to comply with the notice requirements of the act (except as provided for in § 17, discussed below, where applicable) nor to hold its meetings open to the public where an exemption applies.

*24 Question (18):

Are business, occupational and professional licensing exempted from the act?

Answer:

This is covered by § 14 (1), supra. We read the reference to “proceedings” as encompassing the entire ambit of activities, including the application, examinations, interviews, hearings, etc., which are related to business, occupational and professional licenses. This subsection also exempts licenses for sports activities, motor vehicles and mechanical devices.

Question (19):

Are meetings of a quasi-judicial body to consider quasi-judicial matters exempted from the act?

Answer:

Section 14 (2) specifically provides an exemption for:

“(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

”...”

The term “quasi-judicial” is ordinarily used to describe the actions of public administrative officers who are first required to investigate facts or ascertain the existence of facts and then draw conclusions therefrom as a basis for their official action and exercise discretion of a judicial nature. See, Black’s Law Dictionary, 4th ed.; see, also, Ozette R. Co. v. Grays Harbor County, 16 Wn.2d 459, 133 P.2d 983 (1943), wherein the Washington supreme court concluded that the county board of equalization acted in a quasi-judicial capacity when determining the valuation of property for tax purposes. Another case to be noted is Canney v. Board of Public Instruction of Alachua Co., 231 S.2d 34 [[231 So.2d 34]](Fla. Ct. of App. 1970), in which the Florida court held that when a school board acted to suspend a student for violation of a hair and dress regulation, it was acting in a quasi-judicial capacity under a similar exemption contained in the Florida open meetings act.

Thus, if a governing body of an agency has among its functions that of acting in such a quasi-judicial capacity with regard to certain matters, it is to be regarded as a “quasi-judicial body under the act.” Thereupon, it need not comply with the public meeting requirements of the act during such times as it is actually engaged in the exercise of this quasi-judicial function. Accord, memorandum opinion dated June 30, 1971, to E. B. Rogel, Director of the State Teachers’ Retirement System, wherein we said:

“The board of trustees of the Washington State Teachers’ Retirement System when acting upon an individual’s application for disability benefits does so in a quasi-judicial capacity. Therefore, when the board acts in this capacity its actions would be exempt from the public meeting statute under § 14 (2) which exempts that portion of a public meeting which is of a quasi-judicial character since it constitutes consideration of a matter between a named party and the board, as distinguished from a matter having general affect on the public or on a class or group.”

*25 Question (20):

Are proceedings under the State Administrative Procedures Act, Title 34 RCW, subject to the provisions of the open public meetings act?

Answer:

Section 14 (3), supra, specifically excludes from the act:

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

Title 34 RCW only applies to state agencies and it regulates both their conduct of contested cases and their adoption of rules and regulations. Section 17 of the open public meetings act specifically amends the notice requirements for the adoption of rules and regulations as contained in RCW 34.04.025. By virtue of the exemption provided by § 14 (3), the governing body

of a public agency, when acting in accordance with Title 34 RCW, can meet in closed sessions to conduct their deliberations, whether they be on a contested case or for the consideration of the adoption of a rule. However, the actual adoption of a rule, by virtue of the provisions of Title 34 RCW, itself,²² must occur at a public meeting.

During the last session of the legislature a separate administrative procedures act was created for the higher educational institutions. That act is chapter 57, Laws of 1971, 1st Ex. Sess. Since § 18 of that act provides that it shall be made a part of Title 28B RCW, institutions acting under that new law will apparently not be entitled to the exemption provided by § 14 (3), supra, in the absence of future action by the legislature.

We trust the foregoing will be of assistance to you.

Sincerely,

Slade Gorton
Attorney General

- 1 Chapter 216, Laws of 1953, codified as chapter 42.32 RCW.
- 2 Government Code, §§ 54950 - 54961 and 11120, et seq.
- 3 Fla. Stat. 286.011, et seq.
- 4 This section, notably, remains in effect today, whereas the provisions of §§ 1 and 2 have been expressly repealed by § 15, chapter 250, Laws of 1971, 1st Ex. Sess.
- 5 Under this heading you will find our response to the specific question which you posed, relating to informal get-togethers of governing bodies, etc.
- 6 Accord, letter dated September 2, 1971, to State Senator Jonathan Whetzel, concluding that the act is applicable to the Board of Governors of the Washington State Bar Association.
- 7 In further support of this interpretation, we note that the original version of the bill (Senate Bill No. 485) from which the subject act emanated would have reached individual agency "directors" as well as multimember governing bodies. See, § 2 (2) of the bill as first introduced. However, this aspect of the measure was altered by a house committee amendment which replaced the text of the original Senate Bill almost in its entirety. See, State v. Coma, 69 Wn.2d 177, 417 P.2d 853 (1966), for the significance of such legislative history.
- 8 E.g., the council on higher education, as provided for under RCW 28B.80.030. By way of contrast, a board or commission of mixed composition which serves as an agency of the legislature in the performance of a legislative function, such as the boards of legislative ethics as provided for in chapter 44.60 RCW, would be within the scope of the exemption provided for in § 2 (1), supra.
- 9 Government Code, § 54950, et seq., and 11120, et seq., supra.
- 10 In our case, the sanction is a civil penalty assessment rather than a crime.
- 11 See, § 54960 of the California code, which provides:
"Any interested person may commence an action either by mandamus or injunction for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency."
- 12 Accord, AGO 63-79 (January 24, 1964), supra.
- 13 This question has specifically been asked by Representative Dick King for the public employees' collective bargaining committee of the legislative council.
- 14 On that date Representative Hoggins moved for adoption of an amendment to § 14 of the bill, the exemptions section, to add the following exemption:

“(4) Negotiations between public agencies and their employees or recognized employee organizations.”

However, after extensive debate this proposal was defeated, according to the Journal of the House.

- 15 We note that the original version of the bill as introduced in the Senate would have provided that “no other business shall be considered at such meetings...”; however, this language was replaced with the sentence “... Final disposition shall not be taken on any other matter as such meetings...” by an early Senate amendment adopted on March 18, 1971.
- 16 See question (13).
- 17 Also see 54 Cal. Law Rev. 1650 (1966).
- 18 See, e.g., Cal. Gov't. Code § 54959, supra.
- 19 Notably, this section is broader than the original bill, § 14 of which would have limited standing to sue to “any interested person.”
- 20 Interestingly, under a Texas statute requiring certain meetings to be open to the public (Article 6257-17, Vernon's Annotated Civil Statutes) but containing no reference to voidness of actions taken in violation of this requirement, the Texas Court of Appeals in Toyah Ind. Sch. Dist. v. Pecos-Barstow Ind. Sch. Dist., 466 S.W.2d 377 (1971), concluded that action taken by the school board in violation of the open meetings law was voidable by the court.
- 21 This conclusion is consistent with the provision in § 8, supra, which only precludes the “final disposition” of matters not covered by the notice of special meeting. Of course, the failure of the members of the governing body to have complied with the act at their earlier “meeting” would, nevertheless, render them personally liable for a civil penalty under § 12, supra.
- 22 See, RCW 34.04.025.

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