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No. 70606-3-I

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

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

Appellant,

v.

SAN JUAN COUNTY, a Washington municipal corporation and the SAN JUAN COUNTY CRITICAL AREAS ORDINANCE/SHORELINE MASTER PROGRAM IMPLEMENTATION COMMITTEE, a subcommittee of the San Juan County Council,

Respondents.

APPELLANT'S REPLY BRIEF

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During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with "hanky panky" in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.
-Division I Court of Appeals[1]

I. INTRODUCTION

San Juan County believes it is immune from the Open Public Meetings Act ("OPMA") unless a quorum of the six member County Council is physically present at and participating in a meeting–a proposition that violates the unambiguous terms of the OPMA and public policy.[2] The County impermissibly reads out unambiguous provisions of the OPMA that apply to committees and subcommittees.[3] The County's position thwarts the goal of the OPMA to increase public confidence in government decision-making by permitting the public to observe each of

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[1] *Wood v. Battleground School Dist.*, 107 Wn. App.550, 562 n.3, 27 P.3d 1208 (2001) (quoting *Bd. of Pub. Instruction v. Doran,* 224 So.2d 693, 699 (Fla.1969)).

[2] The County's restrictive reading of the OPMA belies its nature and broad public purpose, which must be liberally construed. RCW 42.30.910. Exceptions to the openness requirements of the OPMA are narrowly construed. *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999).

[3] RCW 42.30.010; RCW 42.30.020(2).

the steps employed by their elected officials in making important policy decisions. *See Eugster v. City of Spokane,* 128 Wn. App. 1, 7, 114 P.3d 1200 (2005) ("*Eugster 3*"). This Court should reject the County's position and reverse.

At issue are the meetings of the San Juan County Critical Areas Ordinance / Shoreline Master Program Implementation Committee ("CAO Subcommittee") and its Budget, General Governance and Solid Waste Subcommittees. The Superior Court carved out an unsupportable exemption for meetings of these committees because the County claims the meetings were "informal." This claim is unsupported by any language of the OPMA, which is liberally construed to secure open meetings.[4] It ignores voluminous evidence that the purpose of the CAO Subcommittee was to do the "pick and shovel" work to develop new critical areas regulations, a role it performed in at least 25 secret meetings. *See* Citizens Alliance Opening Brief, pp.20-22.[5]

The County's excuses to avoid application of the OPMA are wrong. The OPMA addresses critical matters of open government and has daily mandatory application to the activities of local policy-makers:

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[4] RCW 4.30.910.

[5] *See* Attorney General's OPEN GOVERNMENT INTERNET MANUAL, Ch. 3 ("As with all laws, the courts will attempt to interpret the OPMA to accomplish the legislature's intent. The OPMA declares its purpose in very strongly worded statement."), attached hereto as **Appendix A-1** (available at http://www.atg.wa.gov/OpenGovernment/Internet Manual).

> Codified in chapter 42.30 RCW, the Act applies to all city and town councils, to all county councils and boards of county commissioners, and to the governing bodies of special purpose districts, ***as well as to many subordinate city, county, and special purpose district commissions, boards, and committees. It requires, basically, that all "meetings" of such bodies be open to the public and that all "action" taken by such bodies be done at meetings that are open to the public***. The terms "meetings" and "action" are defined broadly in the Act and, consequently, ***the Act can have daily significance for cities, counties, and special purpose districts even when no formal meetings are being conducted***.

(Emphasis added)[6]

The first legal issue before this Court is whether the OPMA applies to meetings of less than a quorum of the full County Council. It does. This Court should reverse and remand with directions to enter a partial summary judgment for Citizens Alliance for Property Rights Legal Fund's ("Citizens Alliance") on this issue.[7]

This Court should also conclude (1) that the Council violated the OPMA when some members of the Council held a private meeting via serial email and telephone communications, and (2) that the Council created all of the committees, including the CAO Subcommittee.

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[6] THE OPEN PUBLIC MEETINGS ACT: HOW IT APPLIES TO WASHINGTON CITIES, COUNTIES AND SPECIAL PURPOSES DISTRICTS, Municipal Research Services of Washington, Report No. 60 (revised May 2012), at p.1, attached hereto as **Appendix A-2**.

[7] Summary judgment in favor of the ***non-moving party*** is appropriate where the Court can determine that the non-moving party is entitled to a judgment as a matter of law and if there is no procedural prejudice to the moving party.

Next, this Court should conclude that the County violated the OPMA when the CAO Subcommittee met and took action on behalf of the entire Council regarding the new San Juan County Critical Areas Ordinance ("CAO"). At a minimum, genuine issues of material fact precluded summary judgment to the County on applying the "acting on behalf" and "action" OPMA standards. *See* argument, *infra,* pp.13-15.[8] *See* CR 56(c).[9]

Simple inadvertence is not at issue, nor did the County "cure" the defects in its processes. The Council considered enacting changes to the CAO in over 75 public meetings, but the County admits that only 20 took place after it discontinued the practice of meeting privately in subcommittees. Respondent's Br. at 5; CP 771-75 (Decl. of Lisa Brown). The County did not "cure" its OPMA violations by the subsequent full Council meetings at which the CAO was adopted. If such were the case, the OPMA would be eviscerated. Neither the Council as a whole, nor the public, received the important information that the CAO Subcommittee considered and rejected during its twenty-five secret subcommittee

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[8] The County itself clouded the truth by: (1) submitting self-serving declarations that contradicted prior testimony of its witnesses that the Council created the subcommittees and/or that the subcommittees acted on its behalf; and (2) in belatedly responding to evidence that a meeting of a quorum of the full Council also took place. Remand for trial is proper.

[9] Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not as an unfair substitute for trial. See *Graves v. P.J. Taggares Co.,* 94 Wn.2d 298, 302-03, 616 P.2d 1223 (1980).

meetings, including but not limited to rejected policy choices, regulatory strategies and alternatives. This avoided meaningful comment on the proposed CAO by the public before the whole Council.

II. REPLY ARGUMENT

The law does not condone the private processes employed by the County to adopt the CAO. The plain violations of the OPMA should not be excused.

The County distorts the factual record in its Response. While the Superior Court's findings were contradictory ,[10] material evidence contradicts the Superior Court's conclusions regarding the actions of the CAO Subcommittee or the role of Council members who were Committee members. As a matter of legal construction, moreover, the OPMA applies to the subcommittee regardless of how many council members participated in its work on behalf of the full Council, and regardless of whether a subcommittee's actions constituted "final action" of the Council. Reversal is justified.

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[10] On the one hand, the Superior Court accepted that (1) the Committee discussed, considered, reviewed and evaluated matters related to a proposed Critical Areas Ordinance at the meetings at issue, (2) the Committee was established by the County Council, and (3) the County Council directed the team on its behalf. CP 817 – 818. Notwithstanding these facts, the Superior Court concluded that the OPMA was not violated on the grounds that the Committee was not a "full quorum" of the County Council. *See* Respondents' Brief, p.6. Then, in seeming contradiction of this analysis, the Superior Court found that there was "no evidence" that the Council created the Committee or that the Committee acted for the Council. CP 818.

A. The OPMA Applies to the Subcommittee Regardless Whether it was Composed of a Quorum of the Full Council; the County Attempts to Avoid the Law Based on Details Irrelevant to the Purposes and Application of the OPMA.

This Court should hold that the OPMA applies to committees and subcommittees regardless of whether they are composed of a quorum of a city or county council. *See* RCW 42.30.010; RCW 42.30.020(2); C*lark v. City of Lakewood*, 259 F.3d 996, 1012-1013 (9th Cir. 2001) (OPMA applied to a subcommittee of the Lakewood City Council even though less than a majority of the Council and less than a majority of the Planning Advisory Board members were on the subcommittee). Here, the OPMA applied to the CAO Subcommittee and the other Committees.

The County stubbornly insists that Citizens Alliance was required to show that a quorum of the County Council met in violation of the OPMA. Respondents' Br. at 12. This is contrary to case law, and the plain guidance in the Attorney General Opinion cited in the County's brief which states: "***[A] 'committee thereof' includes committees composed solely of a minority of the members of the governing body ….***" Wash AGO 1986 No. 16, p.4 (emphasis added).

The Superior Court failed to follow Washington and extra-jurisdictional case law that addresses the illegality of subcommittees

meeting outside of public view.[11] These cases include *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis.2d 77, 398 N.W.2d 154 (1987), and *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974). As noted, Washington courts look to Florida decisions for guidance because the OPMA is modeled on Florida's Sunshine Act. *Wood*, 107 Wn. App at 560. There simply is no requirement that a quorum of the Council must be present at a subcommittee meeting for the OPMA to apply.

There is no "loophole" in the OPMA of the type envisioned by the County. The OPMA applies to the subcommittee regardless of whether a quorum of the Council participated on it.

B. Reversal Is Further Proper Because the Record Shows Four Members of the Council Met and Took Action in a Series of Emails.

If the Court concurs that the OPMA only applies if a quorum of the Council participated in the subcommittee, it still should reverse. Citizens Alliance presented competent evidence showing **four** members of the Council participated in the private meetings of the CAO Subcommittee.

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[11] The Attorney General's OPEN GOVERNMENT INTERNET MANUAL, Ch.3 (Appendix A-2 hereto), notes that "[t]here has been relatively little litigation regarding [the OPMA's] interpretation," which explains why Plaintiff cannot cite any Washington case with similar facts. Indeed, there is no reported case that comes even close to the magnitude of San Juan County's violations of the OPMA, in terms of numbers of secret meetings that took place over many months in the four committees and their actions challenged by Citizens Alliance. That it was unable to locate a case with similarly egregious violations of the law should not have been a basis for excusing the County's actions from the OPMA.

Specifically, the record shows that four of the six Councilmembers (Pratt, Fralick, Peterson, and Miller) held a series of secret telephone and email exchanges in which they discussed OPMA action, *i.e.*, the wetland process for the CAO update.[12]

At the very least, a question of fact existed. As the courts ruled in both *Wood* and *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002) ("*Eugster 1*"), whether a "meeting" occurred at which "action" took place is a genuine issue of material fact precluding summary judgment.[13] This authority supports reversal.

Early in the motion practice, Citizens Alliance submitted evidence of a violation of the OPMA based on participation by **four** Councilmembers in the CAO Subcommittee's serial email meetings. Exhibit P to the Palmer Declaration demonstrates this.[14]

The County wrongfully contends that Citizens Alliance did not include such records in response to the County's summary judgment motion or raise the issue until the motion for reconsideration. Respondent's Br. at 9-15. This Court should reject these assertions. First,

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[12] CP 183 – 186 (Appendix A-4 to Citizens Alliance Response to Summary Judgment); CP 483 – 486 (Palmer Decl. Ex. P).

[13] *Wood*, 107 Wn. App.at 566; *Eugster 1*, 110 Wn. App.at 222-24. *See also* RCW 42.30.020(3).

[14] CP 483 – 486 (Palmer Decl. Ex. P). The County's citation to Exhibit P in subsequent pleadings, *e.g.* CP 876 – 879 (Appendix A to County Response to Motion for Reconsideration), acts as a concession that the evidence was submitted and the issue raised.

Citizens Alliance submitted evidence to show a violation of the OPMA in its response to summary judgment. Appendix A-4 to Citizens Alliance's response[15] is a summary table of the OPMA violations with citations to evidence. It specifically identifies OPMA violation number 11 as a serial meeting memorialized in an email exchange that occurred from November 14 to November 21, 2011, between four Councilmembers (Fralick, Pratt, Miller, and Peterson). This evidence of the serial email meeting establishes proof of Citizens Alliance's claim.[16]

Second, in Citizens Alliance 's motion for reconsideration, Citizens Alliance emphasized the four-person meeting to highlight the trial court's error in awarding summary judgment to the County on the grounds articulated.[17]

The email chain constitutes CAO deliberations, discussions, and considerations, which are "action" under the OPMA, as interpreted and applied by Washington courts.[18] *See Wood v. Battle Ground School*

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[15] CP 183 – 186 (Appendix A-4 to Citizens Alliance Response to Summary Judgment) citing to CP 483 – 486 (Palmer Decl. Ex. P).

[16] CP 239, (Palmer Declaration ¶17) citing to CP 483 – 486 (Palmer Decl. Ex. P, which is a copy of Exhibit 19 to the Fralick deposition)

[17] CP 895 – 896 (Plaintiff's Amended Motion for Reconsideration at 8-9).

[18] The record shows that at least four Councilmembers actively discussed the issue responding to and forwarding the email and one of the 4 also discussing the email and issue on the telephone with a fifth member (*see* Resp. Brief at 14-15) and does not support the County's claim of mere "passive" receipt of emails.

District and *Eugster 1*.[19] This evidence establishes a prima facie OPMA case precluding summary judgment.

C. The CAO Subcommittee Is Subject to OPMA Both Because the Council Created It and Because It Acted on the Council's Behalf.

The OPMA also applies to a subcommitee when a governing body creates it or when the subcommittee acts on its behalf.[20] Both of these statutory directives demonstrate at minimum genuine issues of material fact as to the County's violation of the OPMA through the CAO Subcommittee.

The Superior Court determined that the Council created the CAO Subcommittee:

> The court can further assume, for the sake of argument, and without deciding, that the committee was established by the county council, as opposed to the county administrator.

CP 817-818. This establishes applicability of the OPMA. *See also* Citizens Alliance's Opening Brief, pp.17-18, n.35-38.[21]

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[19] 107 Wn. App.550, 564, 27 P.3d 1208 (2001) (holding that exchange of emails constitutes an OPMA "meeting").*See* also RCW 42.30.910; *Equitable Shipyards, Inc. v. State,* 93 Wn.2d 465, 482, 611 P.2d 396 (1980) ("We recognize the statutory statement of purpose in [the OPMA] employs some of the strongest language used in any legislation").

[20] As a matter of law, the CAO Subcommittee is subject to the OPMA if it was created by the Council. *See West*, 162 Wn. App. at 131 (citing RCW 42.30.020(1)(a)).

[21] *See, e.g.*, CP 244 (Palmer Decl. ¶ 59 citing to CP 694 – 696 Palmer Decl. Ex. BH, "Informal" Attorney General of Washington Opinion signed by Timothy Ford and dated March 21, 2008 (concluding that how a committee is created is less important to the OPMA than what the committee actually does)).

Even absent this conclusion, the subcommittee meetings are still subject to the OPMA unless they are "merely advisory." *Wood*, 107 Wn. App. at 565. Extensive evidence shows the only conclusion that could be made by reasonable minds is that the subcommittees, including the CAO Subcommittee, acted on behalf of the Council. In this regard, one need not establish "final action" for the OPMA to apply. As held in *Eugster 1*, 110 Wn. App. at 223-25, discussion and deliberation must occur openly.[22]

The County's arguments defy common sense. The County's Prosecuting Attorney addressed applicability of the OPMA to committees, <u>including</u> the CAO Subcommittee. *See* Citizens Alliance Opening Brief at 5, n.7.[23] Why address a legal memorandum to the full County Council regarding the application of the OPMA to a committee it did not create and which did act on the Council's behalf?

Moreover, undisputed evidence shows that at least three members of the Council met at least 25 times on the CAO and interfaced with staff and consultants to advance the effort on the amendments. Taking the evidence and inferences in the light most favorable to the Citizens

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[22] The record shows that even the more stringent definition of "final action" is satisfied in this case. *See* Citizens Alliance Opening Brief, pp.21-23 (discussion of major policy issues and rejection of alternatives). A "final action" does not necessitate a formal vote, but also encompasses a collective positive or negative decision. RCW 42.30.020(3); *Miller,* 138 Wn.2d at 330. Thus, a consensus on a position to be voted on at a later council meeting would qualify as a collective position and a "final action." *Id.* at 330-31.

[23] The Gaylord Memorandum is found at CP 449-457 (Palmer Decl., Ex. E).

Alliance, the CAO Subcommittee was both created by the Council and acted on its behalf. Summary judgment was improper.

The County takes great pains to leave this Court with the misimpression that only where the County Council has ***specifically authorized*** the subcommittee to act on its behalf are the deliberations of the subcommittee subject to the OPMA. Respondent's Br. at 18-19. The County quotes Representative Hine, but it fails to highlight his testimony regarding meetings of subcommittees that are subject to the OPMA where–***even if not specifically authorized***–policy, testimony or comments are made on the behalf of the governing body. *Id.* (citing House Journal, 48th Legislature (1983) at 1294).

Councilmember Stephens and Prosecutor Gaylord acknowledged the CAO Subcommittee was a subcommittee of the Council.[24]

The evidence viewed favorably to Citizens Alliance shows the CAO Subcommittee was anything but "informal" or "advisory." *See* Citizens Alliance Opening Brief, pp.10-11, 17-18, and 20-23. The

[24] CP 452 (Palmer Decl. Ex. E Gaylord Memo at 3 (showing that the CAO Subcommittee held meetings where "ideas and policies are brought forward, discussed, narrowed and discarded and approaches are formulated for making presentations of subcommittee work to the entire Council."); CP 206 (Petersen Decl. Ex. P 10:18–22, Transcript of an excerpt of the January 31, 2012, San Juan County Council meeting).

evidence rebuts the County's assertions that the CAO Subcommittee did not act on behalf of the Council.[25]

This Court should conclude that the Subcommittee took "action" on behalf of the Council when it winnowed policy alternatives concerning the CAO topics. Like the subcommittee in C*lark v. City of Lakewood*, 259 F.3d 996, 1012-1013 (9th Cir. 2001), which the Ninth Circuit determined to have violated the OPMA, the CAO Subcommittee performed the behind the scenes and "pick and shovel work" to draft a new CAO because the Council did not have the time nor desire to publically discuss the substantive topics.[26]

The County asserts there must be communication about issues that may or may not come before the Full Council to violate the OPMA and no such action was shown. Response Br. at 19. Yet, the County concedes that discussions occurred among three Councilmembers on "the topics of the Critical Areas Ordinances" and sequencing of presentation of scientific reports to the Full Council. Response Br. at 20. That alone is sufficient

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[25] *See* CP 83 – 90 (1986 Attorney General Opinion No. 16); *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001) (meetings of a committee that acted on behalf of the governing body violated the OPMA); CP 244 (Palmer Decl. ¶ 59 citing to CP 694 – 696 Palmer Decl. Ex. BH, "Informal" Attorney General of Washington Opinion signed by Timothy Ford and dated March 21, 2008 (concluding that how a committee is created is less important to the OPMA than what the committee actually does)).

[26] CP 407 – 408___ (Palmer Decl. Ex. D Hale Dep.73:17-74:6). *E.g.* CP 436 (Palmer Decl. Ex. D Hale Dep.144:9–14); CP 374 (Palmer Decl. Ex. D Hale Dep. 35:1–11); CP 289 (Palmer Decl. Ex. B Fralick Dep. 7:17–24).

to show "action occurred" at CAO Committee Meetings, although much more occurred. Doing the "pick and shovel" work for the Full Council, the CAO Subcommittee took on important policy questions and considered and discarded regulatory strategies and alternatives, among other matters. *See, infra,* p. 2.

Again, at a minimum, the evidence supports reversal because there are genuine issues of material fact as to (1) the CAO Subcommittee's creation, (2) whether it acted on behalf of the full Council; and (3) whether it took action within the meaning of the OPMA. *See* Citizens Alliance Opening Brief at 18-20 (creation of CAO subcommittee); and at 29-30 (action on behalf of Full Council and taking action).

D. The Trial Court Failed to View Evidence in a Light Most Favorable to Citizens Alliance and the Burden Did not Shift

The Superior Court also erred when it failed to view the evidence favorably to Citizens Alliance. The Trial Court resolved all inferences against the ***non-moving party***, and failed to explain how reasonable persons could reach but one conclusion where disputes existed concerning the creation of the subcommittees, the number of persons in attendance at meetings, and whether the subcommittees acted for the Council

The County did not present <u>any</u> proof to refute the allegations in the Complaint when it moved for dismissal of Citizens Alliance's

claims.[27] When a defendant moves for summary judgment by pointing out that the plaintiff lacks sufficient evidence to support its case, it "must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact." *Guile v. Ballard Community Hosp.*, 70 Wn. App.18, 22, 851 P.2d 689 (1993) (citing *White v. Kent Medical Center, Inc.,* 61 Wn. App.163, 170, 810 P.2d 4 (1991). The County failed to do so. This supports reversal.

Even if the Court concludes that the County succeeded in shifting the burden to Citizens Alliance, which it did not, reversal is still warranted. The Superior Court did not explain or address the admissions made by the County in its Answer to the Complaint, for example the admission to this request:

> ¶ 10 Admit that the San Juan County Council has met as a group of the whole and also in subcommittees to discuss specific topics within the last two years.

CP 64; CP 817. These admissions supported denial of the County's motion.

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[27] Citizens Alliance's allegations should have been presumed to be true; the nature of the County's motion was for judgment on the pleadings. *See Cutler v. Phillips Petroleum Co.,* 124 Wn.2d 749, 755, 881 P.2d 216 (1994), *cert. denied,* 515 U.S. 1169 (1995); CR 12(c). The County makes a big deal at p.9 of its Respondent's Br. that Citizens Alliance cannot rely on the allegations in its unverified complaint, which ignores case law concerning motions for judgment on the pleadings to which the County's motion is akin.

The County's argument was based on its mistaken assertion that the OPMA does not apply to meetings of subcommittees comprising less than a quorum of the Council as a whole. *E.g.* CP 75 (County's Summary Judgment Motion at 2:15–19); *see* CP 698 (Reply by County in Support of Summary Judgment at 2:4–11).

It baldly alleged the absence of evidence and ignored admissions made in its Answer. CP 76 (County's Summary Judgment Motion at 3: 22–26); *see* CP 701 (Reply by County in Support of Summary Judgment at 5:18–20). Then, it stated that it "reserved the right" to present evidence that no action took place, which the Superior Court improperly and prejudicially allowed on reply. CP 79 (County's Summary Judgment Motion at 6:8–11 (reserving right to introduce evidence in reply brief)); CP 759–775 & 1006–1007 (introducing the eight self-serving and untimely declarations in the County's Reply to its Summary Judgment motion); *White v. Kent Med. Ctr., Inc.,* 61 Wn. App.163, 168, 810 P.2d 4 (1991) ("Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond"); *see also* CR 56(c).

The County, as noted above, identified no portion of the record which would "demonstrate the absence of a genuine issue of material fact. It simply produced self-serving declarations that contradicted its prior

witness testimony in an effort to establish that no action was taken "on behalf" of the Council. The law is plentiful that this tactic is insufficient to support summary judgment.[28]

The County also failed to address Citizens Alliance's allegations concerning the Budget, General Governance and Solid Waste Subcommittees in its motion or oral argument, thereby waiving such arguments. *E.g., Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (where briefing failed to devote any argument to a specific challenge, the issue is deemed waived); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court will not address arguments not developed or supported in the brief).

The Superior Court's conclusory ruling that Citizens Alliance "produced no evidence" that such subcommittees violated the OPMA (CP 926), is an erroneous application of the CR 56 standard because—again—the County never satisfied its initial burden with respect to the detailed allegations in the Complaint concerning these governing bodies.

The Trial Court's statement that Citizens Alliance did not individually name the additional subcommittees as defendants in the

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[28] Courts generally regard self-serving declarations as unreliable. *E.g., Jones v. State*, 170 Wn.2d 338, 362, 242 P.3d 825 (2010). *Miller v. Mohr*, 198 Wash. 619, 640, 89 P.2d 807 (1939). At least, these declarations created an issue of fact for trial, and should not have formed the cornerstone for a summary dismissal of Citizens Alliance 's case. *See Miller*, 198 Wash. at 640 (credibility is an issue of fact).

caption of the Complaint (CP 925) is further error and ignores admissions made by the County in its Answer:[29]

> ¶ 10 … Admit that meetings of the general governance subcommittee, budget subcommittee and solid waste subcommittee have occurred. Admit the purpose of those subcommittees includes bringing forward and discussing ideas and policies prior to meetings of the entire Council. Admit that subcommittees and subgroups make recommendations following meetings to the full Council….
>
> ¶ 15 Admit that some subcommittee meetings have not been noticed nor open to the public. …

CP 64; *See* CP 64 at ¶¶ 44, 45, 46 and 61 (answering allegations regarding the various subcommittees).[30]

Citizens Alliance submitted evidence to show: (1) a meeting of a quorum of the Council occurred via a series of emails/ telephone calls between four Councilmembers; (2) each 3-person subcommittee met without notice and in secret at which they considered material relevant to the adoption of legislation and/or policy, which was not presented to the

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[29] Plaintiffs' Requests for Relief encompass "***any and all decisions made by the County***" in violation of the OPMA. CP 41 (Amended Complaint Section V 1.a, 1.e. CP 41 (Amended Complaint at 20:14-16)). That there is also a separately stated request for relief concerning the CAO Subcommittee does not erase all allegations in the Amended Complaint concerning OPMA violations of the various subcommittees and the County Council.

[30] The Prosecuting Attorney's April 12, 2012 memorandum further admits the existence and work of the committees, and application to the OPMA to its activities, as did members of the County Council who sat on the CAO Implementation Team. CP 449-457 (Palmer Decl. Ex. E Gaylord Memo).

Council in an open public meeting; and (3) the subcommittees were created by and/or acted on behalf of the Council in such secret meetings, with the admitted purpose of streamlining the work of the Council. *See infra*, pp 2, 7-8 10-14.

Although the County asserts that Citizens Alliance failed to present evidence regarding the "dates of meetings," such evidence was not required to establish the meetings took place, particularly when the County admitted so in its Answer. CP 64; CP 817 (Trial Court decision at 2); Respondents' Br. at 9.

E. Because Subsequent Open Meetings of the Council Did not "Cure" OPMA Violations of the Subcommittees, the CAO Should be Declared Null and Void

To save the adoption of the CAO notwithstanding violations of the OPMA, the County argues that the violations are excused because the final deliberations were open. *See* Resp. Br., 22-26.[31] This finds no support in the law and the County did not raise cure as a basis to grant summary judgment; this allegation came only in a reply memorandum. Where the

[31] The County claims, without evidence, that "hundreds of hours of open public meetings" occurred after the County stopped holding secret meetings. Respondents' Br. at 25. Yet, a greater number of secret meetings took place prior to that time, leaving one to reach the reasonable conclusion that hundreds of hours of subcommittee meetings, not open to the public, took place prior to that time. There is a clear absence of proof from the County as to how the actions that took place by the CAO Subcommittee were recaptured such as to be "cured" in subsequent open public meetings.

vast majority of the work of the Council occurred in secret subcommittee meetings, the CAO should be invalidated.

The OPMA requires consideration of the overall process of the adoption of the critical areas ordinances to determine compliance with the OPMA. *See, e.g., Eugster 3*, 128 Wn. App. at 7. Here, the public was excluded from all meetings of the CAO Subcommittee and did not have the opportunity to observe or participate in the deliberations and winnowing down of ideas, issues and proposals for the CAO, which took place over many months.

The Council's subsequent action did not constitute a meaningful "cure" with respect to its adoption of the CAO when so many steps in the process were permanently lost and cannot now be recreated. Pro forma, "rubber stamped action," does not satisfy the requirements of the OPMA. *E.g., Organization to Preserve Agricultural Lands (OPAL) v. Adams County*, 128 Wn.2d 869, 883-84, 913 P.2d 793 (1996) (describing that subsequent action should be invalidated when the prior OPMA violations substantially tainted the subsequent ratification). The illegal actions of the CAO Subcommittee so tainted the final action of the Council that there can be no cure.

The County's reliance on the factual basis of *OPAL*, 128 Wn.2d at 881, is misguided because that case did not involve multiple pervasive

OPMA violations. As described by the County, the OPMA violation in *OPAL* involved a single telephone discussion prior to an open public meeting. Unlike in *OPAL*, when multiple pervasive OPMA violations occur, as is the case here, the subsequent action is invalid unless the tainted process was completely abandoned. *Eugster 1*, 110 Wn. App. at 228-29 (describing that invalidation was unnecessary because the Council abandoned the procedure that violated the OPMA); *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003) (describing that unless the Council abandons and retraces it steps, any subsequent action – even ones that comply with the OPMA – are null and void because the prior OPMA violations tainted the core open government purpose); C*lark v. City of Lakewood*, 259 F.3d 996, 1014 n.10–1015 (9th Cir. 2001) (describing that on remand, the trial court must determine which actions are null and void and what effect that has on the constitutionality of the ordinance that was adopted as a result of multiple pervasive OPMA violations).

The County's argument implies that the matter is moot because voters approved Proposition 3, which "ensures" that future gatherings of three Council members comply with the OMPA, and Proposition 1, reducing the number of Councilmembers to three. Respondents' Br. at p. 23. A moot case is one in which a party seeks to determine an abstract

question that does not rest upon existing facts or rights. *Hansen v. West Coast Wholesale Drug Co.,* 47 Wn.2d 825, 827, 289 P.2d 718 (1955). In other words, resolution of a controversy that will not make a difference to the litigants. *Rosling v. Seattle Bldg. & Constr. Trades Council,* 62 Wn.2d 905, 907-08, 385 P.2d 29 (1963), *cert. denied*, 376 U.S. 971, 84 S.Ct. 1133 (1964).

This case is not moot. For one, it was brought by a non-profit organization that consistently engages in public participation in local legislative processes concerning the drafting and adoption of environmental and land use regulations. Its right to do so in a meaningful manner in San Juan County was denied because it was excluded from more than 25 meetings over a period of many months where data, studies, proposals and expert testimony was considered, evaluated and winnowed down by subcommittees before bringing it to the light of a public forum. Two, the CAO ordinance was held noncompliant in numerous respects by the Growth Management Hearings Board.[32] Because the County needs to re-promulgate the law, whether or not the remaining provisions violated the law such to prohibit use of any portion of the tainted law to comply with the Board's decision remains in controversy. Three, pursuant to

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[32] *See Friends of the San Juans, et al. v. San Juan County*, WWGMHB, No. 13-2-0012c, Final Decision and Order at 107–109 (Sept. 6, 2013).

RCW 36.70A.130(4)(5), the Growth Management Act requires review and updates of comprehensive plans and development regulations.[33] San Juan's Council's flawed approach under the OPMA is open to other local governments to follow[34] and for this reason it should be addressed and corrected in this appeal.

This Court should take the opportunity to correct the Superior Court, which ignored the definition of "action" in the OPMA to reach its result, as follows:

> The court is mindful of the fact that "action" is defined under the Act to include discussions, considerations, reviews and the like, but as a practical matter it would be pointless to declare any such matters null and void.

CP 827. The amounts to an amendment of the OPMA by judicial fiat. This Court must require implementation of the OPMA as written.

The Trial Court's ruling is error. First, the County admitted that the various subcommittees met in secret over many months, "bringing forward and discussing ideas and policies prior to meetings of the entire Council," and at which the members "discussed, considered and reviewed

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[33] Development regulations include critical area regulations. *See* RCW 36.70A.030(7).

[34] An otherwise "moot" case should be decided if it involves a matter of continuing and substantial public interest. *Dunner v. McLaughlin,* 100 Wn.2d 832, 838, 676 P.2d 444 (1984). The governing criteria are whether: (1) the issue presented is of a public or private nature, (2) it is desirable to provide guidance to public officers, and (3) it is likely to recur. *Zehring v. Bellevue,* 103 Wn.2d 588, 590, 694 P.2d 638 (1985). All three criteria are met in this case, both in San Juan County, and state-wide.

policy material and took input from various sources," among other things. *See* Answer ¶¶ 10, 15, 63, 65, 71. None of these actions were "cured" by open public meetings. Respondents' Brief is silent in this regard.

Second, with respect to the actions of the CAO Subcommittee, there is no support for the proposition that relief cannot be granted for past violations of the OPMA, even assuming, *arguendo*, subsequent action was properly noticed and open to the public. In *Eugster 1*, the court discussed the fact that even though subsequent compliance with the OPMA mooted certain issues in the case, the plaintiff would be entitled to attorneys' fees if the trial court determined on remand that a proscribed meeting had taken place. *Eugster 1*, 110 Wn. App. at 228.

The Superior Court could have provided effective relief, even if the subsequent Council meetings did, in fact "cure" prior OPMA violations. Issues concerning compliance with the OPMA are of substantial public interest and are likely to recur. The Trial Court failed to provide effective guidance to public officers concerning the foundational requirements of the OPMA that are so vital to the public trust in this State.

III. CONCLUSION

Citizens Alliance's appeal should be granted and it should be awarded its reasonable attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 27th day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2013, I caused the original and one copy of the document to which this certificate is attached to be hand delivered to:

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I further certify that on this 27th day of December, 2013, I caused a copy of the document to which this certificate is attached to be delivered to the following via email and Priority U.S. Mail:

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APPENDIX

A-1 ATTORNEY GENERAL'S OPEN GOVERNMENT INTERNET MANUAL (Public Records and Open Meetings), Chapter 1: Open Public Meeting Act – General and Procedural Provisions, http://www.atg.wa.gov/OpenGovernment/Internet Manual/Chapter3.aspx

A-2 THE OPEN PUBLIC MEETINGS ACT, HOW IT APPLIES TO WASHINGTON CITIES, COUNTIES, AND SPECIAL PURPOSE DISTRICTS, Report Number 60 Revised, May 2012, Municipal Research and Services Center

APPENDIX A-1

Chapter 3
OPEN PUBLIC MEETINGS ACT – GENERAL AND PROCEDURAL PROVISIONS

3.1 Introduction and Other Resources

The Open Public Meetings Act ("OPMA"), chapter 42.30 RCW was passed by the legislature in 1971 as a part of a nationwide effort to make government affairs more accessible and, in theory, more responsive. It was modeled on a California law known as the "Brown Act" and a similar Florida statute. *See* Cal. Governmental Code 54950-61 and 11120 *et seq.*; Fla. Stat. 286.011 *et seq.*

While the Washington legislature has clarified some of its provisions, the OPMA is substantially unchanged. There has been relatively little litigation regarding its interpretation, with the result that many gray areas exist. Soon after its passage, the Attorney General issued a comprehensive opinion which continues to be a useful resource. *See*1971 Att'y Gen. Op. No. 33. Other resources on the OPMA are Chapter 21, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase) and the Municipal Research Service Center's OPMA Frequently Asked Questions

Together with the Public Records Act, chapter 42.56 RCW, the legislature has created important and powerful tools enabling the public to inform themselves about their government.

3.2 Interpretation of the OPMA

As with all laws, the courts will attempt to interpret the OPMA to accomplish the legislature's intent. The OPMA declares its purpose in a very strongly worded statement.

Statutory Provisions: The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. RCW 42.30.010.

The purposes of [the OPMA] are hereby declared remedial and shall be liberally construed. RCW 42.30.910.

Exceptions to the openness requirements of the OPMA (such as the grounds for executive sessions) are narrowly construed. *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999).

3.3 What Entities Are Subject To The Act

A. "Public Agency"

The Open Public Meetings Act requires, in essence, that meetings of the governing body of a "public agency" are open to the public. RCW 42.30.030 [[link]]
Statutory Provision: "Public agency" means: (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature; (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington; (c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies; (d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency. RCW 42.30.020.

The OPMA does not apply to an entity simply because it receives public funds (such as grants or contracts). Instead, the Attorney General has suggested a four-part test to be used in determining whether an entity is a "public agency" and subject to the OPMA: "(1) whether the organization performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the organization was created by the government." 1991 Att'y Gen. Op. No. 5.

B. "Governing Body"

Statutory provision: "Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment. RCW 42.30.020 (2).

Because the OPMA is directed to meetings of governing bodies, it does not apply to the activity of an agency which is governed by an individual. In *Salmon for All v. Department of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (1992), the court held that the Department of Fisheries was not subject to the OPMA because it was governed by an

individual, the Director. Many state agencies are governed by individuals and, therefore, not subject to the OPMA such as Labor and Industries, Licensing, Social and Health Services, State Patrol, Employment Security, etc.

In 1983, the legislature amended the definition of governing body to include "any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." Laws of 1983, ch. 155, §1. Since the definition uses the language, "a committee thereof," the implication is that some member of the governing body must be included in the committee.

Because a committee of a governing body is typically created by some sort of legislative act of the governing body, a committee may appear to be similar to a subagency, which is also created by legislative act. The difference under the OPMA between a "committee" and a "subagency" is that a committee does not possess policy or rule-making authority. This distinction between whether an entity is a subagency or a committee can be important as to the notice requirements for their meetings. All meetings of the governing body of a subagency are subject to the notice requirements of the OPMA; however, as discussed below, a dispute exists as to whether a committee is similarly required to give notice for all of its meetings when it is only at some of its meetings that it is acting so as to come within the definition of "governing body."

Although it may be clear when a committee is conducting hearings or taking public testimony or comment, it is not clear from the language of the OPMA when a committee "acts on behalf" of the governing body. A 1986 attorney general opinion concludes that a committee acts on behalf of the governing body "when it exercises actual or de facto decision-making authority for the governing body." 1986 Att'y Gen. Op. No. 16. That opinion, citing the legislative history of the OPMA and its amendments, distinguished when a committee is exercising such authority from when it is simply providing advice or information to the governing body. Using that rationale, the question of whether notice under the OPMA is required would depend on the kind of activity to be conducted. However, in *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), the Ninth Circuit Court of Appeals found that a committee took public testimony and comment, held hearings, and acted on behalf of the governing body and therefore violated the Act when it failed to provide notice of all of its meetings. The court, however, did not analyze the committee's activity at each of the meetings, but simply concluded that all the meetings required the statutory notice.

While an argument can be made that a committee may be required to give notice only for those meetings when it will be taking testimony or public comment or exercising decision-making authority for the governing body, it would be prudent for such committees to conduct all their business in open meetings.

***Case example**: The seven-member city council is considering the purchase of public art. The council agrees that public input would assist the selection process. Some councilmembers believe that the creation of an arts commission that would adopt policies for the city's acquisition of public art would "get politics out of the world of art." Other councilmembers express concern that an arts commission will control too*

much of the process without significant council input. Three resolutions are drafted for council consideration:

The first establishes a city arts commission and details the method of selecting the members, including three city councilmembers and two citizen members, who would serve specific terms. The commission is directed to establish policies for the selection and placement of public art in the city. Its recommended policies will be subject to city council approval. It is directed to obtain public input before the adoption of the recommended policies. As funding becomes available, it will make recommendations to the city council regarding the purchase of works of public art and their location in the city.

The second resolution establishes a public arts committee of the city council consisting of three members of the council. Five interested citizens will be asked to participate in its determination of worthy projects. The citizens would serve at the pleasure of the council. The public arts committee is directed to develop a list of citizens who have expressed interest in public art and to hold hearings seeking public comment regarding any recommendations that the committee might make to the full city council.

The third resolution recognizes the existence of a citizen's committee known as "Public Art Now!" that was formed by a councilmember. The committee would be authorized to use city's meeting rooms. The council would welcome the committee's advice regarding the selection and placement of public art and its recommendations would be considered at any public hearing when the council decided to purchase works of art.

What would be the consequences under the OPMA of the adoption of each resolution?

Resolution: *The city arts commission is probably a "subagency" under the OPMA. It has been created by legislative act and its governing body is directed to develop policy for the city. As such, all of its meetings would be subject to the Act's requirements.*

The public arts committee is probably a "committee" of the governing body, the city council. It is not a separate entity. Since it will be obtaining public input, at least some of its meetings would be subject to the Act. However, it is advisable that it hold all its meetings in open session.

"Public Art Now" is not subject to the OPMA. The city council did not establish it or grant it any authority.

3.4 Meetings

A. What Is A "Meeting"

Statutory provisions: "Meeting" means meetings at which action is taken. RCW 42.30.020(4).

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 chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. RCW 42.30.060(1).

It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: PROVIDED, That they take no action as defined in this chapter. RCW 42.30.070.

A meeting occurs whenever the governing body of a public agency takes "action" (the meaning of "action" is discussed below). If the required notice has not been given, the action taken is null and void, that is, as if it had never occurred. The OPMA expressly permits the members of the governing body to travel together or engage in other activity, such as attending social functions, so long as they do not take action.

An email exchange among members of a governing body in which an "action" takes place can be a "meeting" under the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001). (Whether a quorum is required is addressed below.) Since an email exchange among members of a governing body is not open to the public, such an exchange in which an "action" took place would violate the OPMA.

It is generally agreed that an agency may conduct its meeting where one of the members of the governing body attends by telephone and a speaker phone is available at the official location of the meeting so as to afford the public the opportunity to hear the member's input. This should occur only when a member is unable to travel to the meeting site and would not include "telephone trees" where the members repeatedly call each other to form a majority decision.

A quorum of members of a governing body may attend a meeting of another organization's provided that the body takes no "action" (defined below). 2006 Att'y Gen. Op. No. 6. For example, a majority of a city council could attend a meeting of a regional chamber of commerce or a county commission meeting provided that the council members did not discuss city business or do anything else that constitutes an "action."

B. What Is "Action"

Statutory provision: "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the

members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance. RCW 42.30.020(3).

It is important to realize that the OPMA provides that a meeting occurs whenever there is action, including the discussion, deliberation or evaluation that may lead to a final decision. That is, it is the "action" (discussion, etc.) that determines whether a "meeting" has taken place, not whether a "meeting" in the everyday sense of the term (such a gathering of people at City Hall) has taken place. *Eugster v. Spokane*, 110 Wn. App. 212, 225, 39 P.3d 380, *review denied*, 147 Wn.2d 1021 (2002).

The notice requirements of the OPMA are not limited to meetings at which a final official vote is taken, which is intended to authorize or memorialize the policy of the governing body. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), *review denied*, 121 Wn.2d 1011 (1993). That is "final action" under the OPMA and is important for deciding what decisions can be made during an executive session. "Final action" refers to the final vote by the governing body on the matter. One court held that a decision by fire district commissioners to terminate a fire chief was not final action because it was not a decision upon a motion, proposal, resolution, order or ordinance. *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656, *review denied*, 110 Wn.2d 1031 (1988). However, in 1989 the legislature amended the statute to require such action to be taken in an open public meeting. *See* RCW 42.30.110 (1)(g).

A meeting occurs if a quorum (that is, a majority) of the members of the governing body were to discuss or consider, for instance, the budget, personnel, or land use issues no matter where that discussion or consideration might occur. What about if less than a quorum is present? Several cases hold that the OPMA is only triggered by a quorum of the governing body, so the "action" of less than a quorum is not subject to the OPMA. *See, e.g., Eugster v. City of Spokane*, 128 Wn. App. 1, 8, 114 P.3d 1200 (2005). Others argue that the legislative history of the OPMA indicates that the statute formerly required a quorum for an "action" but was amended to apply to an action with less than a quorum. Laws of 1985, ch. 366, § 1(3).

The OPMA does not allow for "study sessions", "retreats", or similar efforts to discuss agency issues without the required notice. Notice must be given just as if a formally scheduled meeting was to be held. In one case, the court held that it was not "action" for members of the governing body to individually review material in advance of a meeting at which a public contract was awarded. *Equitable Shipyards, Inc. v. State of Wash.*, 93 Wn.2d 465, 611 P.2d 396 (1980).

Case example: *The five member School Board attend the annual convention of the State School Association. Over dinner, three members discuss some of the ideas presented during the convention, but refrain from any conversation about how they might apply them to the school district. All five travel together to and from the convention and the only discussion is over whether they are lost.*

Resolution: *No violation occurred but the board members must be careful. The example is offered to highlight the level of awareness members of a governing body must have. It is not unusual for such situations to arise. For instance, the dinner*

discussion was between a majority of the members so a discussion about school district business would have been "action" and, without the required notice, would be in violation of the OPMA.

C. Secret Votes Prohibited

Statutory provision: No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter. RCW 42.30.060(2).

"Secret" votes are prohibited and any votes taken in violation of the OPMA are null and void. Presumably, the members of the governing body are required to publicly announce their vote at the time it is taken, and that vote would be recorded in the minutes of the meeting for future reference.

D. Kinds of Meetings Not Covered by the OPMA

The OPMA excludes from its coverage:

> **(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 chapter 34.05 RCW, the Administrative Procedure Act; or**
>
> **(4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress. RCW 42.30.140.**

The OPMA provides that certain activities that would otherwise be meetings are exempt from its notice requirements. When an agency engages in those activities, it is not required to comply with the OPMA, although other public notice requirements may apply. *Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994). Generally, this provision applies to activities that already require public notice,

such as quasi-judicial matters or hearings governed by the Administrative Procedure Act (chapter 34.05 RCW). Quasi-judicial matters are those where the governing body is required to determine the rights of individuals based on legal principles. The court has held that a decision by a school board to not renew teacher's contracts is quasi-judicial in nature and can properly be discussed outside of public view. *Pierce v. Lake Stevens School Dist. No. 4*, 84 Wn.2d 772, 529 P.2d 810 (1974).

The courts have employed a four-part test to determine whether administrative action is quasi-judicial: (1) Whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), *review denied*, 121 Wn.2d 1011 (1993); *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220, *review denied*, 98 Wn.2d 1008 (1982).

> ***Case example:*** *During a break in the regular meeting, the Council gets together in the chambers to decide what they should do with regard to the union's latest offer. They authorize the negotiator to accept the offer on wages if the union will accept the seniority amendments. When they return to the meeting, nothing is said about the discussion or decision.*
>
> ***Resolution:*** *The Act specifically exempts the discussion and decision about the collective bargaining strategy or position from its requirements. Since it was exempt, the discussion could have occurred at any time or place. It was unnecessary to announce the fact that the discussion took place.*

The OPMA is not a basis for withholding public records. *See Am. Civil Liberties Union v. City of Seattle*, 121 Wn. App. 544, 555, 89 P.3d 295 (2004). Therefore, even though collective bargaining matters can be discussed in a closed session, this is not a basis for withholding public records relating to that topic.

E. Who May Attend Public Meetings and Recording Meetings, and Disorderly Conduct at Meetings

Statutory provision: 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. RCW 42.30.040.

The OPMA provides that any member of the public may attend the meetings of the governing body of a public agency. The agency may not require people to sign in, complete questionnaires or establish other conditions to attendance. For instance, an agency could not limit attendance to those persons subject to its jurisdiction. The OPMA does not address whether an agency is required to hold its meeting at a location that would permit every person to attend. However, it seems clear that the courts would discourage any attempt to deliberately schedule a meeting at a location that was too small to permit full attendance or that was locked. RCW 42.30.050.

A person may record a meeting (audio or video) provided that it does not disrupt the meeting. 1998 Att'y Gen. Op. No.15. A stationary audio or video recording device would not disrupt the meeting.

Statutory provision: 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.RCW 42.30.050.

If those in attendance are disruptive and make further conduct of the meeting unfeasible, those creating the disruption may be removed. *In re Recall of Kast*, 144 W.2d 807, 817, 31 P.3d. 677 (2001). Or the meeting may be adjourned to another place; however, members of the media are entitled to attend the adjourned meeting and the governing body is limited to act only on those matters on the agenda.

> ***Case example:*** *The Board schedules a special meeting to discuss a controversial policy question. It becomes obvious that the regular meeting room is too small for all of those trying to attend the meeting. The Board announces that the meeting will be adjourned to an auditorium in the same building. The chair announces that those who wish to speak should sign in on the sheet on the table. She states that given the available time, speakers will be limited to 10 minutes each. At one point, the meeting is adjourned to remove an apparently intoxicated person who had been interrupting the comments of speakers.*
>
> ***Resolution:*** *While the OPMA allows the public to attend all meetings, it does not allow for the possibility of insufficient space. Presumably, if a nearby location is available, the governing body should move there to allow attendance. The chair can require those who wish to speak (but not all attendees) to sign in. The sign-in requirement for speaking does not restrict attendance, only participation. Since the OPMA does not require the governing body to allow public participation, the time for each speaker can also be limited. The governing body can maintain order by removing those who are disruptive.*

G. Right to Speak at Meetings

The OPMA does not require a governing body to allow everyone to speak at a public meeting. A governing body has significant authority to limit the time of speakers to a uniform amount (such as three minutes) or to not allow anyone to speak. Other laws

might require the governing body to allow the public to speak at a public meeting, but the OPMA does not.

F. Minutes of Meetings

Under a statute outside the OPMA, RCW 42.32.010, agencies must maintain minutes of their meetings and make them available upon request. The law does not specify the format or content of the required minutes. In order to satisfy the need to memorialize certain actions such as the adoption of a budget, the minutes should, at a minimum, recite the significant actions of the agency. Many agencies maintain audio recordings of the open portions of their public meetings (that is, the portions not conducted in executive session).

3.5 Required Notice of Public Meetings

The notice requirements of the OPMA are divided into notice of regular meetings (such as the third Tuesday of every month) and special meetings (meeting to address special occurrences).

A. Regular Meetings

Statutory provisions: State agencies which hold regular meetings shall file with the code reviser a schedule of the time and place of such meetings on or before January of each year for publication in the Washington state register. Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date. For the purposes of this section "regular" meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule. RCW 42.30.075.

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. RCW 42.30.070.

The OPMA requires agencies to identify the time and place they will hold their regular meetings, that is, "recurring meetings held in accordance with a periodic schedule declared by statute or rule." State agencies subject to the OPMA must publish their schedule in the Washington State Register, while local agencies (such as cities and counties) must adopt the schedule "by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body." Although an agency is not required to meet inside the boundaries of its jurisdiction, there is general agreement that agencies should not schedule meetings at locations that effectively

exclude the public. Other statutes may require certain entities to hold their meetings at particular locations, such as RCW 36.32.080, which requires a board of county commissioners to hold regular meetings at the county seat.

The OPMA does not require an agency to notify the public of anything other than the time and place that it will hold its regular meetings. That is, the OPMA does not require an agency to provide an agenda of a regular meeting. *Hartman v. Washington State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975); *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (1982), *review denied*, 98 Wn.2d 1008 (1982). However, other laws may require additional notice or an agenda in specific circumstances. *See, e.g.*, RCW 35.23.221, RCW 35A.12.160. No agenda or other description of the business to be transacted is required by the OPMA for regular meetings.

B. Special Meetings

Statutory provision: 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 written notice personally, by mail, by fax, or by electronic mail 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, by mail, by fax, or by electronic 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, by fax, or electronic mail. 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. RCW 42.30.080.

Whenever an agency has a meeting at a time other than a scheduled regular meeting, it is conducting a "special meeting." For each special meeting, the OPMA requires at least 24 hours' written notice to the members of the governing body and media representatives who have filed a written request for notices of special meetings. Notice by fax or e-mail is allowed. The OPMA does not provide any guidance as to whether the media's written request for notice must be renewed; it is advisable, however, to periodically renew such requests to insure that they contain the proper contact

information for the notice and have not been misplaced or inadvertently overlooked due to changes in agency personnel.

The notice of a special meeting must specify the time and place of the meeting and "the business to be transacted," which would normally be an agenda. At a special meeting, final disposition by the agency is limited to the matters identified as the business to be conducted in the notice. There is disagreement as to whether the governing body could discuss, but not finally dispose of, matters not included in the notice of the special meeting.

A member of the governing body may waive the required notice by filing a written waiver or simply appearing at the special meeting. *Estey v. Dempsey*, 104 Wn.2d 597, 707 P.2d 1338 (1985). The failure to provide notice to a member of the governing body can only be asserted by the person who should have received the notice, not by any person affected by action at the meeting. *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 630 P.2d 930 (1981.

> ***Case example:*** *The superintendent of the school district announced her retirement. The five-member school board passed a motion at its regular meeting to direct the staff to announce the vacancy, seek applicants, screen them and select the three most qualified candidates for presentation to the board for their final selection. The three candidates were identified together with a description of their qualifications. The letter was released to the public and the local newspaper. Controversy arose over which of the candidates was most qualified.*
>
> *At the next regular meeting, the board decided to schedule a special meeting the following week to consider the three candidates, receive public comment and select the new superintendent. No particular agenda was created. The newspaper published the various points of view and the stories described the time and place of the special meeting. The entire board attended the special meeting. No other notice was given.*
>
> ***Resolution:*** *The notice of the meeting was sufficient, unless the media had filed a written request for notice of special meetings. The only notice required of a special meeting is to the members of the governing body and only the members of the governing body may raise the lack of that notice. Here, the members of the governing body all attended the meeting, waiving any objection to the lack of notice. The media is only entitled to notice if the written request is filed.*

C. No Other Notices Required

It is notable that the above regular and special meetings notice requirements are the only meeting notice requirements in the OPMA. With the exception of the media's request for notice of a special meeting, there is no requirement to provide notice to the local media of regular or special meetings, unless the required written request for notice has been filed. Nor are agencies required to publish information through the media or to post notice at public locations. However, local jurisdictions may adopt

additional notice requirements according to their own rules of procedure, or other laws may require notice.

D. No Notice Is Required For Emergency Meetings

The OPMA provides that no notice is required for an emergency meeting such as when the jurisdiction has suffered a natural disaster or similar emergency:

Statutory provision: If, by reason of fire, flood, earthquake, or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency. RCW 42.30.070.

The courts have found that the agency must be confronted with a true emergency that requires immediate action, such as a natural disaster. It has been held that a strike by teachers did not justify an "emergency" meeting by the school board. *Mead School Dist. No. 354 v. Mead Education Ass'n*, 85 Wn.2d. 140, 530 P.2d 302 (1975). It is advisable for the agency to provide special-meeting notice of the emergency meeting if possible.

3.6 Remedies For Violations

There are both public-relations and legal consequences from an OPMA violation. The loss of credibility suffered by an agency as a result of a judicial finding of an OPMA violation—or even the mere filing of an OPMA suit—may be the most severe consequence. Once damaged, that credibility can be very difficult to regain and can negatively affect every other action of the agency in the public's eyes. Most agencies are governed by elected officials, and actual or perceived attempts to hold secret meetings are not popular with voters.

The legal consequences can be severe. First, any action taken in violation of the OPMA is void.

Statutory Provision: (1) 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 chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. (2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter. RCW 42.30.060.

If an agency violates the OPMA and its action is null and void, it must retrace its steps by taking the action in accordance with the OPMA, which usually means re-discussing

and re-voting on the matter in an open meeting. *See Henry v. Town of Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892 (1981), *review denied*, 96 Wn.2d 1027 (1982); *Feature Realty v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003) (agency re-tracing of steps must be done in public). If a person seeks to void an election based upon a violation of the OPMA, the lawsuit must be initiated as soon as possible or the court may bar that relief based on the delay in filing. *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978).

Second, the OPMA provides for financial penalties.

Statutory provision: (1) 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 chapter 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 chapter 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. (2) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause. RCW 42.30.120.

A member of the governing body is personally liable for the $100 penalty only if he or she is aware that the meeting is in violation of the OPMA. *Eugster v. Spokane*, 110 Wn. App. 212, 226, 39 P.3d 380 (2002). The court must award attorney fees to a successful party. If the court finds that the lawsuit against the agency is frivolous, which is a very difficult burden for the agency to prove, the agency may recover its attorney fees and expenses. The only statutory remedy is an action filed in superior court. No agency has the authority to sanction violations or to issue regulations interpreting the "gray areas" of the OPMA.

Attorney General's Open Government Internet Deskbook (Public Records and Open Meetings)

Chapter 1: Public Records Act – General and Procedural Provisions
Chapter 2: Public Records Act – Exemptions from Disclosure (Laws Allowing Withholding of Records)
Chapter 3: Open Public Meetings Act – General and Procedural Provisions
Chapter 4: Open Public Meetings Act – Executive Sessions (Closed Sessions)

APPENDIX A-2

The Open Public Meetings Act

How it Applies to Washington Cities, Counties, and Special Purpose Districts

REPORT NUMBER 60 Revised

May 2012

Municipal Research and Services Center

The Open Public Meetings Act

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Foreword

This is the second revision of our original September 1997 publication on the Open Public Meetings Act. Issues involving public meetings of governing bodies of cities, towns, counties, and special purpose districts continue to figure prominently in inquiries to MRSC legal consultants. This publication is intended for use by city, town, county, and special purpose district officials and is intended to provide general guidance in understanding the policies and principles underlying this important law.

Special acknowledgment is given to Bob Meinig, Legal Consultant, who prepared this publication. Thanks are also due to Pam James, Legal Consultant, for her editing, and to Holly Stewart, Desktop Publishing Specialist, for designing the publication.

Introduction

In 1971, the state legislature enacted the Open Public Meetings Act (the "Act") to make the conduct of government more accessible and open to the public. The Act begins with a strongly worded statement of purpose:[1]

> *The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.*
>
> *The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.*[2]

Codified in chapter 42.30 RCW, the Act applies to all city and town councils,[3] to all county councils and boards of county commissioners, and to the governing bodies of special purpose districts, as well as to many subordinate city, county, and special purpose district commissions, boards, and committees. It requires, basically, that all "meetings" of such bodies be open to the public and that all "action" taken by such bodies be done at meetings that are open to the public. The terms "meetings" and "action" are defined broadly in the Act and, consequently, the Act can have daily significance for cities, counties, and special purpose districts even when no formal meetings are being conducted.

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[1]RCW 42.30.010

[2]Throughout this publication, indented quotations in italics are statutory language.

[3]For convenience, the term "city council" will in this publication also refer to town councils and to city commissions under the commission form of government. There is currently only one city in the state, Shelton, that is governed by the commission form of government.

This publication comprehensively reviews the Act as it applies to Washington cities, towns, counties, and special purpose districts.[4] It also provides answers to selected questions that have been asked of MRSC staff concerning application of the Act. However, we find that new questions constantly arise concerning the Act. So, if you have questions that are not addressed by this publication, do not hesitate to contact your legal counsel or MRSC legal staff.

[4]There is no single uniform definition of a special purpose district in state law. In general, a special purpose district is any unit of local government other than a city, town, or county that is authorized by law to perform a single function or a limited number of functions, such as water-sewer districts, irrigation districts, fire districts, school districts, port districts, hospital districts, park and recreation districts, transportation districts, diking and drainage districts, flood control districts, weed districts, mosquito control districts, metropolitan municipal corporations, etc.

Who Is Subject to the Act?

The basic mandate of the Open Public Meetings Act is 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 chapter.*[5]

The Act applies to "meetings" of a "governing body" of a "public agency." A "public agency" includes a city, county, and special purpose district.[6] A "governing body" is defined in the Act as follows:

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

The legislative bodies of cities and counties[7] clearly are governing bodies under this definition, as are the boards or commissions that govern special purpose districts. However, they are not the only governing bodies to which the Act applies. The Act also applies to any "subagency" of a city, county, or special purpose district,[8] because the definition of "public agency" 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, library or park boards, commissions, and agencies.*[9]

Under this definition, the subagency must be created by some legislative act of the governing body, such as an ordinance or resolution. A group established by a mayor to advise him or her

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[5]RCW 42.30.030.

[6]RCW 42.30.020(1)(b).

[7]The legislative bodies of cities are the city councils or city commissions, and the legislative bodies of counties are the boards of county commissioners or county councils.

[8]Most special purpose district governing bodies do not have the authority to create such subagencies.

[9]RCW 42.30.020(1)(c).

could not, for example, be a subagency, because a mayor does not act legislatively. However, a legislative act alone does not create a subagency. According to the attorney general's office, a board or a commission or other body is not a subagency governed by the Act

> unless it possesses some aspect of policy or rulemaking authority. In other words, its "advice," while not binding upon the agency with which it relates . . . , must nevertheless be legally a necessary antecedent to that agency's action.[10]

If a board or commission (or whatever it may be termed) established by legislative action is merely advisory and its advice is not necessary for the city, county, or district to act, the Act generally does not apply to it.

Given the above definitions, the following are governing bodies within city and county government that *are subject* to the Act:

- City council or commission
- County council or board of commissioners
- Planning commission
- Civil service commission
- Board of adjustment

Other boards or commissions will need to be evaluated individually to determine whether the Act applies to them. For example, the definition of a subagency identifies library boards, but, in some cities (particularly those without their own libraries), library boards function as purely advisory bodies, without any policymaking or rulemaking authority. That type of a library board would not be subject to the Act. In cities where library boards function under statutory authority[11] and possess policymaking and rulemaking authority, those boards must follow the requirements of the Act.

Most special purpose districts have only one "governing body" under the meaning of that term in the Act.

In some circumstances, the Act applies to a committee of a governing body. As a practical matter, city or county legislative bodies are usually the only governing bodies with committees to which the Act may apply. A committee of a city or county legislative body will be subject to the Act in the following circumstances:

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[10]AGO 1971 No. 33, at 9. The attorney general's office bases its conclusion on this issue on the language "or other policy or rulemaking body of a public agency" in the definition of "governing body" in RCW 42.30.020(2), quoted above. See also AGLO 1972 No. 48.

[11]RCW 27.12.210.

- when it acts on behalf of the legislative body[12]
- when it conducts hearings, or
- when it takes testimony or public comment.

When a committee is not doing any of the above, it is not subject to the Act.[13]

Keep in mind that it is usually good public policy to open the meetings of city, county, and special district governing bodies to the public, even if it is uncertain or doubtful that the Act applies to them. Secrecy is rarely warranted, and the Act's procedural requirements are not onerous. This approach would be consistent with the Act's basic intent that the actions of governmental bodies "be taken openly and that their deliberations be conducted openly."[14]

Further Questions

May four councilmembers-elect of a seven-member council meet before taking their oaths of office without procedurally complying with the Act?

Yes. Councilmembers-elect are not yet members of the governing body and cannot take "action" within the meaning of the Act, and so they are not subject to the Act.[15]

Must a committee of the governing body be composed solely of members of the governing body for it to be subject to the Act under the circumstances identified in RCW 42.30.020(2)?

This statute defines a "governing body" to include a "*committee thereof* when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." (Emphasis added.) Does a "committee thereof" include only members of the governing body? This question has not been addressed by the courts. However, the attorney general's office has opined that a "committee thereof" may include individuals who are not members of the governing body when they are appointed by the governing body.[16]

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[12]According to the attorney general's office, a committee acts on behalf of the governing body "when it exercises actual or de facto decisionmaking power." AGO 1986 No. 16, at 12. However, in an informal letter to the Central Kitsap School District Board, dated March 21, 2008, the open government ombudsman for the attorney general's office takes a more expansive view than this prior formal opinion regarding when a committee is subject to the Act.

[13]While the definition of "governing body" speaks of "when" a committee acts so as to come within that definition, the courts have not been clear about whether a committee is subject to the Act for all of its meetings when it is only at some that it is acting in that manner. See *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).

[14]RCW 42.30.010.

[15]*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 561 (2001).

[16]AGO 1986 No. 16.

What Is a "Meeting"?

There must be a "meeting" of a governing body for the Act to apply. Sometimes it is very clear that a "meeting" is being held that must be open to the public, but other times it isn't. To determine whether a governing body is having a "meeting" that must be open, it is necessary to look at the Act's definitions. The Act defines "meeting" as follows: "'Meeting' means meetings at which action is taken."[17] "Action," as referred to in that definition of "meeting," is defined as follows:

> *"Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.*[18]

Since a governing body can transact business when a quorum (majority) of its members are present,[19] it is conducting a meeting subject to the requirements of the Open Public Meetings Act whenever a majority of its members meet together and deal in any way with city, county, or special purpose district business, as the case may be. This includes simply discussing some matter having to do with agency business. Because members of a governing body may discuss the business of that body by telephone or e-mail, it is not necessary that the members be in the physical presence of each other for there to be a meeting subject to the Act.[20] See the "Further Questions" at the end of this section. Also, it is not necessary that a governing body take "final action"[21] for a meeting subject to the Act to occur.

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[17]RCW 42.30.020(4).

[18]RCW 42.30.020(3).

[19]See, e.g., RCW 35A.12.120; 35.23.270; 35.27.280; 36.32.010.

[20]*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 562 (2001).

[21]RCW 42.30.020(3) defines "final action" as "a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance."

Note that it does not matter if the meeting is called a "workshop," a "study session," or a "retreat"; it is still a meeting subject to the Open Public Meetings Act if a quorum is addressing the business of the city, county, or special purpose district. If a governing body just meets socially or travels together, it is not having a meeting subject to the Act as long as the members do not discuss agency business or otherwise take "action."[22]

Further Questions

If a majority or more of the members of a governing body discuss city, county, or district business by telephone or e-mail, are they having a meeting subject to the Act?

Since the members of a governing body can discuss city, county, or district business together by telephone or by e-mail so as to be taking "action" within the above definition, the governing body can conduct a meeting subject to the Act even when the members are not in the physical presence of one another[23] This type of meeting could take many forms, such as a conference call among a majority or more of the governing body, a telephone "tree" involving a series of telephone calls, or an exchange of e-mails. Since the public could not, as a practical matter, attend this type of "meeting," it would be held in violation of the Act.[24]

Given the increasingly prevalent use of e-mail and the nature of that technology, members of city councils, boards of county commissioners, and special district governing bodies must be careful when communicating with each other by e-mail so as not to violate the Act. However, such bodies will not be considered to be holding a meeting if one member e-mails the other members merely for the purpose of providing relevant information to them. As long as the other members only "passively receive" the information and a discussion regarding that information is not then commenced by e-mail amongst a quorum, there is no Open Public Meetings Act issue.[25]

May one or more members of a governing body "attend" a meeting by telephone?

Although no courts in this state have addressed this question, it probably would be permissible for a member of a governing body to "attend" a meeting by telephone, with the permission of the body, *if* that member's voice could be heard by all present, including

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[22]RCW 42.30.070; *In re Recall of Roberts*, 115 Wn.2d 551, 554 (1990).

[23]*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 562-63 (2001).

[24]Though, at least one local government in this state has held an online meeting of its governing body, providing notice under the Act and giving the public the opportunity to "attend."

[25]*Id.* at 564-65.

the public, and if that member could hear all that is stated at the meeting. Some sort of speaker phone equipment would be necessary for this to occur. If a governing body decides to allow participation by telephone, it is advisable to authorize such in its rules, including under what circumstances it will be allowed.

May a quorum of a city or county legislative body attend, as members of the audience, a citizens' group meeting?

Yes, provided that the members attending the meeting do not discuss, as a group, city or county or district business, as the case may be, or otherwise take "action" within the meaning of the Act.[26] That possibility could in most circumstances be avoided by not sitting as a group.

May an entire county council attend a private dinner in honor of the out-going county official without complying with the Open Public Meetings Act?

Again, the issue comes down to whether the council will be dealing with county business. It can be argued that honoring the county official is itself county business. On the other hand, it could be argued that honoring an individual who is leaving county employment does not involve the functioning of the county. This is a gray area where caution should be exercised.

Must the public be allowed to attend the annual city council retreat?

Yes. A retreat attended by a quorum of the council where issues of city business are addressed constitutes a meeting.

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[26]See AGO 2006 No. 6.

What Procedural Requirements Apply to Meetings?

The Act establishes some basic procedural requirements that apply to all meetings of a governing body, whether they are regular or special meetings. *All meetings of a governing body are, under the Open Public Meetings Act, either regular or special meetings.* It does not matter if it is called a "study session" or a "workshop" or a "retreat," it is either a regular or special meeting.

What is a regular meeting?

A regular meeting is one that is held according to a schedule adopted by ordinance, resolution, order, or rule, as may be appropriate for the governing body.[27]

What is a special meeting?

A special meeting is any meeting that is not a regular meeting. In other words, special meetings are not held according to a fixed schedule. Under the Act, special meetings have specific notice requirements, as discussed below. Also, governing bodies may be subject to specific limitations about what may be done at a special meeting.[28]

What procedural requirements apply to all meetings of a governing body?

The following requirements and prohibitions apply to both regular and special meetings of a governing body:

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[27]See RCW 42.30.060, .070, .080. Also, state law, though not the Open Public Meetings Act, may require the governing body of a city, county, or special district to meet with a certain regularity, such as monthly. For example, second class and code city councils, town councils, and the board of directors of any school district must meet at least once a month. RCW 35.23.181; RCW 35.27.270; RCW 35A.12.110; RCW 28A.343.380.

[28]For example, second class city councils may not pass an ordinance or approve a contract or a bill for the payment of money at a special meeting. RCW 35.23.181. Town councils may not pass a resolution or order for the payment of money at a special meeting. RCW 35.27.270. Many special purpose districts are subject to requirements that certain actions can be taken only at a regular meeting, i.e., not at a special meeting. See, e.g., RCW 54.16.100 (appointment and removal of public utility district manager); RCW 85.05.410 (setting compensation of board of diking district commissioners). The councils of first class and code cities and county legislative bodies have no specific limitations on actions that may be taken at a special meeting, other than those imposed by the Open Public Meetings Act.

- All meetings must be open to the public.[29]
- A member of the public may not be required as a condition of attendance to register his or her name or other information, or complete a questionnaire, or be required to fulfill any other condition to be allowed to attend.[30]

- The governing body may require the removal of members of the public who disrupt the orderly conduct of a meeting. If order cannot be restored by removal of individuals, the governing body may order the meeting room cleared and may continue in session or it may adjourn and reconvene the meeting at another location, subject to the limitations in RCW 42.30.050.[31]

- Votes may not be taken by secret ballot.[32]

- Meetings may be adjourned or continued subject to the procedures in RCW 42.30.090, as discussed below.

- The governing body may meet in executive (closed) session, but only for one of the reasons specified in and in accordance with the procedures identified in RCW 42.30.110.[33] See discussion on executive sessions.

Although the Act gives the public the right to attend meetings, the public has no statutory right to speak at meetings. However, as a practical and policy matter, city, county, and special district governing bodies generally provide the public some opportunity to speak at meetings.

The Open Public Meetings Act does not require that a city or county legislative body or special district governing body hold its meetings within the city or in a particular place in the county or district. However, other statutes provide that the councils of code cities, second class cities, and towns may take final actions on ordinances and resolutions only at a meeting within the city or

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[29]RCW 42.30.030.

[30]RCW 42.30.040.

[31]That statute provides in relevant part as follows

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.

[32]RCW 42.30.060(2). Any vote taken by secret ballot is null and void.

[33]But, see footnote 44.

town.[34] Also, county legislative bodies must hold their regular meetings at the county seat,[35] but may hold special meetings in the county outside of the county seat if there are agenda items that "are of unique interest or concern" to the residents of the area of the county in which the meetings are held.[36] Some special purpose district governing bodies, such as first class school district boards of directors,[37] are specifically required to hold their regular meetings within the district, while others, such as irrigation districts,[38] are specifically required to hold meetings in the county where the district is located. Where the statutes are silent as to where meetings must be held for a particular type of district, they should be held, if possible, within the district or, at the very least, within the county in which the district is located.

What procedural requirements apply specifically to regular meetings?

- The date and time of regular meetings must be established by ordinance, resolution, order, or rule, as may be required for the particular governing body.[39]

- If the regular meeting date falls on a holiday, the meeting must be held on the next business day.[40]

What procedural requirements apply specifically to special meetings?

The procedural requirements that apply to special meetings deal primarily with the notice that must be provided. These requirements, contained in RCW 42.30.080, are as follows:

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[34]RCW 35.23.181; 35.27.270; 35A.12.110. Although meetings need not necessarily be held within a city, when a governing body decides to hold one outside the city, it should not site the meeting at a place so far from the city as to effectively prevent the public from attending.

[35]RCW 36.32.080.

[36]RCW 36.32.090.

[37]RCW 28A.330.070.

[38]RCW 87.03.115.

[39]The Act does not directly address designating (in the ordinance, resolution, order, or rule designating the date and time of regular meetings) the place at which regular meetings will be held. RCW 42.30.070. However, the statutes governing the particular classes of cities, except those governing first class cities, require designation of the site of regular council meetings. RCW 35A.12.110; 35.23.181; 35.27.270. The county statutes and those relating to special purpose districts do not address designating the site of regular meetings. However, counties, first class cities, and special purpose districts should, of course, also designate the site of regular meetings along with the designation of the date and time of those meetings.

[40]RCW 42.30.070.

- A special meeting may be called by the presiding officer or by a majority of the members of the governing body.[41]

- Written notice must be delivered personally, by mail, by fax, or by e-mail at least 24 hours before the time of the special meeting to:

    - each member of the governing body, and to

    - each local newspaper of general circulation and each local radio or television station that has on file with the governing body a written request to be notified of that special meeting or of all special meetings.[42]

- Notice of the special meeting must be provided to the public as follows:

    - "prominently displayed" at the main entrance of the agency's principal location, and at the meeting site if the meeting will not held at the agency's principal location; and

    - posted on the agency's web site. Web site posting is not required if the agency:

        - does not have a web site;
        - has fewer than 10 full-time equivalent employees; or
        - does not employ personnel whose job it is to maintain or update the web site.

- The notice must specify:

    - the time and place of the special meeting, and
    - the business to be transacted at the special meeting.

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[41]There is a conflict between the provision in RCW 42.30.080 authorizing a majority of the members of a governing body to call a special meeting and the provision for code cities in RCW 35A.12.110 authorizing three members of the city council to call a special meeting. This conflict occurs only with respect to a code city with a seven-member council, because three members is less than a majority. Since RCW 42.30.140 provides that the provisions of the Act will control in case of a conflict between it and another statute, four members of a seven-member code city council, not three, are needed to call a special meeting.

[42]Note also that statutes relating to each class of city require that cities

> *establish a procedure for notifying the public of upcoming hearings and the preliminary agenda for the forthcoming council meeting. Such procedure may include, but not be limited to, written notification to the city's official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement.*

RCW 35A.12.160; 35.22.288; 35.23.221; 35.27.300. There are no similar statutes that apply to counties or special purpose districts. Nevertheless, we recommend that counties and special districts establish like procedures for notifying the public.

- The governing body may take final action *only* concerning matters identified in the notice of the meeting.[43]

- Written notice to a member or members of the governing body is not required when:

    - a member files at or prior to the meeting a written waiver of notice or provides a waiver by telegram, fax, or e-mail; or

    - the member is present at the meeting at the time it convenes.

- Special meeting notice requirements may be dispensed with when 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 the time requirements of the notice would make notice impractical and increase the likelihood of such injury or damage.[44] An emergency meeting must, nevertheless, be open to the public.[45]

What procedural requirements apply to adjournments of regular or special meetings?

A regular or special meeting may be adjourned to a specified time and place, where it will be continued. There are a number of circumstances under which a meeting might be adjourned. A meeting may be adjourned and continued to a later date because the governing body did not complete its business. The Act, in RCW 42.30.090, addresses two other circumstances under which a meeting may be adjourned and continued at a later date:

- When the governing body does not achieve a quorum. In that circumstance, less than a quorum may adjourn a meeting to a specified time and place; or

- When all members are absent from a *regular meeting* or an *adjourned regular meeting*. In that instance, the clerk of the governing body may adjourn the meeting to a stated time and place, with notice provided as required for a special meeting, unless notice is waived as provided for special meetings. However, the resulting meeting is still considered a regular meeting.

Notice of an adjourned meeting is to be provided as follows:

- An order or notice of adjournment, specifying the time and place of the meeting to be continued, must be "conspicuously posted" immediately following adjournment on or

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[43] This does not prevent a governing body from discussing or otherwise taking less than final action with respect to a matter not identified in the notice.

[44] The type of emergency contemplated here is a severe one that "involves or threatens physical damage" and requires urgent or immediate action. *Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 140, 144-45 (1975).

[45] *Teaford v. Howard*, 104 Wn.2d 580, 593 (1985)

near the door of the place where the meeting was held.

- Notice of a regular meeting adjourned by the clerk when all members of the governing body are absent must be provided in the same manner as for special meetings.

- If the notice or order of an adjourned meeting fails to state the hour at which the adjourned meeting is to be held, it must be held at the hour specified for regular meetings by ordinance, resolution, or other rule.

If the governing body is holding a hearing, the hearing may be continued at a later date by following the same procedures for adjournment of meetings.[46]

Further Questions

Must a city, county, or special purpose district provide published notice of a special meeting?

No, not under the Open Public Meetings Act. While notice must be provided to media that have on file a request to be notified of special meetings, this is not equivalent to a publishing requirement. Of course, if the governing body has adopted a requirement of published notice for special meetings, that requirement must be followed.

May notice to the media of a special meeting be provided by fax or e-mail?

Yes. Legislation passed in 2005 amended RCW 42.30.080 to allow notice by fax or e-mail.

May a governing body prohibit a member of the public from tape recording or videotaping a meeting?

No, there is no legal basis for prohibiting the audio or videotaping of a meeting, unless the taping disrupts the meeting. If the governing body enacted such a rule, it essentially would be conditioning attendance at a meeting on not recording the meeting. This would be contrary to RCW 42.30.040, which prohibits a governing body from imposing any condition on attending a public meeting.[47]

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[46]RCW 42.30.100.

[47]See AGO 1998 No. 15.

How can a majority of the governing body agree outside of a formal meeting to call a special meeting without violating the Act?

Since a majority of the governing body, under RCW 42.30.080, may call a special meeting "at any time," it would indeed be an anomaly if, in calling for that meeting, the majority would be considered to have violated the Act. In our opinion, the only way to give effect to this statutory provision is to allow a majority to communicate as a group in some way (e.g., by phone, e-mail, in person, or through the clerk's office) to decide whether to have a special meeting, when to have it, and what matters it will deal with. The members could not discuss anything else, such as the substance of the matters to be discussed at the special meeting.

When May a Governing Body Hold an Executive Session?

What is an executive session?

"Executive session" is not expressly defined in the Open Public Meetings Act, but the term is commonly understood to mean that part of a regular or special meeting of a governing body that is closed to the public. A governing body may hold an executive session only for specified purposes, which are identified in RCW 42.30.110(1)(a)-(o),[48] and only during a regular or special meeting. Nothing, however, prevents a governing body from holding a meeting, which complies with the Act's procedural requirements, for the sole purpose of having an executive session.

A governing body should always follow the basic rule that it may not take final action in an executive session. However, there may be circumstances, as discussed below, where the governing body will need to reach a consensus concerning the matter being considered in closed session. Nevertheless, as discussed below, recent case law casts doubt on the authority of a governing body to reach a consensus regarding *any* matter in executive session.

Who may attend an executive session?

Attendance at an executive session need not be limited to the members of the governing body. Persons other than the members of the governing body may attend the executive session at the invitation of that body.[49] Those invited should have some relationship to the matter being addressed in the closed session, or they should be attending to otherwise provide assistance to the governing body. For example, staff of the governing body or of the governmental entity may

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[48]There is at least one statute outside of the Open Public Meetings Act that authorizes an executive session for a purpose not identified in RCW 42.30.110(1)(a)-(o). RCW 70.44.062 authorizes the board of commissioners of a public hospital district to meet in executive session "concerning the granting, denial, revocation, restriction, or other consideration of the status of the clinical or staff privileges of a physician or other health care provider" or "to review the report or the activities of a quality improvement committee."

[49]When the governing body is meeting in executive session to discuss litigation or potential litigation, legal counsel *must* be present and take part in the discussion. RCW 42.30.110(1)(i).

be needed to present information or to take notes or minutes. However, minutes are not required to be taken at an executive session.[50]

What procedures must be followed to hold an executive session?

Before a governing body may convene in executive session, the presiding officer must publicly announce the executive session to those attending the meeting by stating two things:

- the purpose of the executive session, and
- the time when the executive session will end.

The announced purpose of the executive session must be one of the statutorily-identified purposes for which an executive session may be held. The announcement must contain enough detail to identify the purpose as falling within one of those identified in RCW 42.30.110(1).

If the executive session is not over at the stated time, it may be extended only if the presiding officer announces to the public at the meeting place that it will be extended to a stated time. If the governing body concludes the executive session *before* the time that was stated it would conclude, it should not reconvene in open session until the time stated. Otherwise, the public may, in effect, be excluded from that part of the open meeting that occurs between the close of the executive session and the time that was announced for the conclusion of the executive session.

What are the allowed purposes for holding an executive session?

An executive session may be held only for one or more of the purposes identified in RCW 42.30.110(1). The purposes addressed below are those which have practical application to cities, counties, and special purpose districts. A governing body of a city, county, or special district may meet in executive session for the following reasons:

- *To consider matters affecting national security;*

  Until the events of September 11, 2001, this provision had little, if any, practical application to cities, counties, or special districts. However, since the events of September 11, 2001, it has become clear that local security issues may in some instances have national security implications. So, discussions by city, county, or district governing bodies of security matters relating to possible terrorist activity should come within the ambit of this executive session provision. This would include discussions of vulnerability or response assessments relating to criminal terrorist activity.

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[50]See RCW 42.32.030.

- *To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;*[51]

  This provision has two elements:

  - the governing body must be considering either purchasing or leasing real property; and

  - public knowledge of the governing body's consideration would likely cause an increase in the price of the real property.

  The consideration of the purchase of real property under this provision can involve condemnation of the property, including the amount of compensation to be offered for the property.[52]

  Since this provision recognizes that the process of purchasing or leasing real property or selecting real property to purchase or lease may justify an executive session, it implies that the governing body may need to reach some consensus in closed session as to the price to be offered or the particular property to be selected.[53] However, the state supreme court has emphasized that "only the action explicitly specified by [an] exception may take place in executive session."[54] Taken literally, this limitation would preclude a governing body in executive session from actually selecting a piece of property to acquire or setting a price at which it would be willing to purchase property, because such action would be beyond mere "consideration." Yet, the purpose of allowing this type of consideration in an executive session would be seemingly defeated by requiring a vote in open session to select the property or to decide how much to pay for it, where public knowledge of these matters would likely increase its price. While this issue awaits judicial or legislative resolution, city and county legislative bodies and special district governing bodies should exercise caution.

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[51] RCW 42.30.110(1)(b).

[52] *Port of Seattle v. Rio*, 16 Wn. App. 718, 724 (1977).

[53] See *Port of Seattle v. Rio*, 16 Wn. App. at 723-25.

[54] *Miller v. Tacoma*, 138 Wn.2d 318, 327 (1999). See also, *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

- *To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;*[55]

  This subsection, the reverse of the previous one, also has two elements:

  - the governing body must be considering the minimum price at which real property belonging to the city or county will be offered for sale or lease; and
  - public knowledge of the governing body's consideration will likely cause a decrease in the price of the property.

  The requirement here of taking final action selling or leasing the property in open session may seem unnecessary, since all final actions must be taken in a meeting open to the public. However, its probable purpose is to indicate that, although the decision to sell or lease the property must be made in open session, the governing body may decide in executive session the minimum price at which it will do so. However, see the discussion regarding the previous provision for meeting in executive session and taking any action in executive session that is not expressly authorized.

  If there would be no likelihood of a change in price if these real property matters are considered in open session, then a governing body should not meet in executive session to consider them.

- *To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;*[56]

  This subsection indicates that when a city, county, or special district and a contractor performing a publicly bid contract are negotiating over contract performance, the governing body may "review" those negotiations in executive session if public knowledge of the review would likely cause an increase in contract costs. MRSC is not aware of an executive session being held under this provision. It is not clear what circumstances would result in a governing body meeting in executive session under this provision.

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[55]RCW 42.30.110(1)(c).

[56]RCW 42.30.110(1)(d).

- *To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;*[57]

  For purposes of meeting in executive session under this provision, a "charge" or "complaint" must have been brought against a city, county, or special district officer or employee. The complaint or charge could come from within the city, county, or district or from the public, and it need not be a formal charge or complaint. The bringing of the complaint or charge triggers the opportunity of the officer or employee to request that the discussion be held in open session.[58]

  As a general rule, city governing bodies that are subject to the Act do not deal with individual personnel matters.[59] For example, the city council should not be involved in individual personnel decisions, as these are within the purview of the administrative branch under the authority of the mayor or city manager.[60] This provision for holding an executive session should not be used as a justification for becoming involved in personnel matters which a governing body may have no authority to address.

- *To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;*[61]

  There are two different purposes under this provision for which a governing body may meet in executive session. For both purposes, the references to "public employment" and to "public employee" include within their scope public offices and

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[57]RCW 42.30.110(1)(f).

[58]Another possible interpretation of this provision is that the officer or employee subject to the complaint or charge may request that the complaint or charge be heard by the governing body in open session, *in addition to* rather than instead of a discussion of the complaint or charge in executive session. This provision, however, has not been addressed by the courts.

[59]A civil service commission is an obvious exception. It, however, addresses personnel actions taken against a covered officer or employee, and it does so in the context of a formal hearing. Another exception is where the governing body may be considering a complaint against one of its members. Also, when a city council has confirmation authority over a mayoral appointment, it may discuss the appointment that is subject to confirmation in executive session.

[60]An exception is where the council, in a council-manager city, may be considering a complaint or charge against the city manager.

[61]RCW 42.30.110(1)(g).

public officials. This means that a governing body may evaluate in executive sessions persons who apply for appointive office positions, such as city manager, as well as those who apply for employee positions.[62]

The first purpose involves evaluating the qualifications of applicants for public employment. This could include personal interviews with an applicant, discussions concerning an applicant's qualifications for a position, and discussions concerning salaries, wages, and other conditions of employment personal to the applicant.

This authority to "evaluate" applicants in closed session allows a governing body to discuss the qualifications of applicants, not to choose which one to hire (to the extent the governing body has any hiring authority). Although this subsection expressly mandates that "final action hiring" an applicant for employment be taken in open session, this does not mean that a governing body may take preliminary votes in executive session that eliminate candidates from consideration.[63]

The second part of this provision concerns reviewing the performance of a public employee. Typically this is done where the governing body is considering a promotion or a salary or wage increase for an individual employee or where it may be considering disciplinary action.[64]

The result of a governing body's closed session review of the performance of an employee may be that the body will take some action either beneficial or adverse to the officer or employee. That action, whether raising a salary of or disciplining an officer or employee, must be made in open session.

Any discussion involving salaries, wages, or conditions of employment to be "generally applied" in the city, county, or district must take place in open session. However, discussions that involve collective bargaining negotiations or strategies are not subject to the Open Public Meetings Act and may be held in closed session without being subject to the procedural requirements for an executive session.[65]

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[62]The courts have, for various purposes, distinguished between a public "office" and a public "employment." See, e.g., *Oceanographic Comm'n v. O'Brien*, 74 Wn.2d 904, 910-12 (1968); *State ex rel. Hamblen v. Yelle*, 29 Wn.2d 68, 79-80 (1947); *State ex rel. Brown v. Blew*, 20 Wn.2d 47, 50-52 (1944). A test used to distinguish between the two is set out in *Blew*, 20 Wn.2d at 51.

[63]*Miller v. Tacoma*, 138 Wn.2d 318, 329-31 (1999).

[64]In general, a city council has little or no authority regarding discipline of public officers or employees. An exception would be a city manager over which the council has removal authority. RCW 35A.13.130; 35.18.120.

[65]See RCW 42.30.140(4).

- *To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;*[66]

  This provision applies to a city, county, or district governing body only when it is filling a vacant elective position. Under this provision, the governing body may meet in executive session to evaluate the qualifications of applicants for the vacant position. However, any interviews with the candidates must be held in open session. As with all other appointments, the vote to fill the position must also be in open session.

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

  This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present.[67]

  For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6[68] *or RCW 5.60.060(2)(a)*[69] *concerning:*

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

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

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

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[66]RCW 42.30.110(1)(h).

[67]RCW 42.30.110(1)(i).

[68]RPC 1.6 is part of the Rules of Professional Conduct for attorneys, and it deals specifically with client confidentiality, generally prohibiting disclosure of client confidences except in certain specific situations.

[69]RCW 5.60.060(2)(a) provides that an attorney may not be compelled to be a witness at trial and reveal client confidences.

Three basic requirements must be met before this provision can be used by a governing body to meet in closed session:[70]

- The attorney or special legal counsel representing the city, county, or special district must attend the executive session to discuss the enforcement action or the litigation or potential litigation;

- The discussion with legal counsel must concern either an enforcement action or litigation or potential litigation to which the city, county, district, a governing body, or one of its members is or is likely to become a party; and

- Public knowledge of the discussion would likely result in adverse legal or financial consequence to the city, county, or district.

The potential litigation issue. Until this section was amended in 2001 to define "potential litigation," the scope of this provision was unclear and subject to a range of interpretations. The 2001 legislature expanded the meaning of that term to authorize governing bodies to discuss in executive session the legal risks of a proposed or existing practice or action, when discussing those risks in open session would likely have an adverse effect on the agency's financial or legal position. This allows a governing body to freely consider the legal implications of a proposed decision or an existing practice without the attendant concern that some future litigation position might be jeopardized.

The probability of adverse consequence to the city or county. It is probable that public knowledge of most governing body discussions of existing litigation would result in adverse legal or financial consequence to the city, county, or district. Knowledge by one party of the communications between the opposing party and its attorney concerning a lawsuit will almost certainly give the former an advantage over the latter. The same probably can be said of most discussions that qualify as involving potential litigation.

The state supreme court has held that a governing body is not required to determine beforehand whether public knowledge of the discussion with legal counsel would likely have adverse consequences; it is sufficient if the agency, from an objective standard, should know that the discussion is not benign and that public knowledge of it will likely result in adverse consequences.[71]

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[70]This provision for holding an executive session is based on the legislative recognition that the attorney-client privilege between a public agency governing body and its legal counsel can co-exist with the Open Public Meetings Act. See *Final Legislative Report, Forty-Ninth Legislature, 1985 Regular and 1st Special Sessions,* at 270-71; see also *Recall of Lakewood City Council,* 144 Wn.2d 583, 586-87 (2001); *Port of Seattle v. Rio,* 16 Wn. App.718, 724-25 (1977); AGO 1971 No. 33, at 20-23. However, that privilege is not necessarily as broad as it may be between a private party and legal counsel.

[71]*Recall of Lakewood City Council,* 144 Wn.2d 583, 586-87 (2001).

Again, no final action in executive session. The purpose of this executive session provision is to allow the governing body to discuss litigation or enforcement matters with legal counsel; the governing body is not authorized to take final action regarding such matters in an executive session. And, recent case law emphasizes that, in order for any action to take place legally in executive session, authority must be "explicitly specified" in an exemption under RCW 42.30.110(1), though that case law did not address this exemption.[72] The only action that is specifically authorized in this exemption is discussion.

However, since a basic purpose of shielding these discussions from public view is to protect the secrecy of strategic moves concerning litigation, the scope of a governing body's authority in executive session should be interpreted to afford that protection. So, for example, while this provision does not authorize a governing body to approve a settlement agreement in executive session, it should provide authority for that body to authorize its legal counsel to settle a case for no higher than a certain amount. An interpretation supporting the council's authority to take such action appears warranted, *but* such an interpretation may not be supported by the strict language in recent case law.

Further Questions

May an executive session be called to discuss "personnel matters"?

No, this would not be a legally sufficient reason to hold an executive session. The purpose for holding an executive session must be within those specifically identified in RCW 42.30.110(1). Although there are personnel issues that may be addressed in an executive session under this statute, such as complaints or charges against an employee or an employee's performance, "personnel matters" is too broad a purpose and could include purposes not authorized by the statute.

May a city council meet in executive session to ask the mayor to resign?

No. Although the council could meet in executive session to discuss complaints or charges against the mayor, the council should take the action of asking for the mayor's resignation in open session. (Of course, a mayor is not legally bound by the council's wishes.)

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[72] *Miller v. Tacoma*, 138 Wn.2d 318, 327 (1999). See also, *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

May the board of a special purpose district meet in executive session at a special meeting if the notice of the special meeting did not identify that an executive session would be held?

Yes. The prohibition in RCW 42.30.080 on taking final disposition on any matter not identified in the special meeting notice does not apply to holding an executive session, because that does not involve final disposition on any matter. The board is already prohibited from taking final action in an executive session. Nevertheless, from a policy standpoint, the notice should identify the executive session if the board knows at the time of giving the notice that it will be meeting in executive session at the special meeting.

If three members of a seven-member city council interview candidates for a council vacancy, must those interviews be open to the public?

Yes. Although they do not represent a quorum of the council, the three councilmembers would be acting on behalf of the entire council in conducting these interviews. As such, they would be considered a "governing body" subject to the Act. Since interviews by a governing body of candidates for appointment to elective office must occur in an open meeting (RCW 42.30.110(1)(h)), this three-member committee may not meet in executive session for the purpose of interviewing the candidates.

What Meetings Are Exempt from the Act?

RCW 42.30.140 sets out four situations where a governing body may meet and not be subject to any requirements of the Open Public Meetings Act. That statute provides that the Act does not apply to:

- *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;*

  This provision, for the most part, has little, if any, application to any city, county, or special district governing body. One type of proceeding where it has been used is where a city provides for a hearing before revoking a business license.[73]

- *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;*

  This exception applies when a governing body is acting in a quasi-judicial capacity.[74] Typically, a city or county governing body is acting in a quasi-judicial capacity in certain land use actions such as site-specific rezones, conditional use applications, variances, and preliminary plat applications. Other examples include the civil service commission when it is considering an appeal of a disciplinary decision and the LEOFF disability board when it is considering an application for disability benefits.

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[73]See *Cohen v. Everett City Council*, 85 Wn.2d 385, 386 (1975).

[74]The courts have employed a four-part test to determine whether a matter qualifies under the quasi-judicial action exemption from the Open Public Meetings Act (RCW 42.30.140(2)): (1) whether the action is one a court could have been charged to determine; (2) whether it is one historically performed by courts; (3) whether it involves the application of existing law to past or present facts for purposes of enforcing or declaring liability; and (4) whether it resembles the ordinary business of courts more than that of legislators or administrators. *Raynes v. Leavenworth*, 118 Wn.2d 237, 244 (1992). See also, RCW 42.36.010 (definition of quasi-judicial land use actions, for purposes of the appearance of fairness doctrine); *The Appearance of Fairness Doctrine in Washington State*, MRSC Report No. 32 (January 1995), at 6-8 (discussion of quasi-judicial land use actions).

However, where a public hearing is required for a quasi-judicial matter, only the deliberations by the body considering the matter can be in closed session.

- *Matters governed by chapter 34.05 RCW, the Administrative Procedures Act;*

  This exception has no application to cities, counties, or special purpose districts.

- *Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress.*

  The language of this exception is basically self-explanatory.[75] However, the term "professional negotiations" must be interpreted in the context of collective bargaining; it should not be interpreted to apply generally to negotiations for professional services.

Further Questions

Does the Open Public Meetings Act require that a civil service commission hearing regarding a police officer's appeal of disciplinary action be open to the public?

No, because such a hearing would fall under the exception from the Act in RCW 42.30.140(2) for quasi-judicial matters. However, since RCW 41.12.090 requires that such a hearing be public, the Act's exemption does not apply. The commission may nevertheless deliberate in private.

Must the city council give any notice under the Act when it is meeting to discuss the strategy to be taken during collective bargaining with an employee union?

No. Under RCW 42.30.140(4), this meeting is exempt from the Open Public Meetings Act. The council may therefore meet without notifying anyone. Of course, each of the councilmembers should be notified.

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[75]City, county, and special district governing bodies should be aware that this exemption from the Act does not protect from public disclosure documents that are introduced at such a meeting. *ACLU of WA v. City of Seattle*, 121 Wn. App. 544 (2004).

What Are the Penalties for Violating the Act?

The only avenue provided by the Open Public Meetings Act to enforce its provisions or to impose a penalty for a violation of its provisions is by an action in superior court. "Any person" may bring that action in superior court. If a superior court determines that a violation has occurred, liability may be imposed as follows:

- *Individual liability.* Members of a governing body who attend a meeting where action is taken in violation of the Act are subject to a $100 penalty *if* they attend with knowledge that the meeting is in violation of the Act.[76] Violation of the Act is not a criminal offense. The penalty is assessed by the superior court, and any person may bring an action to enforce the penalty.

  Also, a knowing or intentional violation of the Act may provide a legal basis for recall of an elected member of a governing body, although recall is not a penalty under the Act.[77]

- *City, county, or district liability.* The city, county, or district is liable for all costs, including reasonable attorney fees.[78]

  However, if a court determines by written findings that an action for violation of the Act was "frivolous and advanced without reasonable cause," a city, county, or district *may* be awarded reasonable expenses and attorney fees.[79]

In addition to the above, any person may bring an action by mandamus or injunction to stop violations of the Act or to prevent threatened violations.[80]

Actions in violation of the Act are null and void. Any ordinance, resolution, rule, regulation, order, or directive that is adopted at a meeting that does not comply with the Act, and any secret

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[76]RCW 42.30.120(1).

[77]See *Recall of Lakewood City Council*, 144 Wn.2d 583, 586 (2001); *In re Recall of Kast*, 144 Wn.2d 807, 817 (2001).

[78]RCW 42.30.120(2).

[79]*Id.*

[80]RCW 42.30.130.

vote taken, is null and void.[81] This does not, however, mean that a subsequent action that complies with the Act is also invalidated.[82] But, where action taken in open session merely ratifies an action taken in violation of the Act, the ratification is also null and void.[83]

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[81] RCW 42.30.060.

[82] *OPAL v. Adams County*, 128 Wn.2d 869, 883 (1996); *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001); see also, AGO 1971 No. 33 at 40.

[83] *Clark v. City of Lakewood*, 259 F.3d at __, n. 10; see, *Miller v. Tacoma*, 138 Wn.2d at 329-31.

Selected Cases and Attorney General Opinions

AGO 1971 No. 33 – This AGO contains a comprehensive overview of the scope of the Open Public Meetings Act, as it was enacted in 1971. Although parts of the Act have been amended since 1971, much of it remains the same.

RCW 42.30.010 – Legislative Declaration (Purpose of Act)

- *Cathcart v. Anderson*, 85 Wn.2d 102 (1975).
- *Equitable Shipyards v. State*, 93 Wn.2d 465 (1980).

RCW 42.30.020 – Definitions

- *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120 (2011).
- *Eugster v. City of Spokane*, 110 Wn. App. 212, *review denied*, 147 Wn.2d 1021 (2002).
- *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001).
- *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).
- *Miller v. City of Tacoma*, 138 Wn.2d 318 (1999).
- *Improvement Alliance v. Snohomish Cy.*, 61 Wn. App. 64 (1991).
- *Refai v. Central Wash. Univ.*, 49 Wn. App. 1 (1987), *review denied*, 110 Wn.2d 1006 (1988).
- *Estey v. Dempsey*, 104 Wn.2d 597 (1984).
- AGO 2010 No. 9.
- AGO 2006 No. 6.
- AGO 1986 No. 16 – Applicability of Open Public Meetings Act to a committee of the governing body.

RCW 42.30.030 – Meetings Declared Open and Public.

- AGO 1992 No. 21.

RCW 42.30.040 – Conditions to Attendance Not to be Required.

- AGO 1998 No. 15.

RCW 42.30.060 – Actions in Violation of Act Are Null and Void.

- Eugster v. City of Spokane, 128 Wn. App. 1 (2005).
- *Eugster v. City of Spokane*, 110 Wn. App. 212, *review denied*, 147 Wn.2d 1021 (2002).
- *Recall of Lakewood City Council*, 144 Wn.2d 583 (2001).
- *OPAL v. Adams County*, 128 Wn.2d 869 (1996).
- *Snohomish County Improv. Alliance v. Snohomish County*, 61 Wn. App. 64 (1991).
- *Henry v. Oakville*, 30 Wn. App. 240 (1981).
- *Slaughter v. Fire District*, 50 Wn. App. 733 (1988).
- *Mead School Dist. v. Mead Education Assoc.*, 85 Wn.2d 140 (1975).

RCW 42.30.070 – Time and Places for Meetings – Emergencies

- *In re Recall of Roberts*, 115 Wn.2d 551 (1990).
- *Teaford v. Howard*, 104 Wn.2d 580 (1985)
- *Mead School Dist. v. Mead Education Assoc.*, 85 Wn.2d 140 (1975).
- AGO 1992 No. 21.

RCW 42.30.080 – Special Meetings

- *Estey v. Dempsey*, 104 Wn.2d 597 (1985).
- *Dorsten v. Port of Skagit County*, 32 Wn. App. 785 (1982).
- *Kirk v. Fire Protection Dist.*, 95 Wn.2d 769 (1981).

RCW 42.30.110 – Executive Sessions

- *Recall of Lakewood City Council*, 144 Wn.2d 583 (2001).
- *Miller v. City of Tacoma*, 138 Wn.2d 318 (1999).

- *Port of Seattle v. Rio*, 16 Wn. App. 718 (1977).
- *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

RCW 42.30.120 – Violations - Personal Liability - Penalty - Attorney Fees and Costs

- *Eugster v. City of Spokane*, 110 Wn. App. 212, *review denied*, 147 Wn.2d 1021 (2002).
- *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001).
- *Protect the Peninsula's Future v. Clallam Cy.*, 66 Wn. App. 671 (1992).
- *Cathcart v. Anderson*, 10 Wn. App. 429 (1974).

RCW 42.30.130 – Violations - Mandamus or Injunction

- *Protect the Peninsula's Future v. Clallam Cy.*, 66 Wn. App. 671 (1992).
- *Lopp v. Peninsula School Dist.*, 90 Wn.2d 754 (1978).

RCW 42.30.140 – Chapter Controlling - Application (Exceptions)

- *ACLU of WA v. City of Seattle*, 121 Wn. App. 544 (2004).
- *Protect the Peninsula's Future v. Clallam Cy.*, 66 Wn. App. 671 (1992).
- *Pierce v. Lake Stevens School Dist.*, 84 Wn.2d 772 (1974).