

# WASHINGTON STATE'S OPEN PUBLIC MEETINGS ACT

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## I. INTRODUCTION

Washington State's first open meetings act was enacted 1953. It was largely ineffective because it only required "final action" to be taken in public. The state legislature adopted a new Open Public Meetings Act in 1971. Laws of 1971, ch. 250, 1st Ex. Sess. This article outlines that act and court decisions and Attorney General Opinions interpreting that act.

In interpreting and applying the OPMA in any particular situation, public agencies and the courts should be guided by: (1) the language of the provisions of the act; (2) the legislature's intent in adopting the OPMA; (3) the purposes of the OPMA; (4) court decisions interpreting provisions of the OPMA; (5) Washington AG opinions interpreting the OPMA; and (6) decisions from California and Florida open meetings acts on which the Washington's OPMA was modeled.

### A. Legislative Declaration of Intent

The Supreme Court has found that the OPMA employs some of the strongest language of any legislation. *Equitable Shipyards, Inc. v. State of Washington*, 93 Wn. 2d 465, 611 P.2d 396 (1980).

*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.

### B. Purposes of the OPMA

Some of the purposes of the OPMA are stated directly in the act itself, for example:

- To require governing bodies to conduct all actions and deliberations openly, with limited exceptions. RCW 42.30.010.
- To make all meetings open and public and allow all persons to attend. RCW 42.30.030.
- To require any ordinance, resolution, rule, regulation, order or directive be adopted at a public meeting in the open or otherwise it is invalid and null and void. RCW 42.30.060.

- To require all members of governing bodies to vote openly and not by secret ballot, or otherwise the vote is invalid and the action is null and void.  
RCW 42.30.060(2)

Some of the purposes of the OPMA as articulated by the courts are:

- To guarantee public access to and participate in activities of their representative agencies. *Mead School Dist. No. 354 v. Mead Education Assn.*, 85 Wn. 2d 140, 530 P.2d 302 (1975).
- To allow the public to view the decision making process at all stages. *Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978).
- To make all meetings of governing bodies of public agencies (even informal sessions) open and accessible to the public, with limited exceptions.
- To prevent public officials from avoiding public scrutiny and accountability. *Eugster v. City of Spokane*, 128 Wn. App. 1, 114 P.3d 1200 (Div. 3 2005).
- To give the public ready access to first hand knowledge of the deliberations and decisions of public agencies where the executive session does not apply. *Snohomish County Improvement Alliance v. Snohomish County*, 61 Wn. App. 64, 808 P.2d 781 (Div. 1 1991).

### C. Liberal Construction

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

RCW 42.30.910.

Because the OPMA is a remedial legislation and is to be liberally construed, exceptions to the act are to be narrowly confined. *Mead School Dist. No. 354 v. Mead Education Assn.*, 85 Wn. 2d 140, 530 P.2d 302 (1975); *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999).

In one decision, however, involving a petition for recall, the majority suggested that in that context the OPMA need not be liberally interpreted. *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985). In *Recall of Estey*, the majority held that because violations of the OPMA do not constitute crimes, the act should not be liberally construed as a ground for recall unless the alleged violations of the OPMA actually form the underlying basis of the recall charge. It is not clear what the majority meant since in that case, the underlying basis of the recall charges was violations of the OPMA.

**D. Supremacy Over Other Laws**

*If any provision of this chapter conflicts with the provisions of any other statute, the provisions of this chapter shall control [with limited exceptions specified].*

RCW 42.30.140

**E. California and Florida Decisions**

The OPMA was patterned closely after the California open meetings act, referred to as the “Brown Act,” and the Florida open meetings act, called the “Sunshine Law,” although the legislature did not copy those acts verbatim. Both Washington court decisions and the Washington Attorney General’s opinions have at times looked to California and Florida decisions regarding their open meetings acts to help guide interpretation of the Washington OPMA. *See, e.g., Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978) (look to Florida “Sunshine Law” for support); *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn. 2d 869, 913 P.2d 793 (1996) (court was particularly persuaded by Florida law); *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2, 2001) (court found California and Florida open meeting laws decisions provide guidance in interpreting Washington OPMA); AGO 1971 No. 33.

**F. Authorities Relied Upon**

Sections and provisions of the OPMA quoted in these materials are shown in *italics* and indented. Principle cases interpreting provisions of the OPMA are listed on Exhibit A. Washington Attorney General Opinions interpreting provisions of the OPMA are listed on Exhibit B.

**II. WHEN DOES THE OPMA APPLY**

The OPMA applies only to meetings of the governing body of a public agency.

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

RCW 42.30.030.

Two questions arise: (1) to whom does it apply; and (2) to what does it apply?

**A. Public Agency or Subagency**

*“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 the 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(1).

Whether an entity is a “public agency” subject to the OPMA may be determined by the functional equivalency test: (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. AGO 1991 No. 5. Thus, even some “agencies” created by the state may not be subject to the OPMA, for example the Small Business Export Finance Assistance Center. *Id.*

Subagency means a board, commission or similar entity; created by or pursuant to state or local legislation. RCW 42.30.020(1)(c). “Pursuant to” means in conformity with or in the course of carrying out; implying that what is done is in accordance with an instruction or direction. *Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978). It is not necessary that a statute expressly create a subagency so long as there is an enabling provision which allows that subagency to come into existence, at some future date, as the need may arise. *Id.*

In *Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978), the supreme court found that the University of Washington law school is a subagency of the University of Washington and subject to the OPMA. The University of Washington is a state educational institution and included in the definition of “public agency.” Likewise the law school is created pursuant to statute and the faculty empowered as an agent of the board of regents to govern the immediate affairs of the law school. The court held that the law school faculty meetings were subject to the OPMA.

A public agency or subagency does not include those discretionary *ad hoc* groups which may be formed pursuant to general, implied executive authority instead of a specific statute or ordinance. AGO 1971 No. 33. Although subsequent amendments to “governing body” applies the OPMA to “committees” that are not established by any statute or ordinance. Courts have appeared at times to conflate the analysis whether a multimember board is a subagency or is a committee. If it is not a public agency then even though it has a multimember composition its activities would not be subject to the provisions of the OPMA.

## **B. Multimember Governing Body or Committee**

A “governing body” is a multimember policy or rule making body and any committee thereof.

*“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).

### **1. Policy and Rule Making Authority**

It is not a “governing body” unless it has policy or rule making authority. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 119 (Div. 2 2004). The term “policy or rule making” modifies all terms that precede it as well as those that follow it.

In *Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978), the supreme court found that the law school faculty was delegated certain rule making and policy powers and thus was a governing body. The board of regents had delegated authority to the president and he to the law faculty. The law faculty exercised considerable power over governing the law school. The court found that it did not matter that the board of regents has ultimate authority since decisions of the law faculty are conditional only in an abstract hypothetical sense and the board of regents adopts faculty actions almost as a matter of course. Accordingly, the court held that the OPMA applied to law faculty meetings.

In *Refai v. Central Washington Univ.*, 49 Wn. App. 1, 742 P.2d 137 (Div. 3, 1987), the Faculty Senate Executive Committee (“SEC”), pursuant to provisions in the faculty code evaluated the president’s declaration of continuing financial exigency and prepared layoff plans. The SEC met in several closed sessions to develop the plan. Its recommended plan was presented to the president. Refai a professor at Central was laid off pursuant to that plan. A hearing officer determined that the closed meetings violated the OPMA and the entire process was void. The hearings board found no violation of the OPMA and affirmed the layoffs. The superior court reversed the decision of the board and ordered Central to reinstate Refai with back pay. The court of appeals reversed. The court of appeals determined that Central Washington University is a public agency but that the SEC was not a subagency. The majority found that the SEC was not a subagency because there was no enabling statute, unlike the law school faculty in *Cathcart*. Given the amended definition of “governing body” to include the definition of “committee” the *Refai* decision may have little continuing validity. Under that amended definition, the SEC would have been subject to the OPMA.

In *Salmon for All v. Department of Fisheries*, 118 Wn. 2d 270, 821 P.2d 1211 (1991), the supreme court held that the OPMA does not apply to an interstate compact between Washington and other states. The agency employees that participate in compact meetings are not a governing body even if they are involved in rule making and policy development for the compact. The term “governing body” applies to the internal authority of an agency and not to an entity outside

the public agency or one to which an agency sends a representative. Employees of a state agency involved with other compact jurisdictions do not constitute a governing body of that agency. Even if the agency director may ultimately ratify or accept the results of those employees' negotiations.

## **2. Single Individual Agency Head**

A single agency department governed by an individual vested with full decision making authority is not subject to the OPMA. *Salmon for All v. Department of Fisheries*, 118 Wn. 2d 270, 821 P.2d 1211 (1991) There is no multimember governing body where there is a single director management.

In *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 86 P.3d 835 (Div. 3 2004), the issue was whether a private meeting between the mayor and special litigation counsel about litigation violated the OPMA. The court said that the meeting with the mayor did not come within the definition of "public agency" or "governing body." (Even if it did, the OPMA permits executive sessions for the governing body when discussing litigation or potential litigation if public knowledge regarding the discussion is likely to result in adverse legal or financial consequences.)

But, even some aspects of an agency with a single individual head may be subject to the OPMA.

In *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 119 (Div. 2 2004), the court of appeals found that the Pierce County auditor's office is headed by a single individual, the independently elected auditor, and not by any multimember board of commissioners, committee or the like. But, in this case the auditor had convened a county canvassing board to "remake" absentee ballots and canvass the votes cast. The court found the OPMA applied to the canvassing board, but the record was insufficient to find that the canvassing board held a meeting to which the OPMA applied.

## **3. Committee Acting On Behalf of the Governing Body**

As enacted in 1971, the OPMA did not apply to committees, subcommittees or other groups that were not created by or pursuant to statute ordinance or other legislative act. Prior to 1983, the definition of "governing body" meant only "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency." At the time, "governing body" was interpreted to require some aspect of policy or rule making authority. AGO 1971 No. 33 at 8-9. Initially, "committee" was not defined. In opining that the OPMA did not apply to committees, the Attorney General stated that a committee or subcommittee is not normally created by statute, ordinance or other legislative act and is not included within the definition of a "public agency." AGO 1971 No. 33. For the OPMA to apply to committees not established by statute or other legislative act, its activities, even though not legally binding, had to be a necessary antecedent to the agency's action. AGO 1971 No. 33; *see also* AGLO 1975, No. 53 (OPMA applies to hearing aid council because statute requires department to consider and be guided by council's recommendations).

In 1983 the legislature amended the definition of “governing body” to include committees thereof by adding “ *or 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. A committee is a body of persons delegated to consider, investigate or take action up and usually to report concerning some matter of business. The purpose of this amendment was to extend the coverage of the OPMA to committees, subcommittees and other groups that are not created by or pursuant to statute, ordinance or other legislative act.

In *Refai v. Central Washington Univ.*, 49 Wn. App. 1, 742 P.2d 137 (Div. 3, 1987), the appellate court held that the SEC was not a governing body because it had no policy or rule making authority. The court noted that the power of the law school faculty to govern the affairs of the law school found in *Cathcart* was significantly broader than the power of the SEC which has no governing power. Also the SEC’s recommendation was not a necessary antecedent to the president’s decision because the SEC actions in developing the layoff plan was not binding on the president (applying the prior test for determining whether the OPMA applies to a committee). The majority held that the OPMA is not designed to cover groups that meet to collect information and make recommendations but have no authority to make the final decisions. The dissent would have held that OPMA applies to the SEC. Applying the prior test, the dissent found that the SEC formulation of the draft layoff plan was a necessary antecedent to the president’s decision to layoff Refai. Without a valid plan, Refai’s layoff would violate the faculty code. Furthermore, the dissent noted that had the case been decided under the amended definition of “governing body” which includes the definition of “committee,” it would have been decided differently.

Under the amended definition, a “committee” constitutes a “governing body” when the committee (1) acts on behalf of the governing body; (2) conducts hearings, or (3) takes testimony or public comment. A finding that the committee’s activities are “a necessary antecedent” to the agency’s actions is no longer necessary.

The difference under the OPMA between a committee and a subagency is that a committee need not be created by statute, ordinance or other legislative act and a committee need not possess policy or rule making authority.

It does not matter how the committee is created. “Committee thereof” includes all committees created by a governing body pursuant to its executive authority regardless of whether there is a specific statute, ordinance or other legislative act authorizing it.

A committee may be comprised of solely a minority of the members of the governing body or even of nonmembers of the governing body appointed by the governing body. AGO 1986 No. 16.

A committee acts on behalf of the governing body only when it exercises delegated authority, such as fact finding, or when it exercises actual or de facto decision making power. AGO 1986 No. 16. This is in contrast to the situation where the committee simply provides advice or information to the governing body. Such an *ad hoc* advisory committee does not act on behalf of the governing body and is therefore not subject to the OPMA. Likewise, a

committee is not acting on behalf of the governing body simply because it performs a specified function in the interest of the governing body.

A committee that exercises both decision making power and serves a separate advisory function is subject to the OPMA when it meets to conduct business related to the exercise of its decision making power. It is not subject to the act when it meets to conduct business related to its advisory role. AGO 1986 No. 16.

In *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), the Lakewood City Council authorized the planning advisory board to analyze adult entertainment within the city. The planning advisory board appointed a subcommittee called the Lakewood Adult Entertainment Task Force. The task force held several closed meetings to study the issues and prepare a report for the city council. The city council held a public meeting at which they considered and adopted a new adult cabaret ordinance. The Ninth Circuit found that the OPMA applied to the task force. The City of Lakewood and the planning advisory board were both public agencies. The city council and the planning advisory board were both governing bodies because they both took testimony and public comment. The task force was created by the planning advisory board and it too took testimony and public comment and conducted hearings and acted on behalf of the planning advisory board and the city council. Thus it was a “committee” of a “governing body.” The court distinguished the decision in *Refai* finding that it relied on the older narrower definition of “governing body.”

#### **4. Student Associations**

In 1980, the legislature adopted a provision applying the OPMA to student associations.

*The multimember student board which is the governing body of the recognized student association at a given campus of a public institution of higher education is hereby declared to be subject to the provisions of the open public meetings act as contained in this chapter, as now or hereafter amended. For the purposes of this section, “recognized student association” shall mean any body at any of the state’s colleges and universities which selects officers through a process approved by the student body and which represents the interest of students. Any such body so selected shall be recognized by and registered with the respective boards of trustees and regents of the state’s colleges and universities: PROVIDED, That there be no more than one such association representing undergraduate students, no more than one association representing graduate students, and no more than one such association representing each group of professional students so recognized and registered at any of the state’s colleges or universities.*

RCW 42.30.200.

Also, prior to the amendment to “governing body,” the Attorney General had opined that student services and activities fees committees at state colleges and universities are committees created by or pursuant to statute and are subject to the OPMA. While their advice was not

binding upon the administration or the board of regents, its actions nevertheless were a legally necessary antecedent to the regents' actions. AGO 1983 No. 1.

### **C. Meeting**

*“Meeting” means meetings at which action is taken.*

RCW 42.30.020(4).

Regardless of what the meeting is called, whether a workshop, retreat or study session, if action is taken, it constitutes a meeting. Even if no “final action” is taken, a governing body or committee may trigger the OPMA by taking any action.

#### **1. Quorum Rule**

Nowhere in the OPMA does the act distinguish between a meeting of a majority of the members and a meeting of less than a majority of the members of a governing body. But case law has established a quorum rule on the basis that anything less than a majority of the members have no authority to act. *Eugster v. City of Spokane*, 128 Wn. App. 1, 114 P.3d 1200 (Div. 3 2005) (OPMA is only triggered by majority of governing body, so that action of less than quorum is not subject to act); *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 119 (Div. 2 2004) (if governing body or committee lacks quorum OPMA does not apply); *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2, 2001) (OPMA is not violated if less than majority of governing body meet; participants must collectively intend to meet to transact governing body's official business).

But note that a committee of less than a quorum of the governing body is nevertheless subject to the OPMA if acting on behalf of the governing body. AGO 1986 No. 16. But if a subcommittee is comprised of a majority of the members of the governing body of a public agency then the subcommittee also would be subject to the OPMA, just as the governing body would be. AGO 1971 No. 33 at 9.

To apply, the members must be active members of the governing body or committee at the time.

In *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2, 2001) three new school board members were elected and before being sworn in met with a couple of continuing board members to discuss matters regarding the superintendant. The court of appeals found that the OPMA does not define “member” and its definition of “governing body” is ambiguous. In looking at California and Florida law for guidance, the appellate court held that nothing suggests that members-elect have the power to transact a governing body's official business before they are sworn in and thus are not members with the authority to take action. The meeting between two current members and three members-elect did not violate the OPMA.

## 2. E-mail Meetings

Physical presence is not required for a meeting. Meetings may be conducted by telephone, conference call, instant messaging, internet chat sessions, web meetings, and now Facebook or Twitter. Two members of a three member governing body discussing agency business on the phone constitutes a meeting. And, members cannot avoid application of the law by using an intermediary to exchange viewpoints.

In *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2, 2001), a majority of the school board exchanged e-mail messages about board business. The court of appeals held that the OPMA does not require contemporaneous physical presence of the members to constitute a “meeting.” The court concluded that an exchange of e-mails may constitute a meeting although the mere passive receipt of e-mail does not automatically constitute a meeting.

In *Wood*, the court differentiated between passive receipt of information by e-mail and active discussion of issues by exchanging email.

The mere passive receipt of e-mail from another member or a third party intermediary, as opposed to the active exchange of information and opinions via email, does not automatically constitute a meeting. Passively received e-mail is when one member or through a third party intermediary sends e-mail to other members merely for the purpose of providing relevant information and no discussion is commenced by the quorum. Passive is a one sided exchange. (But can passive become active when the message says “I will assume that you agree with me unless I hear from you”? Can a long time period over which emails are exchanged turn a series of one sided passive exchanges into an active dialog?)

To constitute a meeting, the e-mail exchange must involve active participation by the members and they must collectively intend to transact official business. Active participation involves the exchange of opinions, view points and ideas between members, discussions and deliberations. “Meeting” would include e-mail that discusses issues that may or will come before the governing body for a vote.

E-mail about scheduling or personal matters do not constitute a meeting. The OPMA is not implicated when members receive information about upcoming issues or communicate amongst themselves by e-mail about matters unrelated to the governing body’s official business. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2, 2001). Simply calling to confirm that a member has received relevant information is not action and so this contact does not constitute a meeting. *Clover Park School Dist. No. 400 v. Washington State Board of Education*, 2006 WL 401690 (Wn. App. Div. 2 2006) (unpublished).

In *Equitable Shipyards, Inc. v. State of Washington*, 93 Wn. 2d 465, 611 P.2d 396 (1980), the supreme court held that merely sending documents to members of the governing body does not constitute a meeting or implicate the OPMA. The independent separate examination of documents by members of the governing body constitutes neither an “action” nor a “meeting” under the OPMA. It is not a violation of the OPMA and not an action when all the members receive the same information individually.

### 3. Serial Meetings

“Serial meetings” occur when there are a series of meetings of either less than the majority of the members at small gatherings or through the use of a go-between or intermediary to communicate opinions, viewpoints, and ideas, such that through the series of meetings the majority collectively intends to take action. Any one of the meetings by itself may not be subject to the OPMA because less than a quorum is present. But the collection of meetings would be subject to the OPMA. One-on-one serial discussions in an attempt to build consensus is subject to the OPMA. *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (Div. 3 2002).

The types of serial meetings include (1) a series of telephone calls between members to develop a collective commitment or promise on agency business; (2) successive meetings between board members; (3) use of electronic communications by a quorum of the governing body to deliberate toward or to make a decision; and (4) telephone trees where members repeatedly phone each other to form a collective decision. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2 2001).

In *In re Recall of Roberts*, 115 Wn. 2d 551, 799 P.2d 734 (Dept. 1 1990), the petitioner in a recall case alleged that a series of meetings between a majority of the council were held to agree on a building moratorium. The court, however, found the charge insufficient because the petitioner failed to allege facts that indicated the council members intended to violate the OPMA and the petitioner lacked personal knowledge of the facts. The court in finding the charge factually insufficient stated nevertheless that “only two of the [council members] ever met on any one occasion precisely because they wished to avoid violating the Open Public Meetings Act.” The *Roberts* decision is an example of the problem with “serial meetings.”

#### D. Action

Action is broadly defined:

*“Action” means the transaction of official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.*

RCW 42.30.020(3).

In 1985 the legislature amended the definition of “action” to broaden it to include “discussions.” Laws of 1985, ch. 366, § 1. Thus, if a majority of the members of a governing body meet to discuss agency business, even if no decision is made, even if within a social context, the discussions constitute “action” and the gathering constitutes a “meeting” subject to the OPMA. Action by the governing body is not confined to just “final action.” *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (Div. 3 2002). The governing body members need merely communicate about issues that may or will come before the board for a vote for there to be action.

Mere presence or attendance of a majority of members of the governing body at a meeting called by a third party does not itself violate the OPMA. AGO 2006 No. 6. The fact

that a quorum of members of the governing body is present at the same time and place does not “automatically” mean that a meeting has occurred for purposes of the OPMA because an action must occur to trigger the act. *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985)

In *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985), charges were brought against a school board member for, among other things, holding a special meeting without proper notice to other members to discuss the superintendent’s contract. The court held that an action must take place for a meeting to occur and that an action means the transaction of official business of a public agency by its governing body. The concurrence and dissent said that action on negotiations does not constitute action as defined by the OPMA applicable at the time. The dissent pointed out, however that under the 1985 amendment to “action” the broadened definition might encompass negotiations on a contract. The *Estey* decision in this regard probably has little continuing validity.

## **E. Final Action**

*“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).

Final action includes the collective positive or negative decisions whether by formal motion or informal proposal or vote by a majority of members of the governing body. *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999); *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (Div. 3 2002). Balloting is a final action. Final action may occur without formal motion but also may be upon informal proposals. Reaching a consensus on a position even if to be voted on at a later meeting would qualify as a “final action.” *Id.* The court in *OPAL* recognized in dicta that a decision taken in secret meetings may constitute final action even though there is subsequent formal approval in a public meeting. *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn. 2d 869, 913 P.2d 793 (1996).

Whether something is a “final action” is important in determining whether a particular action can be taken during a special meeting, during a regular meeting closed after a disruption or while in an executive session.

In *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656 (Div. 1 1988), the court of appeals held that a decision by two of three fire district commissioners to terminate a fire chief was not a “final action” because it was not a decision upon a motion, proposal, resolution order or ordinance. Note that in 1989 the legislature amended the OPMA to require “final actions” on discharging an employee to be taken in an open public meeting. RCW 42.30.110(1)(g).

When a governing body prepares written findings after a hearing, questions may arise whether those findings constitute a separate “final action” and whether they are themselves a violation of the OPMA.

*Snohomish County Improvement Alliance v. Snohomish County*, 61 Wn. App. 64, 808 P.2d 781 (Div. 1, 1991), concerned a rezone application. The hearing examiner required an EIS and denied the rezone. It was appealed to the county council which held a public hearing. On an oral motion the council discussed and appeared to reach a consensus to remand the application back to the hearing examiner. But in the written decision the council reversed the hearing examiner. The opponents of the application filed a petition challenging the council's decision. The superior court dismissed on summary judgment and the court of appeals affirmed. The issue was to what extent a written decision may vary from what was discussed in the open public meeting. The court held that the written decision accurately reflected the proceedings and deliberations and so was not a violation of the OPMA. The court found that the council members knew they were reversing the hearing examiner's conclusions. The additional findings made in the written decision all involved subjects that were discussed at the public hearing and were mentioned in the motion or summary of the discussion. It is to be expected that findings and conclusions that state in detail the basis and reasons for the council's ultimate decision will be more expansive and detailed than the wording of the motion ultimately adopted. What is required is that the decision be consistent with the issues discussed in open hearing and the oral decision made at the time. But the dissent disagreed noting that prior testimony and discussion during an open meeting do not amount to findings and conclusions. The majority's holding renders any preliminary discussions binding on the council. A comment is no indication that a majority of the council approves or that the member making the comment might not subsequently change his mind. The dissent found it impossible to say that the written findings merely reflected the oral decision. The written findings were much more detailed than the oral motion. The dissent would have held that adopting the written finding was an independent action that must be conducted in an open meeting.

In *Clover Park School Dist. No. 400 v. Washington State Board of Education*, 2006 WL 401690 (Wn. App. Div. 2 2006) (unpublished), the school district challenged the regional educational service district's decision to transfer some of its territory to another school district. Clover Park argued that the written findings differed substantially from the factors discussed at the meeting. But the court found that the written findings adequately summarized the factors the committee considered and the findings were not evidence of a violation of the OPMA.

These cases arose because the written findings were prepared after the public hearing but were not further reviewed or approved in an open public meeting. The issue probably could be avoided by reviewing and approving the written findings at a subsequent open public meeting in compliance with the OPMA.

When final action may be taken:

- (1) At a regular meeting on any matter;
- (2) At a regular meeting closed to the public because of disruption, only on matters included in the agenda published prior to the meeting;
- (3) At a special meeting only on matters included on the notice for the meeting;
- (4) At emergency meetings presumably only to address the emergency; and

(5) Not on any matter during executive session.

## **F. Not subject to the OPMA**

The legislature has excepted from the OPMA certain “public agencies” and certain “actions” even if conducted by a governing body of a public agency. When a governing body otherwise subject to the OPMA engages in these activities it is not required to comply with the OPMA, although other public notice requirements may apply. *See Responsible Urban Growth Group v. City of Kent*, 123 Wn. 2d 376, 868 P.2d 861 (1994).

### **1. Courts and Legislature**

The OPMA does not apply to the courts or the legislature.

*Public agency means . . . 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.*

RCW 42.30.020(1)(a).

### **2. Social Gatherings**

The OPMA also does not apply to any gathering of a majority of members at which they do not transact the official business of the agency. For example, social gatherings at which the members of the governing body take no “action” as defined by the OPMA are not subject to the act.

*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.

Social gatherings are not a meeting if members do not discuss agency business or otherwise take action. Members of a governing body are not prohibited from gathering together for purposes other than a regular or special meeting so long as they take no action. *In re Recall of Roberts*, 115 Wn. 2d 551, 799 P.2d 734 (Dept. 1 1990). Likewise, members of a governing body may attend a citizen group meeting without violating the OPMA if members attending do not discuss agency business or take action. AGO 2006 No. 6; *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 119 (Div. 2 2004) (OPMA does not apply to meeting in which governing body does not transact official business of agency).

### **3. Licensing Activities**

*This chapter shall not apply to: (1) The proceedings concerned with the formal issuance of an order granting suspending, revoking or denying any*

*license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a members of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical devise or motor vehicle where a license or registration is necessary;*

RCW 42.30.140(1).

#### **4. Quasi-Judicial Matters**

*This chapter shall not apply to: (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 a class or group;*

RCW 42.30.140(2).

To determine whether an administrative action is quasi-judicial and therefore excepted from the OPMA, the court examines (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 the legislature or executive. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (Div. 2 1992). A quasi-judicial act is where the governing body is required to determine the rights of individuals based on legal principles, as opposed to determining matters of general interest to the public. *See, e.g., Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (Div. 1 1982) (fixing moorage rates at marina is not quasi-judicial function).

The Attorney General opined that the proceedings of the county boards of equalization and the state board of tax appeals were “quasi-judicial.” AGLO 1973 No. 12. The actions of those boards is to review an assessor’s disposition of an individual property owner’s claim for a tax exemption; reviewing the matter between the named parties as distinguished from a matter having general effect upon the public at large or an indeterminate class or group.

In *Lake Stevens School Dist. No. 4 v. Snohomish County*, 84 Wn. 2d 772, 529 P.2d 810 (1975), the school district in executive session decided not to renew the contracts for certain teachers. The teachers challenged the decision on the ground that the action violated the OPMA. The trial court held that the decision to not renew the contracts was a quasi-judicial matter expressly excepted from the OPMA. The supreme court agreed finding the school directors performed a quasi-judicial function because the action was subject to judicial review and because it was a matter between the district and the teachers and not a matter that affects the public generally. The court speculated that the district wanted to protect the fired teachers from unwanted publicity. The court found that the teachers had given no reason why the public interest would be served by requiring these matters to be considered in an open meeting.

In *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (Div. 2 1992), at a regular meeting of the county commissioners, they went into an executive session to discuss a shoreline permit application. At a later meeting, the commissioners adopted

a revised draft of the conditions for the permit. On appeal the county claimed that the review of the application was a quasi-judicial action excepted from the OPMA. The court of appeals disagreed. It found that although the county commissioners could be a quasi-judicial body on occasion, the matter of a shoreline permit application was a matter of substantial importance to the general public and not only to the named parties. The court found that none of the factors for determining whether an action is quasi-judicial was present. Even though the court of appeals found that there was a violation of the OPMA, however it refused to enter an injunction.

## **5. State Administrative Procedures Act**

*This chapter shall not apply to: (3) Matters governed by chapter 34.05 RCW, the Administrative Procedures Act;*

RCW 42.30.140(3).

The APA sets forth procedures for adjudications by state agencies. See RCW 34.05 *et seq.* The APA does not apply to local agencies. Generally under the APA, fact finding hearings are open but agency deliberations are closed.

## **6. Collective Bargaining Agreements**

*This chapter shall not apply to: (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(4)

Collective bargaining sessions with the employee organization for the purposes of contract negotiations or grievance meetings may be held in closed session and are not subject to the procedural requirements of the OPMA for executive sessions. Similarly, the governing body's meetings to discuss negotiating strategies or its positions during the course of the negotiations may be held in closed session and are not subject to the procedural requirements of the OPMA or its executive sessions rules.

In *Mason County v. Public Employment Relations Commission*, 54 Wn. App. 36, 771 P.2d 1185 (Div. 2 1989), the court of appeals held that the OPMA applied to collectively bargaining sessions in which the agency decision making representatives and the bargaining representative of the employees participated. The court held that the collective bargaining itself had to be conducted in open public meetings.

In 1990, the legislature amended this subsection, however, by adding subsection (a) that the collective bargaining sessions themselves are excepted from the OPMA. Laws of 1990, ch. 98, § 1.

In *ACLU v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (Div. 1 2004), the ACLU sought a list of the negotiating issues the city and police guild exchanged in connection with a new labor contract. The city contended that the documents were exempt from disclosure arguing that the OPMA exception for collective bargaining sessions was an “other statutory” exemption from disclosure of public records under the state’s Public Records Act (“PRA”). The trial court agreed but the court of appeals reversed that part of the decision. The court of appeals found that the OPMA does not expressly exempt written materials and since exceptions are to be narrowly construed the court would not imply one. The court of appeals found that the OPMA excepts information exchanged during the collective bargaining negotiations from the open meeting requirements but that exception does not explicitly include documents. Therefore the OPMA cannot be construed as an “other statute” under the PRA.

### **III. WHAT DOES THE OPMA REQUIRE**

Attached as Exhibit C is a chart summarizing the requirements for meetings subject to the OPMA.

#### **A. Types of Meeting**

The requirements of the OPMA will vary depending on the type of meeting.

##### **1. Regularly scheduled meeting**

*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.*

RCW 42.30.070.

*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.

A regular meeting is a meeting on a fixed schedule according to the schedule adopted by ordinance, resolution, order or rule.

##### **2. Special meeting**

A special meeting is any meeting other than a regular meeting or emergency meeting called by the presiding officer or a majority of the members of the governing body.

##### **3. Emergency meeting**

*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 emergency exception was not included in the original versions of the 1971 Act. It was added in response to concerns that the notice requirement would be unworkable and unjustified in unusual circumstances.

In *Mead School Dist. No. 354 v. Mead Education Assn.*, 85 Wn. 2d 140, 530 P.2d 302 (1975), the court found the context and history of the statute indicated that the “emergency” must be a severe one. The court held that in order to dispense with notice required by the OPMA an emergency must exist which involves or threatens physical damages. The circumstances must be unexpected and must call so urgently for action that even the one-day delay the notice of a special meeting entails would substantially increase a likelihood of such injuries. In *Mead*, the court found an impending teachers strike was not an emergency justifying a meeting without notice.

Thus, the emergency must involve or threaten: (1) sudden, unexpected and severe; (2) physical injury or damage; (3) to persons or property; (4) a likelihood that the injury will occur; (5) requiring immediate action; (6) such that notice would be impractical or increase the likelihood of the injury.

## **B. Notice Required**

### **1. Regular Meetings**

*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 OPMA does not require notice of a regular meeting. It requires the agency or governing body to establish the time for holding regular meetings by ordinance, resolution, laws or other rule. RCW 42.30.070. The OPMA requires that state agencies publish the schedule for their regular meetings in the state register. RCW 42.30.075. Other statutes require that local and municipal governing bodies give specific notice of their regular meetings.

## 2. Special Meetings

*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.*

RCW 42.30.080.

The OPMA does not require the agency or governing body to publish notice of a special meeting to the public, unless the governing body's rules require it to do so. Notice of a special meeting must be provided in writing only to the members of the governing body, unless they have waived notice, and to any news media that have filed written requests for notice of special meetings with the agency. Notice of a special meeting must state the time and place and the business to be transacted. If no news media have filed a request for notice of special meetings, no notice need be given except to the members of the governing board, unless another statute or the governing body's rules require that notice of special meetings be published. There are specific statutes for certain agencies that may require notice of special meetings to be published and how they are to be published.

Members of the governing board may waive notice for special meetings either in writing or by actually being present at the meeting.

*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.*

RCW 42.30.080.

In *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985), the court held that no public notice of a special meeting is required. Written notice is to be given only to members of the governing body and to local news media that have on file with the governing body requests to be notified of any special meeting. The majority in *Estey* found that failure to notify some of the directors of a special meeting was cured by their attendance at that meeting. The dissent agreed that the OPMA does not explicitly require notice to the general public of a special meeting. But the dissent pointed out, one of the directors was not notified of the meeting and did not attend. Two directors were told orally (not in writing) of the special meeting to be held the next day, but later they were told that the meeting was cancelled. In fact the other three directors did meet. Thus the governing body failed to give proper notice of the special meeting.

### **3. Emergency Meetings**

For an emergency meeting, the notice requirements are suspended.

*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.

## **C. Location**

### **1. Regular Meetings**

OPMA does not address designating the place of regular meetings.

*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.*

RCW 42.30.070.

A regular meeting may be held at any place within or outside the territorial jurisdiction of the governing body unless otherwise provided by law. Several statutes specifically provide where certain governing bodies must hold their regular meetings. For example: County commissioners' meetings must be held at the county seat. RCW 36.32.080. City and town councils must meet within the city or town. RCW 35.28.1181; RCW 35.27.270; RCW 35A.12.110. School district boards must meet within the school district. RCW 28A.330.070.

### **2. Special Meetings**

*The call and notice shall specify the time and place of the special meeting and the business to be transacted.*

RCW 42.30.080.

### **3. Emergency Meetings**

An emergency meeting may be held wherever the presiding officer may designate.

## **D. Agenda and Business that May be Considered**

### **1. Regular Meetings**

No agenda is required for regular meetings. The OPMA does not limit the kinds of business that the governing body may transact during a regular meeting. Agencies are not

required to provide notice of the agenda of their regularly scheduled meetings. *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (Div. 1 1982). The only exception is if the meeting is closed because of an interruption, the governing body may take final action only on the items included in the agenda. If there is no agenda, the governing body in that situation would be prevented from taking any final action.

Other statutes may require certain types of public agencies to publish notice. For example, in *Port of Edmonds v. Northwest Fur Breeders Coop., Inc.*, 63 Wn. App. 159, 816 P.2d 1268 (1991), the court reviewing the published notice of the preliminary agenda of a city council meeting held that it violates RCW 35.22.288 if it does not fairly apprise citizens of the actions that will be taken during the meeting.

## **2. Special Meetings**

Notice of an agenda is required for a special meeting. *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (Div. 1 1982).

*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.*

RCW 42.30.080.

The statute limits the business that the governing body may transact during a special meeting to the agenda items identified in the notice. The governing body may take “final action” only concerning the agenda items identified in that notice. The members can still discuss or take “action,” other than “final action,” on any matter not identified in the notice of special meeting.

## **E. Open to the Public**

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

RCW 42.30.030.

*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.*

RCW 42.30.060.

Whether regular, special or emergency meeting, it must be open to the public. Emergency meetings must still be open to the public. *Teaford v. Howard*, 104 Wn. 2d 580, 707

P.2d 1327 (1985). The only exceptions are for executive sessions or if the meeting is closed because of disruption by the public.

**1. No Secret Ballots**

*No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot.*

RCW 42.30.060(2).

Generally, members of the governing board must cast their votes and make recommendations openly so that observers know each member's position. A governing board may reach a decision by an informal procedure when the matter is brought up at a public meeting and it is obvious which member of the board agrees or disagrees. It does not require formal ballots. *Eugster v. City of Spokane*, 128 Wn. App. 1, 114 P.3d 1200 (Div. 3 2005).

**2. No Conditions on Attendance**

*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 public has no statutory right to speak at open meeting, but they have the right to attend. The governing body cannot condition a citizen's attendance on any thing, such as making him registered his name or other information, making him complete a questionnaire, or requiring him to fulfill some other conditions. Governing bodies cannot prohibit the public from audio or video recording meetings as that would be conditioning attendance on them not recording. AGO 1998 No. 15.

**F. Interruptions**

*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.

A governing body may set reasonable rules of conduct so meetings can be conducted in an orderly fashion. Disorderly persons may be expelled from the meeting. If that is not enough to avoid further interruptions, the governing body may clear the meeting or relocate the meeting. Nonoffending news media may not be excluded. If the meeting room is cleared or the meeting is relocated, the governing body may take “final action” only on items identified in a written agenda. Because the OPMA does not require written agendas for regular meetings, if there is no written agenda, no “final action” can be taken at the relocated meeting.

In *In re Recall of Kast*, 144 Wn. 2d 807, 31 P.3d 677 (2001), a recall petition charged Kast with ejecting a citizen from a public meeting in violation of the OPMA. The trial court found the charge sufficient but the supreme court reversed. The supreme court recognized that under the OPMA the board had the discretion to order the removal of a party disrupting a public meeting. But if the board exercises that discretion in an unreasonable manner it may be sufficient to justify a recall. Here there was testimony that the citizen had been threatening. The supreme court held that individual board members’ subjective perceptions determine what things or actions they consider threatening. The OPMA does not grant citizens the right to interrupt meetings as they see fit. Citizens are granted a privilege to be present during the public meetings so they can remain informed of agency actions.

#### **G. Minutes**

The OPMA does not require that minutes be kept. Rather, a separate statute requires that minutes be kept and requires that they be promptly recorded and made available for public inspection.

*The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.*

RCW 42.32.030.

Written or taped minutes of any meetings are public records available under the PRA, unless otherwise exempt under that act.

#### **H. Adjourn or Postpone**

*The governing body of a public agency may adjourn any regular, adjourned regular, special or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn from time to time. If all members are absent from any regular or adjourned regular meeting the clerk or secretary of the governing body may declare the meeting adjourned to a stated time and place. He shall cause a written notice of the adjournment to be given in the same manner as provided in RCW 42.30.080 for special meetings, unless such notice is waived as provided for special meetings. Whenever any meeting is adjourned a copy of the order or notice of adjournment shall be conspicuously posted immediately after the time of the adjournment on or near the door of the place where the regular, adjourned regular, special or adjourned special meeting was held. When a regular or*

*adjourned regular meeting is adjourned as provided in this section, the resulting adjourned regular meeting is a regular meeting for all purposes. When an order of adjournment of any meeting fails to state the hour at which the adjourned meeting is to be held, it shall be held at the hour specified for regular meetings by ordinance, resolution, bylaw, or other rule.*

RCW 42.30.090.

*Any hearing being held, noticed, or ordered to be held by a governing body at any meeting may by order or notice of continuance be continued or recontinued to any subsequent meeting of the governing body in the same manner and to the same extent set forth in RCW 42.30.090 for the adjournment of meetings.*

RCW 42.30.100.

Regardless of whether the meeting is a regular or special meeting, or a continuation of a regular or special meeting, if the meeting is adjourned or continued, notice of the meeting must be conspicuously posted on or near the door of the place where the meeting was being or would have been held. It must state the location, date and time at which the meeting will resume. In addition, written notice must also be given to all members of the governing body and to the news media in the same manner as notice required for a special meeting. If the notice for an adjourned regular meeting does not state the time, it must be held at the established time for regular meetings. If a regular meeting is adjourned or continued, it continues as a regular meeting for all purposes.

#### **IV. WHEN ARE EXECUTIVE SESSIONS PERMITTED**

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

RCW 42.30.110(1).

Although an executive session is not defined by the OPMA, it is understood to be a closed session at which the public is not allowed.

##### **A. Procedures for Executive Session**

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

RCW 42.30.110(2).

An executive session must be part of a regular or special meeting so that the public knows when the governing body is convening an executive session. The permissible exception to an open public meeting must be triggered before the executive session may be convened. *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999). The burden of showing that the executive session is permitted is on the proponents of the executive session. *In re Recall of Lakewood City Council Members*, 144 Wn. 2d 583, 30 P.3d 474 (2001). While certain actions may occur in executive session, any final action must be taken in an open meeting. RCW 42.30.060.

### **1. Notice of Executive Session**

The presiding officer must publicly announce: (1) the purpose of the executive session which must be one of the statutory purposes; (2) the time when the executive session will conclude and the regular session will resume. The governing body may not resume in open public session before the stated executive session was announced to conclude. The presiding officer may extend the executive session by announcing at a public meeting that it will be extended for a stated period of time.

### **2. No Minutes Required**

No minutes are required for executive sessions. The statute requiring minutes of regular and special meetings to be promptly recorded and made available for public inspection, expressly excepts executive sessions. RCW 42.32.030. If the subject matter is proper for consideration in an executive session, the omission from the minutes of the session from the public record is also proper. *Port of Seattle v. Rio*, 16 Wn. App. 718, 559 P.2d 18 (1977).

The Washington Coalition for Open Government has proposed requiring governing bodies to record executive sessions. The recordings would be exempt from disclosure under the PRA unless a lawsuit was filed challenging the propriety of the governing body convening an executive session. In any such challenge, the recording of the executive session could be reviewed by the superior court judge *in camera*. If it is determined that the executive session violated the OPMA, only that portion of the recording or minutes that should have been made public would be released.

### **3. Confidentiality**

It is unclear what obligation members of the governing body or guests may have to maintain the confidentiality of the discussion held in executive session. Generally the disclosure of confidential information by a public official is illegal. RCW 42.20.070(4) prohibits release of confidential information. A public official who makes the unauthorized disclosure of confidential information may be liable for \$500 civil penalty and the forfeiture of office. The willful disobeying of the law is a gross misdemeanor. But information exempt from disclosure (such as discussions held in executive session) is not necessarily the same as “confidential information.” Under the PRA, a public official is immune from liability in releasing records if the official acted in good faith in attempting to comply with the provisions of the PRA. RCW 42.56.060. No similar statutory immunity is provided however for public officials who disclose matters discussed in an executive session.

#### **4. Who May Attend**

While the public may be excluded from an executive session, persons other than members of the governing body may attend at the invitation of the governing body. Those individuals must have some relationship to the matter being discussed or be present to provide assistance to the governing body during the executive session. Obviously for the exception that permits closed meetings for discussion with counsel, attorneys representing the public agency must be present. For other permitted purposes of executive sessions, the governing body may need expert consultation, for example on real estate valuations and appraisals.

In *In re Recall of Lakewood City Council Members*, 144 Wn. 2d 583, 30 P.3d 474 (2001) the dissent would have invalidated the executive session because the city manager was present. It said that under the attorney client privilege exception the governing board can not include some members of the public and exclude other members of the public and the city manager was not a member of the governing board or its counsel.

#### **5. Limited to the Purposes Permitted**

Executive sessions may be held only for a specified purpose permitted by the OPMA. An action in executive session violates the OPMA unless it falls within the specified parameters of a permissible exception. *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999). If the permissible purpose stated in the statute allows for “evaluation” or “consideration” the governing body may not reach a collective decisions — or take final action — on the subject matter of the executive session. *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003).

In *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999), the city council at a public meeting interviewed candidates for appointment to an unpaid position on the planning commission. The council then went into executive session to discuss the qualification and to take a consensus on the preferred candidate. Later in a public meeting they adopted a resolution appointing the preferred candidate. The city argued that the council took no final action and thus the executive session was permitted. But the court noted a ballot to reach a consensus is not an “evaluation.” To comply with the OPMA the governing body must limit the action it takes in executive session to that authorized by the relevant section. Only actions explicitly specified by the exemption may take place in executive session. Here the court found the council was only allowed to evaluate the qualifications of the candidates. Balloting, even though informal, was beyond the scope of the exception. The dissent said that a nonbinding opinion poll as part of deliberations and an expression of opinion is part of “evaluation.” The dissent found that no actual vote nor any collective positive or negative decision was made because none of the members of the council were bound by the vote. It was a straw vote not an official action and did not commit anyone. It was part of the ratings and rankings.

### **B. Purposes for Which Executive Sessions are Permitted**

#### **1. Consider Site and Price for Real Estate Acquisition, Lease or Sale**

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

RCW 42.30.110(1)(b).

*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;*

RCW 42.30.110(1)(c).

Both sections permit the governing body to “consider” in executive session the acquisition, sale or lease of real estate only if public knowledge regarding such consideration would cause a likelihood of increase or decrease in the price to the disadvantage of the public agency. While only subsection (c) indicates that final action must be in an open public meeting, it is understood that any final acquisition of real estate by lease or purchase must also be in an open public meeting.

## **2. Receive and Evaluate Complaints Against Public Officer or Employee**

*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;*

RCW 42.30.110(1)(f).

A complaint or charge against an agency officer or employee need not be a formal complaint for the governing body to convene in executive session to receive and evaluate it. The officer or employee may request that a hearing or meeting about the complaint be open.

## **3. Evaluate Qualifications for Public Employment or Appointment to Elective Office**

*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;*

RCW 42.30.110(1)(g).

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

RCW 42.30.110(1)(h).

In *Port Townsend Publishing Co. v. Brown*, 18 Wn. App. 80, 567 P.2d 664 (Div. 2, 1977), the county commissioners held an executive session to discuss among other things the availability of funding and whether to extend positions or promote or dismiss certain employees. During the executive session the decision was made to permit department heads to hire several applicants. The county claimed the executive session was permitted because it concerned matters “affecting” the appointment, employment or dismissal of public officers or employees. The court of appeals held that the decision to proceed with the hiring of several individuals as well as the discussions relating to funding were properly deemed “consideration” of matters affecting the appointment, employment or dismissal of a public employee. The court found that the purpose of the exception was that government will operate far more efficiently if it is permitted to organize and staff itself in private. The court said it is unrealistic to expect public officials to be candid about prospective personnel in public because any criticism can take on an unintended personal tone.

In *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999) the city council interviewed candidates for appoint to an unpaid position on the planning commission. The council then went into executive session to discuss the qualification and to take a consensus on the preferred candidate. Later in a public meeting they adopted a resolution appointing the preferred candidate. The majority did not address the question whether unpaid positions are “public employment” under this exception. The dissent would have held that the candidate was not a candidate for public employment within the meaning of the exception and thus the city council could not meet in executive session.

In summary:

What may be done in executive session: (1) evaluation of the qualifications of applicants for public employment; (2) interviews of applicants for public employment; (3) discussions of the qualifications of applicants for public employment; (4) discussions of salary, wages, and other conditions of employment for applicants for public employment that are personal to the applicant; (5) review of the performance of a public employee for promotion, salary adjustment or disciplinary action; (6) evaluation of the qualifications of a candidate for appointment to elective office.

What must be done at an open public meeting: (1) setting of salaries, wages and other considerations of employment to be applied generally within an agency; (2) deciding which applicant to hire; (3) any final action in hiring or setting of salary of an individual employee or class of employees; (4) any final action in discharging or disciplining a employee; (5) interviewing candidates for appointed elective office; (6) any final action in appointing a candidate to elective office

#### **4. Discuss with Legal Counsel**

*To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a*

*party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.*

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

*(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;*

RCW 42.30.110(1)(i).

The exception was amended in 2001 to allow agencies to consider in executive session the legal implications of a proposed decision or an existing practice without jeopardizing its future litigation position. Laws of 2001, ch. 216, § 1.

In *In re Recall of Lakewood City Council Members*, 144 Wn. 2d 583, 30 P.3d 474 (2001), the court held that the attorney client exemption is not available when from an objective standard the agency should know before hand that the discussion is benign and will not likely result in adverse consequences. A candid discussion with counsel of the legal risk and consequences of potential litigation is specifically contemplated by this exception. The dissent said that there can be no executive session merely because an attorney representing the agency is present. The exception for discussions in executive session with counsel is not the same as the attorney client privilege. The exception is more narrow than the privilege. The exception only applies if public knowledge of the discussion would most likely lead to adverse legal or financial consequences. The dissent disagreed with the majority and would require the board to determine before it goes into executive session for a discussion with legal counsel that adverse legal or financial consequences most likely will follow if the discussion were in an open public meeting.

In *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003), the city had reached a tentative settlement of litigation. A confidential memo of the terms of the proposed settlement was presented to the council and the council members adjourned to an executive session for the purpose of discussing whether or not to approve the settlement. The council members discussed the terms of the agreement and the city attorney asked the council members whether they wanted to approve the settlement. No actual vote took place but an informal consensus was achieved by going around the table. The Ninth Circuit held that the approval of the settlement agreement in executive session violated the OPMA and the approval of the settlement was null and void. An executive session to “discuss” is permissible but the council

could not approve of a settlement by way of a collective positive decision in closed session. The city argued that several exceptions expressly state that final action may only occur in public meetings but the exception for discussions with legal counsel does not mention final action in public. The Ninth Circuit found that to be a clever textual argument but rejected it as contrary to *Miller*.

In summary: For a permitted executive session to discuss litigation or potential litigation:

- (1) Legal counsel must be present and must take part in the discussion.
- (2) The discussion must concern litigation or potential litigation.
- (3) Potential litigation exists when (a) litigation has been specifically threatened to which the agency, governing body or member acting in his official capacity is or likely is to be come a party; (b) the agency reasonably believes litigation may be commenced by or against the agency, governing body or member acting in his official capacity; or (c) the agency has identified litigation or legal risks of a proposed action or current practice; and
- (4) The governing body must find that public discussion of the litigation or legal risk is likely to result in adverse legal or financial consequences to the agency.
- (5) The governing body is not required to determine beforehand if the public knowledge would likely have an adverse consequence. It is sufficient if the agency from an objective standard should know that the discussion is not benign and public knowledge would likely result in adverse consequences.

## **5. Other Exceptions**

There are several other permitted purposes for which the governing body may hold a closed executive session:

*To consider matters affecting national security;*

RCW 42.30.110(1)(a).

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

RCW 42.30.110(1)(d).

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

RCW 42.30.110(1)(e).

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

RCW 42.30.110(1)(j).

*To consider, in the case of the state investment board, financial and commercial information when the information relates to the investment of public trust or retirement funds and when public knowledge regarding the discussion would result in loss to such funds or in private loss to the providers of this information;*

RCW 42.30.110(1)(k).

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

RCW 42.30.110(1)(l).

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

RCW 42.30.110(1)(m).

## **V. WHAT ARE THE CONSEQUENCES OF A FAILURE TO COMPLY**

Violations of the OPMA should not be without consequence. *Mead School Dist. No. 354 v. Mead Education Assn.*, 85 Wn. 2d 140, 530 P.2d 302 (1975). In fact, violation of the OPMA may lead to consequences beyond the remedies set forth in the act, such as potential recall for elected public officials. Also, in *McDonald v. Pierce County Fire Protection Dist. No. 13*, 2006 WL 223740 (W.D. Wash. 2006) (unpublished), the district court found that the OPMA shows a legislative intent to set forth a clear mandate of public policy. If a public official is discharged in violation of the OPMA, it constitutes a wrongful discharge in violation of a public policy. Thus a violation of the OPMA constitutes a violation of a strong public policy that can lead to other consequences beyond those remedies expressly set forth in the act.

### **A. Standing to Enforce**

Any person may bring an action in the superior court to enforce the OPMA.

*Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body.*

RCW 42.30.130.

*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.*

RCW 42.30.120(1)

To prevail on an OPMA claim a person must demonstrate: (1) members of the governing body; (2) held a meeting; (3) where the governing body took action in violation of the OPMA; and (4) the members of the governing body had knowledge that the meeting violated the statute. *Eugster v. City of Spokane*, 128 Wn. App. 1, 114 P.3d 1200 (Div. 3 2005)

In *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn. 2d 769 P.2d 930 (1981), two of three commissioners held an executive session to consider the dismissal of the fire chief. The third commissioner did not receive notice and did not attend the meeting. No news media had filed a request for notice. The fire chief and the board secretary were present at the meeting. The trial court found that the district had not complied with the notice requirements of the OPMA for a special meeting. The court of appeals reversed. It acknowledged that the meeting was not a regularly scheduled meeting and that it was not a special meeting because notice was not given. It further found that one commissioner was not present and he had not be notified in writing, although he testified that he knew the other two would be considering the matter. The court of appeals reversed on the grounds that the fire chief had no standing to assert a violation of the OPMA. The court held that only the aggrieved member of the board could raise the issue and he failed to do so.

*Kirk* was wrongly decided. The statute says that “any person” may bring an action. In fact, the original bill for the OPMA would have limited standing to “any interested persons.” But the OPMA as enacted uses the much broader “any person” phrase; meaning that any citizen has standing to challenge violations of the OPMA by any governing body. It does not require residency, nor does the OPMA provide that any citizen waives the requirements of the act by attending an otherwise illegal meeting. The *Kirk* decision would circumvent citizen enforcement of the OPMA if the only persons with standing to challenge the lack of notice to a special meeting are members of the governing body when no media has filed a request for notice.

**B. Agency Action in Violation of the OPMA is Null and Void**

*Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.*

RCW 42.30.060(1).

*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).

The dissent in *Refai v. Central Washington Univ.*, 49 Wn. App. 1, 742 P.2d 137 (Div. 3 1987), said that the “of this section” phrase in RCW 42.30.060(1) includes all internal references to notification and public meeting requirements. Thus, any actions taken at a meeting at which the governing body failed to give notice are null and void.

A resolution approving a lawsuit against striking teachers adopted in violation of the OPMA is null and void. *Mead School Dist. No. 354 v. Mead Education Assn.*, 85 Wn. 2d 140, 530 P.2d 302 (1975).

In *Mason County v. Public Employment Relations Comm.*, 54 Wn. App. 36, 771 P.2d 1185 (Div. 2 1989), the county met with the employee representatives several times in closed sessions to negotiate a collective bargaining agreement. Later the county refused to ratify that agreement in an open public meeting and the employee organizations sued the county claiming an unfair labor practice. The court held the collective bargaining sessions did not comply with the OPMA. That part of the decision has been effectively overruled by amendment to RCW 42.30.140(4)(a) excepting collective bargaining sessions from the OPMA. The court went on to hold that the county could not ratify the proposed agreement since the agreement was reached in meetings conducted in violation of the OPMA. The agreement reached in violation of the OPMA was null and void and the county could not ratify a void agreement.

In *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn. 2d 238, 103 P.3d 792 (2004), the county brought a suit that had been dismissed twice before. In seeking to avoid dismissal under the “two dismissal rule,” the county argued that the first lawsuit was not authorized as required by the OPMA. Citing *Mead*, the county contended that a lawsuit not authorized as required by the OPMA must be dismissed. Thus, the first filing did not constitute an action that implicated the two dismissal rule. The court of appeals and the supreme court held that the filing of the “unauthorized action” nevertheless commenced the first action and its dismissal on the grounds that it was unauthorized nevertheless implicated the two dismissal rule.

## **1. Valid Subsequent Actions**

The issue becomes whether subsequent actions taken in compliance with the OPMA are valid or whether the prior null and void actions taint the later actions invalidating them as well.

Meetings in violation of the OPMA will not invalidate a later final action taken in compliance with the OPMA. *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (Div. 3 2003). Even if the challenged meetings violated the OPMA, such violations will not nullify the properly enacted ordinance.

In *Henry v. Town of Oakville*, 30 Wn. App. 240, 633 P.2d 892 (Div. 2 1981), the plaintiff challenged the validity of certain ordinances because of the failure to give proper notice as required by the OPMA for special and adjourned meetings. The town council had given no notice for the special and adjourned meetings at which the ordinances were approved. Before the case went to trial, the town council met in regular session and ratified each of the ordinances. The trial court held the ordinances were void in light of the OPMA violations. In remanding the case back to the trial court, the appellate court sought to give guidelines for further proceedings.

In its guidelines, the court of appeals reiterated the well established rule that where a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defect by reenactment with the proper formalities. The appellate court went on to opine that it saw no evidence of any procedural or substantive improprieties in the enactment of the ratification ordinances, unless some impropriety lies in the factually unresolved areas of whether the town complied with the provisions of the OPMA.

In *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn. 2d 869, 913 P.2d 793 (1996), two of three commissioners discussed a proposal by phone agreeing how they would vote. The court found that even if they discussed the substance of the issuance, the action was valid because the actions was approved at a proper meeting. OPAL had argued that the independent final action did not cure the earlier OPMA violation. The court, however, held that preliminary discussions in violation of the OPMA do not invalidate the formal action done in an open meeting. The OPMA does not require that subsequent actions taken in compliance with the act are also invalidated. A final action taken in accordance with the OPMA would be defensible even though there may have been a failure to comply with the act earlier during the governing body's preliminary consideration.

In *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), the Lakewood City Council authorized the planning advisory board to analyze adult entertainment within the city. The planning advisory board appointed a subcommittee called the Lakewood Adult Entertainment Task Force. The task force held several closed meetings to study the issues and prepare a report for the city council. The city council held a public meeting at which they considered and adopted a new adult cabaret ordinance. The Ninth Circuit found that the OPMA applied to the task force and that the task force violated the OPMA by having closed meeting. But, the court held, the remedy is not to declare the ordinance null and void, rather to declare the actions of the task force conducted behind closed doors null and void. Because the ultimate ratification of the ordinance was done in compliance with the OPMA it was valid. The court held that the OPMA does not require subsequent actions taken in compliance with the act also be declared null and void. There is a limited exception to the rule, however, if the decisions made in secret meetings are only formally ratified in a public setting that formal ratification is null and void. The court also noted that the fact that the actions taken by the task force in closed meetings are null and void potentially under cuts the evidentiary foundation of the ordinance.

*Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 75 P.3d 1003 (Div. 2 2003) was another challenge to the Lakewood adult entertainment ordinance. Again the claim asserted that, among other things, Lakewood's adoption of the ordinance was in violation of the OPMA. Although in *Clark* the Ninth Circuit suggested that nullifying the task forces closed meeting under cut the evidentiary foundation of the ordinance, the court of appeals held that a city can rely on different sources as evidence when enacting an ordinance. It held that an action to adopt an ordinance that takes place at a proper open meeting is valid even if previous actions that lead up to its adoption are held to violate the OPMA. Without further discussion the court found that there was ample evidence in the record to support a finding that Lakewood properly enacted the ordinance in an open public manner.

In *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003), Feature argued that the city council ratified a settlement agreement reached in closed meetings by adopting in

subsequent open public meetings certain ordinances to fulfill the settlement. The city argued that the settlement agreement was not valid because it had been reached in violation of the OPMA. The Ninth Circuit found, however, that it is well established that where a governing body takes an otherwise proper action later invalidated for procedural reasons, the body may retrace its steps and remedy the defects by reenactment with the proper formalities. Here, however, the court found that the city council's approval of certain payments and actions implementing the settlement were a far cry from retracing its steps and remedying the defects by reenactment with the proper formalities. The court voided the settlement agreement.

## **2. Summary**

Accordingly, the issue can be summarized as follows:

- (1) Any action taken in violation of any provision of the OPMA is null and void;
- (2) Subsequent actions taken in compliance with the provisions of the OPMA, however, are valid so long as the governing body retraces its steps and remedies the defects by reenactment with the proper formalities;
- (3) Actions taken in violation of the OPMA that serve as the foundation for an otherwise validly adopted final action may undercut the evidentiary foundation for that final action; and
- (4) If actions taken in violation of the OPMA are only formally ratified in a meeting in compliance with the OPMA, that formal ratification is also null and void.

## **C. Injunctions and Mandamus May Be Sought To Prevent Violations**

*Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body.*

RCW 42.30.130.

One who seeks a temporary or permanent injunction must show (1) that he has a clear legal or equitable right; (2) that he has a well-grounded fear of an immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual or substantial injury. *Washington Federation of State Employees v. State*, 99 Wn. 2d 878, 665 P.2d 1337 (1983); *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn. 2d 785, 638 P.2d 1213 (1982), *vacated and remanded on other grounds*, 483 U.S. 232 (1987).

In *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (Div. 2 1992), at a regular meeting of the county commissioners, the commissioners went into an executive session to discuss a shoreline permit application. At a later meeting, the commissioners adopted a revised draft of the conditions for the permit. The trial court held that the discussion and review of the draft application constituted an "action" and a violation of the OPMA. The court of appeals agreed. The trial court had, however, refused to enter a preliminary injunction. The court of appeals affirmed finding no well-grounded fear of further

violations of the OPMA. The court found no evidence that suggested the county commissioners regularly hold meetings in violation of the OPMA or that it has threatened to do so in the future.

**D. Public Officials Who Knowingly Violate the OPMA are Subject to Personal Liability**

*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.*

RCW 42.30.120(1).

*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.*

RCW 42.30.120(1).

Violation of the OPMA is not a criminal offense but a civil penalty. Members of a governing body are subject to civil penalties only if they attend a meeting knowing that it was in violation of the OPMA. *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999); *Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978).

In *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2, 2001) some of the writers of the e-mail expressed concerned about violating the OPMA indicating the possibility of constructive knowledge. It shows an awareness of possible OPMA violations.

**E. Public Official Who Violate the OPMA May be Subject To Recall**

In addition to the other remedies included in the statute, violations of the OPMA have been charged as a basis for recall of an elected official.

**1. Requirements for Recall**

In Washington State, an elected official may only be subject to recall for cause. WASHINGTON CONST. ART. I §§ 33 & 34 (AMEND. 8); *Chandler v. Otto*, 103 Wn. 2d 268, 274, 693 P.2d 71(1984). The courts are given responsibility to review recall petitions to determine whether the allegations are sufficient to constitute cause. RCW 29A.56.110; *Cole v. Webster*, 103 Wn. 2d 280, 288, 692 P.2d 799 (1984). The recall petition must be both legally and factually sufficient. *In re Recall of Wasson*, 149 Wn. 2d 787, 791, 72 P.3d 170 (2003).

To be legally sufficient the petition must identify substantial conduct clearly amounting to misfeasance, malfeasance or a violation of his oath of office. *Id.* To be factually sufficient the petition must allege facts that establish a *prima facie* case that the official committed an act of misfeasance, malfeasance or violation of his oath of office. *Id.* The petition must state concisely but in detail the facts, including the date, location and nature of each allegation. *Teaford v.*

*Howard*, 104 Wn. 2d 580, 586-87, 707 P.2d 1327 (1985). The allegations must be made with sufficient precision and detail to enable the electorate and the public official to make informed decisions about the recall process, and so that he can fairly defend himself. *In re Recall of Lee*, 122 Wn. 2d 613, 616, 859 P.2d 1244 (1993). The petition must also allege sufficient facts that would indicate that the public official knowingly intended to commit an unlawful act. *In re Recall of Wade*, 115 Wn. 2d 544, 548-49, 799 P.2d 734 (1990). Finally, the petitioner must have personal knowledge of the facts underlying the charges that he brings. *Wasson*, 149 W. 2d at 791.

## **2. Legal Sufficiency**

There has been some confusion over whether violation of the OPMA constitutes a basis for a recall. Malfeasance only requires the commission of an unlawful act. The court has held that charges that an elected official violated the OPMA fall within the category of an act of malfeasance since such conduct is alleged to have been unlawful and in violation of the laws of the state. *Bocek v. Bayley*, 81 Wn. 2d 831, 837, 505 P.2d 814 (1973).

In *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985), the majority found that because the charge did not specify whether the “action” was a decision by the board to discuss, negotiate or award a contract, the charge was legally insufficient. The dissent found that the school board’s failure to immediately adjourned its regular meeting to the school auditorium constituted the willful failure to perform a duty and grounds for recall.

In *In re Recall of Kast*, 144 Wn. 2d 807, 31 P.3d 677 (2001), a recall petition charged Kast with ejecting a citizen from a public meeting in violation of the OPMA. The supreme court recognized that this could be misfeasance because it could be wrongful conduct that interferes with the performance of official duty to allow citizens access to open public meetings.

But, in *Teaford v. Howard*, 104 Wn. 2d 580, 707 P.2d 1327 (1985), the majority held that in some instances a violation of the OPMA may constitute legally sufficient grounds for a recall, but it did not specify in what instances it would and in what instances it would not. The dissent held that a prima facie showing of misfeasance and malfeasance is established when three directors make a decision without the others.

## **3. Factual Sufficiency**

Like recall petitions that charge other acts of malfeasance or misfeasance, petitions that charge violation of the OPMA must state concisely but in detail the facts, including the date, location and nature of each allegation.

In *Teaford v. Howard*, 104 Wn. 2d 580, 707 P.2d 1327 (1985), the petition charged that the school board violated the OPMA when three of five members held a secret meeting where they discussed and decided to vote in the negative on an agenda item at the next regular meeting. One of the three leaked their confidential discussions. What agenda item they agreed to vote on was not specified in the recall petition. The majority held the charge was insufficient because it failed to meet the statutory requirement of a detailed description of the act complained of; it did not specify the particular agenda item. Four justices would have found the charge sufficient.

In *In re Recall of Roberts*, 115 Wn. 2d 551, 799 P.2d 734 (Dept. 1 1990), a petition charging the town council of Friday Harbor with violating the OPMA by having a series of closed secret meetings at which they drafted and agreed upon an ordinance for a building moratorium. The supreme court found the charge was insufficient on its face because it contained no details regarding the meetings.

There may be difficulty in satisfying the factual sufficiency requirements for alleging violations of the OPMA. For example, “secret meetings” which are illegal are by their very nature “secret” and therefore the details are difficult for any petitioner to allege.

#### **4. Intent to Violate**

There is also some confusion over the extent to which a recall petition must show the official’s intent to violate the OPMA.

In *Bocek v. Bayley*, 81 Wn. 2d 831, 837, 505 P.2d 814 (1973), the court found the failure of the charge to allege that that board member knowingly participated in an unlawful meeting was irrelevant since a charge of violating the OPMA implicitly alleges the elements of the wrongful conduct including a knowledge that the meeting was held in violation of the law.

But in *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985), the majority found that the petitioners did not have knowledge of the facts that indicated an intent by the board members to commit an unlawful act — to meet in violation of the OPMA, and that therefore the petition was insufficient. *See also In re Recall of Roberts*, 115 Wn. 2d 551, 799 P.2d 734 (Dept. 1 1990) (court found petition insufficient because it failed to allege facts indicating members intended to violate OPMA); *In re Recall of Beasley*, 128 Wn. 2d 419, 908 P.2d 878 (1996) (petition for recall included no allegations of intent by board members to violate the OPMA).

In *In re Recall of Anderson*, 131 Wn. 2d 92, 929 P.2d 410 (1997), the court held that petitioners must have knowledge of facts indicating an intent to violate the OPMA. That may be inferred from the facts. Where there are no allegations of intent to violate the OPMA and no facts from which such intent may be inferred, the charges are factually insufficient.

#### **5. Petitioner’s Personal Knowledge**

In a recall case, the petitioner should at least have some knowledge.

In *Teaford v. Howard*, 104 Wn. 2d 580, 707 P.2d 1327 (1985), three of five directors held secret meetings at which they committed to vote negatively on an item to be addressed in a public meeting. The court found the petition insufficient, in part, because it failed to indicate the petitioner had knowledge of the facts upon which the stated grounds for recall were based other than simply a belief that the charges were true.

Such a requirement, however, is likely to undermine enforcement of the OPMA. How is it ever possible for the petitioner to have personal knowledge of a secret meeting at which he does not participate? *See also In re Recall of Roberts*, 115 Wn. 2d 551, 799 P.2d 734 (Dept. 1 1990) (court found petition insufficient in part because petitioners lacked knowledge of facts

supporting charge); *In re Recall of Beasley*, 128 Wn. 2d 419, 908 P.2d 878 (1996) (court found basis of petitioner's knowledge of factual allegations insufficient).

In *In re Recall of Davis*, 164 Wn. 2d 361, 193 P.3d 98 (2008), the court said that although first hand knowledge is not statutorily required it has held that generally news media articles do not form a sufficient basis for the personal knowledge required by the law. There are, however, exceptions to this rule. If documents are published by the news media which directly evidence misfeasance or malfeasance this may suffice to establish the petitioner's personal knowledge. In this case a port commissioner signed a memorandum assuring the CEO severance upon his resignation. The petitioner claimed that it was done in violation of the OPMA. The court found the evidence failed to show the petitioner's personal knowledge as required to allege an act of malfeasance by a violation of the OPMA. (But the court found that the commissioner by signing the memorandum and potentially obligating the port acted without the support of the other commissioners or the necessary public vote and thus acted outside the scope of her duties in an improper manner.)

#### **F. The Agency May Be Liable for Costs and Attorneys' Fees**

*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(2).

Where there was no meeting subject to the OPMA, and no violation of the OPMA, no attorneys' fees are available. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 119 (Div. 2 2004). To recover attorneys' fees and costs, the petitioner must show only that a violation of the OPMA has occurred; he is not required to show that the participants knowingly violated the act. *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999); *see also Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (Div. 3 2002) (knowledge element is required to impose civil penalties but is not necessary element for award of attorneys' fees).

In *Schmitt v. Cape George Sewer Dist. No. 1*, 61 Wn. App. 1, 809 P.2d 217 (Div. 2, 1991), the sewer district commission held unscheduled meetings to discuss the guidelines for verifying signatures on the petition for a ULID. Several meetings later the commissioners adopted a resolution for the ULID. The claim was that the discussion at the unscheduled meetings rendered the resolution null and void. The petitioners also sought their fees. The court held that because the commissioners took no formal action at the earlier unscheduled meeting and the ULID resolution passed at the regularly scheduled open meeting, the petitioners were not entitled to fees based on a violation of the OPMA.

## Exhibit A

### OPMA Cases in chronological order

1. *Bocek v. Bayley*, 81 Wn. 2d 831, 837, 505 P.2d 814 (1973)
2. *Pierce v. Lake Stevens School Dist. No. 4*, 84 Wn. 2d 772, 529 P.2d 810 (1975)
3. *Mead School Dist. No. 354 v. Mead Education Assn.*, 85 Wn. 2d 140, 530 P.2d 302 (1975)
4. *Port of Seattle v. Rio*, 16 Wn. App. 718, 559 P.2d 18 (Div. 1 1977)
5. *Port Townsend Publishing Co. v. Brown*, 18 Wn. App. 80, 567 P.2d 664 (Div. 2 1977)
6. *Cathcart v. Andersen*, 85 Wn. 2d 102, 530 P.2d 313 (1978)
7. *Equitable Shipyards, Inc. v. State of Washington*, 93 Wn. 2d 465, 611 P.2d 396 (1980)
8. *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn. 2d 769 P.2d 930 (1981)
9. *Henry v. Town of Oakville*, 30 Wn. App. 240, 633 P.2d 892 (Div. 2 1981), *rev. denied*, 96 Wn. 2d 1027 (1982)
10. *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (Div. 1), *rev. denied*, 98 Wn. 2d 1008 (1982)
11. *In re Recall of Estey*, 104 Wn. 2d 597, 707 P.2d 1338 (1985)
12. *Teaford v. Howard*, 104 Wn. 2d 580, 707 P.2d 1327 (1985)
13. *Refai v. Central Washington Univ.*, 49 Wn. App. 1, 742 P.2d 137 (Div. 3 1987)
14. *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656 (Div. 1), *rev. denied*, 110 Wn. 2d 1031 (1988)
15. *Mason County v. Public Employment Relations Comm.*, 54 Wn. App. 36, 771 P.2d 1185 (Div. 2), *rev. denied*, 113 Wn. 2d 1013 (1989)
16. *In re Recall of Roberts*, 115 Wn. 2d 551, 799 P.2d 734 (Dept. 1 1990)
17. *Schmitt v. Cape George Sewer Dist. No. 1*, 61 Wn. App. 1, 809 P.2d 217 (Div. 2 1991)
18. *Snohomish County Improvement Alliance v. Snohomish County*, 61 Wn. App. 64, 808 P.2d 781 (Div. 1 1991)
19. *Salmon for All v. Department of Fisheries*, 118 Wn. 2d 270, 821 P.2d 1211 (1991)

20. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (Div. 2 1992), *rev. denied*, 121 Wn. 2d 1011 (1993)
21. *In re Recall of Beasley*, 128 Wn. 2d 419, 908 P.2d 878 (1996)
22. *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn. 2d 869, 913 P.2d 793 (1996)
23. *In re Recall of Anderson*, 131 Wn. 2d 92, 929 P.2d 410 (1997) (pre curiam)
24. *Miller v. City of Tacoma*, 138 Wn. 2d 318, 979 P.2d 429 (1999)
25. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (Div. 2 2001)
26. *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001)
27. *In re Recall of Lakewood City Council Members*, 144 Wn. 2d 583, 30 P.3d 474 (2001)
28. *In re Recall of Kast*, 144 Wn. 2d 807, 31 P.3d 677 (2001) (per curiam)
29. *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (Div. 3), *rev. denied*, 147 Wn. 2d 1021 (2002)
30. *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082 (9th Cir. 2003)
31. *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 75 P.3d 1003 (Div. 2 2003), *rev. denied*, 151 Wn. 2d 1029 (2004)
32. *Eugster v. City of Spokane*, 118 Wn. App. 383, 76 P.3d 741 (Div. 3 2003), *rev. denied*, 151 Wn.2d 1027 (2004)
33. *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 119 (Div. 2), *rev. denied*, 152 Wn. 2d 1023 (2004)
34. *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 86 P.3d 835 (Div. 3 2004)
35. *ACLU of Washington v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (Div. 1 2004)
36. *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn. 2d 238, 103 P.3d 792 (2004)
37. *Eugster v. City of Spokane*, 128 Wn. App. 1, 114 P.3d 1200 (Div. 3 2005), *rev. denied*, 156 Wn. 2d 1014 (2006)
38. *McDonald v. Pierce County Fire Protection Dist. No. 13*, 2006 WL 223740 (W.D. Wash. 2006) (unpublished)

39. *Clover Park School Dist. No. 400 v. Washington State Board of Education*, 2006 WL 401690 (Wn. App. Div. 2) (unpublished), *rev. denied*, 158 Wn. 2d 1016 (2006), *cert. denied*, 550 U.S. 934 (2007)
40. *In re Recall of Davis*, 164 Wn. 2d 361, 193 P.3d 98 (2008)

## **Exhibit B**

### **OPMA Attorney General Opinions** in chronological order

1. AGO 1971 No. 33 (Applicability of Open Public Meetings Act to state and local governmental agencies)
2. AGLO 1973 No. 12 (Applicability of the Open Public Meetings Act to county boards of equalization and state board of tax appeals)
3. AGLO 1975 No. 53 (Applicability of Open Public Meetings Act to council on hearing aids)
4. AGO 1983 No. 1 (Applicability of Open Public Meetings Act to services and activities fees committees at colleges and universities)
5. AGO 1985 No. 4 (Applicability of Open Public Meetings Act to board of regents consideration of president's salary in executive session)
6. AGO 1986 No. 16 (Applicability of Open Public Meetings Act to a committee of the governing body)
7. AGO 1991 No. 5 (Applicability of the Open Public Meetings Act to Small Business Export Finance Assistance Center)
8. AGO 1998 No. 15 (Authority of county to restrict video and or sound recording of county meetings)
9. AGO 2006 No. 6 (Applicability of Open Public Meetings Act when quorum of members of governing body are present at meeting not called by that body)