

**Meeting Minutes**  
September 23, 2010

Orcas Island Park and Recreation District Commission  
Special Meeting  
10:30 A.M., Orcas Island Fire Dept. Station 1

**I. CALL TO ORDER (10:30)**

Meeting called to order by Martha Farish, Chairman.

Roll call:

Commissioner 1: Vicki Vandermay - present  
Commissioner 2: Bob Eagan - present  
Commissioner 3: Martha Farish - present  
Commissioner 4: Jim Bredouw - present  
Commissioner 5: Ian Lister – present

**II. OLD BUSINESS (10:31)**

Deferred to future meetings

**III. NEW BUSINESS (10:35)**

Adina Cunningham presented highlights of the State Municipal Officers Ethics Act and the Open Public Meetings Act, for new public officials.

Power Point Presentation  
FAQ from MRSC of Washington

"The Open Public Meetings Act - How it Applies to Washington Cities, Counties, and Special Purpose Districts" (MRSC Report Number 60)

**IV. NEXT AGENDA (12:00)**

PTSA  
Skype  
October 14th  
Farmer's Market  
Web  
Budget

**Motion:** for adjournment  
- Lister, 2nd Farish  
- Vote: unanimously aye

VI. ADJOURNMENT (12:45)

**Addenda:**

Paper Document: FAQ from MRSC of Washington

Paper Document: MRSC Report Number 60

Special Meeting minutes for September 23, 2010

Approved by motion on this 30<sup>th</sup> day of September, 2010

Signed and attested this 18<sup>th</sup> day of October, 2010

  
\_\_\_\_\_  
Ian Lister, Commissioner #5,  
Secretary

  
\_\_\_\_\_  
Martha Farish, Commissioner #3,  
Chair

HIGHLIGHTS OF THE  
OPEN PUBLIC MEETINGS ACT  
AND THE MUNICIPAL  
OFFICERS ETHICS CODE

Adina K. Cunningham  
For the Orcas Island Parks and Recreation District – September 23, 2010

Why are we here?



- ❑ “Good laws have their origins in bad morals.”
- ❑ Public officials are subject to strict requirements.
- ❑ We’ ll cover some basics of the:
  - ❑ Open public meetings, under the state Open Public Meetings Act (“OPMA”), RCW Ch. 42.30; and
  - ❑ Ethics Act, under the state Code of Ethics for Municipal Officers (“Ethics Act”), RCW Ch. 42.23.
  - ❑ You are also subject to many laws not covered here.

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Overview



- ❑ Highlights of the OPMA and the Ethics Act:
  - ❑ What are the purposes of the Acts?
  - ❑ Why do you need to comply with them?
  - ❑ Can you use email to discuss Commission business?
  - ❑ When can you hold an executive session?
  - ❑ How do you circulate notice of Commission business?
  - ❑ Can you accept a paid lunch from a constituent?
  - ❑ And other Greatest Hits...

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Part One: The OPMA



- ❑ The purpose of the OPMA is open government:
 

“The legislature finds and declares that all public commissions, boards, committees, 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.**

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### What is a "meeting"?



- ❑ You are a public Commission subject to the OPMA.
- ❑ When does it apply?
  - ❑ When a quorum of members "meet" by any media (phone, email, in person);
  - ❑ To take "action", i.e., to discuss, deliberate, consider, or review any Commission business, including receiving public testimony and taking final action.
  - ❑ This includes simply discussing a matter having to do with agency business, with a quorum of members.

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### What CAN you do outside of a public meeting?

- ❑ You CAN:
  - ❑ Discuss Commission business with one member, but not 3 or more;
  - ❑ Email a member, but not 3 or more;
  - ❑ Travel and attend trainings together, so long as no official business is discussed;
  - ❑ Attend social events and dinners together, so long as no official business is discussed;
  - ❑ Copy other Commissioners on Commission business, so long as no discussion takes place.

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### What CAN'T you do outside of a public meeting?



- ❑ You CAN'T:
  - ❑ Directly email or conference call 3 or more members regarding Commission business;
  - ❑ Discuss or consider in "chain" or "serial" meetings Commission business with 3 or more members, including by email;
  - ❑ Privately meet for a Commission "retreat," "study session," or "work session" (it's still a "meeting");
  - ❑ Receive public testimony w/more than a quorum;
  - ❑ Take any final action w/more than a quorum.

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### What procedures apply?

- ❑ For regular or special meetings, basic procedural requirements are:
  - ❑ All meetings must be open to the public;
  - ❑ Notice must be published with the date, time, place, and subject matter of the meeting;
  - ❑ Date and time of all regular meetings must be established by ordinance, resolution, order, or rule;
  - ❑ Notice requirements for special meetings must be followed (see RCW 42.30.080, at page 11 of OPMA Handbook);
  - ❑ Other requirements (see pp. 9-14 of OPMA Handbook)

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## What is an executive session?

- ❑ An executive session is a meeting closed to the public, held during a regular or special meeting.
- ❑ Notice requirements apply.
- ❑ The presiding officer must announce:
  - ❑ The purpose of the session (including the statutory purpose); and
  - ❑ The time when the session will end.
  - ❑ Other procedures apply.



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## When to hold an executive session?

- ❑ Authorized purposes (that are relevant to this Commission), see RCW 42.30.110:
  - ❑ **Real Estate and Bids.** Selection of a site or acquisition of real estate by lease or purchase, or to review negotiations on publicly bid contracts, when public knowledge would cause a likelihood of increased price;
  - ❑ **Complaints or charges.** Receive or evaluate complaints or charges brought against a public employee;
  - ❑ **Hiring.** Evaluate qualifications of an applicant for public employment or review the performance of a public employee (not including salaries, wages or working conditions generally applied, and the vote must be made in public);

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## When to hold an executive session?

- ❑ Authorized purposes cont.:
  - ❑ **Candidates for Office.** Evaluate candidate for appointment to elective office (interview and final action must be in public session);
  - ❑ **Litigation.** Discuss with legal counsel enforcement actions or litigation or potential litigation when public discussion is likely to result in an adverse legal or financial consequence to agency;
  - ❑ **Union.** Matters concerning collective bargaining with a union.

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## Summary

- ❑ OPMA Basics:
  - ❑ Stay **OPEN**
  - ❑ Communicate in public meetings, when you have a quorum.
  - ❑ Do not make decisions or take "private" votes before a public meeting.
  - ❑ Follow procedural requirements for meetings.
  - ❑ Only hold executive sessions when needed, to meet District needs and statutory guidelines.



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## Questions?

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## Part Two: The Code of Ethics for Municipal Officers

- ❑ What ethics apply to your job as a member of a municipal organization?
- ❑ The Maze:
  - ❑ (a) Open Public Meetings Act
  - ❑ (b) Public Records Act
  - ❑ (c) Civil and criminal laws
  - ❑ (d) The State Municipal Officers Ethics code
  - ❑ (e) Your conscience
- ❑ Ethics in government is more than knowing the state ethics code, but it's one guide.

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## Who Does the Code Apply to?

- ❑ RCW 42.23, "Code of Ethics for Municipal Officers—Contract Interests."
- ❑ The Code is mandatory for officers of counties, cities, towns, districts, and other municipal corporations and quasi municipal corporations formed in Washington.
- ❑ "Municipal officer" means:  
All elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer.

RCW 42.23.020(2) (emphasis added).

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## The Four "Nos"

- ❑ The Code sets out four prohibitions:
  - ❑ **(1) Contracts.** No direct or indirect beneficial financial interest in a contract you control or supervise.
  - ❑ **(2) Beyond Contracts.** No "special privileges or exemptions" due to your position.
  - ❑ **(3) Gifts.** No giving or receiving any "compensation, gift, reward, or gratuity" from "a source" other than the District, if it's related to your job.
  - ❑ **(4) Confidential Information.**
    - No outside employment or activity that requires use of confidential information.
    - No disclosure of confidential information to third parties.

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### (1) Contracts

- ❑ “Contract” includes employment, sales, purchases, leases, and other financial transactions of a contractual nature. Some exemptions apply.
- ❑ You “control or supervise” the contract.
- ❑ You have a “direct or indirect financial interest.”
- ❑ The Code “is directed at *self-dealing* where a public official would otherwise have the discretion to use his [or her] public office to favor his [or her] private interests over the interests of others.”

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### (1) Contracts

- ❑ Direct or indirect financial interest + control or supervise = void contract.
- ❑ Rule of recusal likely does not cure.
- ❑ Rule of Recusal - Before the vote is made:
  - ❑ (1) Disclose in public session the conflict of interest and have it recorded in the minutes;
  - ❑ (2) Recuse yourself from all proceedings;
  - ❑ (3) Do not influence or attempt to influence the vote.

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### (1) Contracts: Remote interest

- ❑ Is there a “remote interest”:
  - ❑ (1) You are a nonsalaried officer of a nonprofit.
  - ❑ (2) An employee or agent of a contracting party where your compensation consists entirely of fixed wages or salary.
  - ❑ (3) A landlord or tenant of a contracting party.
  - ❑ (4) A holder of less than one percent of the shares of a corporation or cooperative that is a contracting party.

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### Remote interests

- ❑ If a remote interest exists, before the contract is deliberated on you must:
  - ❑ Disclose the interest in open session and have it recorded in the minutes;
  - ❑ Contract authorization must be in good faith;
  - ❑ The vote must pass without counting the vote of the member with the remote interest; and
  - ❑ Member with remote interest must not influence or attempt to influence the vote.

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### Case Studies - What to do?

- ❑ Your company subcontracts to supply gravel to contractors for an OIRPD project.
- ❑ Your company supplies towing services for an OIRPD event.
- ❑ You sit as a volunteer board member of a non-profit, and as a Parks Commissioner, you vote on a matter that benefits the non-profit.
- ❑ You are a landlord for a party that contracts with your district.

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### Effect of Contract Interest

- ❑ “Washington courts have strictly enforced the statutory bar against contracts in which public officials have beneficial interests. Under this statutory scheme, any contract in which an official has an interest is void as to the official's interest, and an official who willfully violates the statute is subject to removal from office [and penalties]. Good faith on the official's part does not mitigate the effect of the statute upon the contract.” *City of Raymond v. Runyon* (Washington Court of Appeals).

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### (2) Beyond Contracts : “Special privilege or exemption”

- ❑ You cannot use your position “to secure special privileges or exemptions for [yourself] or others”; can’t “horsetrade” for special favors, even non-financial favors.
- ❑ You cannot influence or make decisions in favor of a third party or yourself that violates the law, or use your office to secure “special privileges or exemptions.”
- ❑ If in doubt, consult your attorney and follow the Rule of Recusal.

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### (3) Gifts and compensation

- ❑ Lunches? Gifts? Travel expenses?
- ❑ “No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.”
- ❑ *De minimus* gifts or compensation may be exempt, but it's safest to avoid any appearance of impropriety, and decline.

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### (4) Confidential Information



- ❑ Close the vault!
- ❑ You cannot “accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.”

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### (4) Confidential Information

- ❑ Further, you cannot:
  - ❑ (1) Disclose confidential information gained by reason of your position; or
  - ❑ (2) Otherwise use such information for your personal gain or benefit.
- ❑ “Confidential information” is likely information not subject to disclosure due to a legal privilege. This often includes matters discussed in executive session.



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### Summary



- ❑ In sum, the Ethics Code prohibits:
  - ❑ (1) **Contracts.** No direct or indirect beneficial financial interest in a contract you “control or supervise.”
  - ❑ (2) **Beyond Contracts.** No “special privileges or exemptions” due to your position—this includes more than just conflicts of interest in contracts.
  - ❑ (3) **Gifts.** No giving or receiving any “compensation, gift, reward, or gratuity” from “a source” other than the District, if it’s related to your job.
  - ❑ (4) **Confidential Information.**
    - No outside employment or activity that requires use of confidential information.
    - No disclosure of confidential information to third parties.
- ❑ When in doubt, consult your attorney and follow the Rule of Recusal.

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### The Court’s Guiding Light



“Ethics in government are the foundation on which the structure of government rests. State officials and employees of government hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are elected and appointed. Paramount in that trust is the principle that public office, whether elected or appointed, may not be used for personal gain or private advantage.”

*Section 1 of the Ethics in Public Service Act, Laws of 1994, ch. 154, § 1.*

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# Questions?



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REPORT NUMBER 60

May 2008

Municipal Research and Services Center

# The Open Public Meetings Act

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

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## Foreword

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

As new legislation is enacted or court decisions are issued that affect the Open Public Meetings Act, revisions to this publication may be made to the online version at <http://mrsc.org/Publications/opma08.pdf>. To insure you are viewing the most up-to-date version of this publication, see the online version.

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

Richard Yukubousky  
Executive Director

# Introduction

In 1971, the state legislature enacted the Open Public Meetings Act (the “Act”) to make the conduct of government more accessible and open to the public. The Act begins with a strongly worded statement of purpose:<sup>1</sup>

*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.<sup>2</sup>*

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

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<sup>1</sup>RCW 42.30.010

<sup>2</sup>Throughout this publication, indented quotations in italics are statutory language.

<sup>3</sup>For convenience, the term “city council” will in this publication also refer to town councils and to city commissions under the commission form of government. There is currently only one city in the state, Shelton, that is governed by the commission form of government.

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

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

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

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

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

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

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

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

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

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

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

<sup>11</sup>RCW 27.12.210.

## What Is a “Meeting”?

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

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

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

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<sup>17</sup>RCW 42.30.020(4).

<sup>18</sup>RCW 42.30.020(3).

<sup>19</sup>See, e.g., RCW 35A.12.120; 35.23.270; 35.27.280; 36.32.010.

<sup>20</sup>*Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 562 (2001).

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

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

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

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

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

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

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

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

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<sup>26</sup>See AGO 2006 No. 6.

- All meetings must be open to the public.<sup>29</sup>
- A member of the public may not be required as a condition of attendance to register his or her name or other information, or complete a questionnaire, or be required to fulfill any other condition to be allowed to attend.<sup>30</sup>
- The governing body may require the removal of members of the public who disrupt the orderly conduct of a meeting. If order cannot be restored by removal of individuals, the governing body may order the meeting room cleared and may continue in session or it may adjourn and reconvene the meeting at another location, subject to the limitations in RCW 42.30.050.<sup>31</sup>
- Votes may not be taken by secret ballot.<sup>32</sup>
- Meetings may be adjourned or continued subject to the procedures in RCW 42.30.090, as discussed below.
- The governing body may meet in executive (closed) session, but only for one of the reasons specified in and in accordance with the procedures identified in RCW 42.30.110.<sup>33</sup> See discussion on executive sessions.

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

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

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<sup>29</sup>RCW 42.30.030.

<sup>30</sup>RCW 42.30.040.

<sup>31</sup>That statute provides in relevant part as follows

In such a session, final disposition may be taken only on matters appearing on the agenda. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the governing body from establishing a procedure for readmitting an individual or individuals not responsible for disturbing the orderly conduct of the meeting.

<sup>32</sup>RCW 42.30.060(2). Any vote taken by secret ballot is null and void.

<sup>33</sup>But, see footnote 44.

- A special meeting may be called by the presiding officer or by a majority of the members of the governing body.<sup>41</sup>
- Written notice must be delivered personally, by mail, by fax, or by e-mail at least 24 hours before the time of the special meeting to:
  - each member of the governing body, and to
  - each local newspaper of general circulation and each local radio or television station that has on file with the governing body a written request to be notified of that special meeting or of all special meetings.<sup>42</sup>
- The notice must specify:
  - the time and place of the special meeting, and
  - the business to be transacted at the special meeting.
- The governing body may take final action *only* concerning matters identified in the notice of the meeting.<sup>43</sup>
- Written notice to a member or members of the governing body is not required when:
  - a member files at or prior to the meeting a written waiver of notice or provides a waiver by telegram, fax, or e-mail; or
  - the member is present at the meeting at the time it convenes.

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

<sup>42</sup>Note that the Act does not require any notice directly to the public. Also, there may be no media with a request on file to be notified of special meetings. This does not mean, however, that the governing body need not notify the public in some way about an upcoming meeting. Statutes relating to each class of city require that cities

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

RCW 35A.12.160; 35.22.288; 35.23.221; 35.27.300. There are no similar statutes that apply to counties or special purpose districts. Nevertheless, counties and special districts should have procedures for notifying the public of their meetings.

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

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

## Further Questions

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

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

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

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

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

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

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

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

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<sup>46</sup>RCW 42.30.100.

<sup>47</sup>See AGO 1998 No. 15.

be needed to present information or to take notes or minutes. However, minutes are not required to be taken at an executive session.<sup>50</sup>

### **What procedures must be followed to hold an executive session?**

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

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

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

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

### **What are the allowed purposes for holding an executive session?**

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

- *To consider matters affecting national security;*

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

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<sup>50</sup>See RCW 42.32.030.

- *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;*<sup>55</sup>

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

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

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

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

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

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

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<sup>55</sup>RCW 42.30.110(1)(c).

<sup>56</sup>RCW 42.30.110(1)(d).

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

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

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

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

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

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

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

<sup>63</sup>*Miller v. Tacoma*, 138 Wn.2d 318, 329-31 (1999).

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

<sup>65</sup>See RCW 42.30.140(4).

Three basic requirements must be met before this provision can be used by a governing body to meet in closed session.<sup>70</sup>

- The attorney or special legal counsel representing the city, county, or special district must attend the executive session to discuss the enforcement action or the litigation or potential litigation;
- The discussion with legal counsel must concern either an enforcement action or litigation or potential litigation to which the city, county, district, a governing body, or one of its members is or is likely to become a party; and
- Public knowledge of the discussion would likely result in adverse legal or financial consequence to the city, county, or district.

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

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

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

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

<sup>71</sup>*Recall of Lakewood City Council*, 144 Wn.2d 583, 586-87 (2001).

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

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

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

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

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

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

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

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

The language of this exception is basically self-explanatory.<sup>75</sup> However, the term “professional negotiations” must be interpreted in the context of collective bargaining; it should not be interpreted to apply generally to negotiations for professional services.

## Further Questions

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

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

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

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

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

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

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<sup>81</sup>RCW 42.30.060.

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

<sup>83</sup>*Clark v. City of Lakewood*, 259 F.3d at \_\_, n. 10; see, *Miller v. Tacoma*, 138 Wn.2d at 329-31.

- *Feature Realty, Inc. v. Spokane*, 331 F.3d 1082 (9th Cir. 2003).

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

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

RCW 42.30.130 – Violations - Mandamus or  
Injunction

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

RCW 42.30.140 – Chapter Controlling -  
Application (Exceptions)

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



Municipal Research and Services Center of Washington  
Working Together for Excellence in Local Government

## MRSC Inquiries

### Open Public Meetings

1. **Does a code city council violate the Open Public Meetings Act if it meets in executive session to discuss whether to confirm a mayoral appointment?**

No. Such an executive session would not violate the Open Public Meetings Act. [RCW 42.30.110\(1\)\(g\)](#) provides that the council may meet in executive session "to evaluate the qualifications of an applicant for public employment." That provision would apply to an executive session to discuss whether to confirm a mayoral appointment. The person "appointed" is still an applicant for public employment, because the appointment is not complete until the council confirms it. This is assuming, of course, that the council has required confirmation of an appointment to that particular office. The actual vote on whether to confirm should, of course, take place in an open meeting.

For more information, see our [Open Public Meetings Act](#) web page.

2. **Does the Open Public Meetings Act apply to training sessions or team-building exercises involving a governing body?**

A "meeting" as defined in the Open Public Meetings Act does not occur simply because a quorum of a governing body is gathered together. A training or team-building session would not be a meeting under the Open Public Meetings Act if the governing body (e.g., city council, board of county commissioners) does not discuss city or county business, as the case may be, or otherwise take action as defined in the Act. Receiving training or engaging in team-building exercises does not inherently require the discussion of city or county business. If the governing body is not going to open such a session to the public, it should be made clear that the members of the governing body are not to discuss business at the session.

3. **May a governing body go into executive session even if it is not on the meeting agenda?**

Yes. There is no requirement in the Open Public Meetings Act that an executive session be listed on the agenda in order for a governing body to go into executive session. A decision to go into executive session may be made at the meeting, and this may be done legally as long as the requirements in the Open Public Meetings Act are followed concerning executive sessions. Although [RCW 35A.12.160](#), [RCW 35.27.300](#), [RCW 35.23.221](#), and [RCW 35.22.288](#) require that the public be made aware of the preliminary agenda of a city council meeting in advance of the meeting, this does not mean that a matter arising after the preliminary agenda has been posted cannot be discussed at the meeting, even in executive session.

4. **May city council interview candidates for city manager in executive session and, while still in executive session, reach a consensus on the candidate to be offered the position?**

No. Although the city council may interview the candidates for this appointive position in executive session under [RCW 42.30.110\(1\)\(g\)](#) for the purpose of evaluating the qualifications of applicants for public employment, it may not take any action other than evaluating the candidates. Identifying a consensus candidate in executive session would be action that is not authorized by this provision for holding an executive session. In *Miller v. Tacoma*, 138 Wn.2d 318, 328 (1999), the state supreme court stated:

Reading the exception in [RCW] 42.30.110(1)(g) narrowly and in accordance with the purposes of the act, it is clear the council could discuss and consider the worth, quality and significance of the applicants' qualifications, and individual council members could express their opinions on such matters, but they could not choose a candidate. Here the council conducted a secret ballot. This did not weigh or evaluate the qualifications of the applicants, but identified a consensus candidate for appointment to the planning commission. As such, these secret ballots constituted "action" beyond mere evaluation of the candidates' qualifications and therefore fell outside the scope of the RCW 42.30.110(1)(g) exception.

5. **May a city council or board of county commissioners meet in executive session to review the qualifications of candidates for selection as an independent contractor?**

No. The only possible provision for executive sessions in the Open Public Meetings Act under which this could possibly fit is [RCW 42.30.110\(1\)\(g\)](#). That section allows an executive session "[t]o evaluate the qualifications of an applicant for public employment." The council or board could meet in executive session in this case under this provision only if "an applicant for public employment" could be construed to cover an "applicant" to be an independent contractor. Since the Open Public Meetings Act is to be "liberally construed" by the courts so that any exceptions are narrowly confined ([RCW 42.30.910](#)), a court would not likely construe an independent contractor to be a public employee, since they are two different legal statuses.

6. **If the city council or board of county commissioners meets in executive session to consider the purchase of real estate, may it in that executive session direct staff to do some preliminary work concerning acquiring the property?**

Yes, in our opinion, subject to the caution below. Note also that the council or board may meet in executive session to

17. **What if a member of the audience becomes disorderly at a council meeting?**

The Open Public Meetings Act does not guarantee the right of the public to participate or become unruly at a council meeting; it only guarantees that they can attend. It is the role of the presiding officer to see that the public does not become disorderly during a council meeting. A member of the public may be instructed regarding rules of courtesy and, if rules are not followed, the speaker may lose any privilege to speak at the meeting and may even be ejected for disorderly conduct. See [RCW 42.30.050](#).

18. **May a member of the public videotape council or commissioner meetings?**

A local government probably may not prohibit the public from using video or tape recorders at a public meeting as long as the taping is done in a reasonable manner and the meeting is not disrupted. See [AGO 1998 No. 15](#), which opined that a county does not have authority to ban video or sound recording of a meeting open to the public.

19. **How many councilmembers are needed to call a special meeting in a code city having a seven-member council?**

The Open Public Meetings Act authorizes the city council, in addition to the mayor, to call special council meetings. However, there is a conflict between a code city statute ([RCW 35A.12.110](#)) and an Open Public Meetings Act statute ([RCW 42.30.080](#)) as to how many councilmembers are necessary to call a special meeting. The former allows three councilmembers to call a special meeting, and the latter allows a majority of the councilmembers, which would be four in a seven-member council, to do so. The Open Public Meetings Act statute is the one that must be followed here because of [RCW 42.30.140](#), which states that, in the event of a conflict with another statute, the Open Public Meetings Act will control. Thus, four members of a seven-member council are needed to call a special meeting.

20. **Would discussions of city business between two councilmembers be considered a council meeting subject to the Open Public Meetings Act?**

No. Because less than a quorum of the council is present, it would not be considered a meeting under the Act.

21. **Must the public be allowed to attend an annual council retreat?**

Yes, a retreat is a council meeting which must be open to the public. Regardless of whether a meeting of the city council is called a council retreat, a council workshop, or a council study session, the Open Public Meetings Act requires that the public be allowed to attend. This does not mean that citizens must be given an opportunity to make comments to the council at the retreat, but they must be allowed to attend. Even if held outside the city limits, a retreat is still a meeting and the public must be allowed to attend.

22. **May a multi-member legislative body (a quorum of that body) schedule a pre-meeting session or otherwise meet in advance of a meeting to review the upcoming meeting's agenda, collect materials or staff comments for the meeting, and discuss the business that will be considered?**

No, not without inviting the public and following the procedural requirements of the the Open Public Meetings Act. The Act requires all meetings of the governing body of a public agency be open and public. [RCW 42.30.030](#). The Act defines the term "meeting" to be any meeting "at which action is taken." The term "action" is defined as:

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

[RCW 42.30.020\(3\)](#). As one can see, the term "action" is very broadly defined and includes discussions or reviews of agency business. Even though no final action will take place on an issue, this "pre" meeting should be open to the public because a discussion of upcoming business will occur.

23. **What happens if the Open Public Meetings Act is violated?**

There are several potential consequences for violating the requirements of the Open Public Meetings Act. Most importantly, actions taken in meetings that violate the Act are null and void, including the passage of ordinances and resolutions. In addition, a member attending a meeting knowing it is being held improperly can be punished by a civil fine of \$100. The party that prevails in an action for violation of the Act may recover reasonable expenses and attorneys' fees under certain circumstances. [RCW 42.30.120](#).

24. **May a citizen may make a sound recording of a council or board of commissioners meeting and transmit that over the Internet?**

The public has a right to make audio and video recordings of council or board of commissioners meetings, as long as it is done in a way that does not disrupt the meetings. See [AGO 1998 No. 15](#). Given that right, we see no legal reason why a citizen could not transmit that recording over the Internet.

A citizen would not need council or board permission to make the recording or to transmit it over the Internet. However, if a citizen wanted to tap into the council or board's audio amplification system to obtain a clearer audio recording, he or she would need council or board permission for that.

25. **May city or county legislative bodies meet in executive session to discuss "matters affecting national security," including terrorism security and response planning?**

Yes. A governing body is authorized under [RCW 42.30.110\(1\)\(a\)](#) to "consider matters affecting national security" in executive session. While we have not previously encountered a situation where a local government governing body

"meeting" only applies if the governing body takes some kind of final action or vote - such as adopting an ordinance or a motion.

However, the definition of "meeting" in the OPMA is actually much broader than that. "Meeting" is defined to include any meeting when "action" is taken. "Action" is defined to include discussion, deliberations, considerations, reviews, evaluations, and it also includes, of course, final actions when a formal vote is taken. But it is clear that the OPMA covers all meetings of a quorum of a local governing body whenever there is merely discussion of public business, even if no votes or final actions are planned or taken. If a quorum of the governing body discusses public business, then they are having a "meeting" as defined in the OPMA and the notice and other requirements of the Act apply.

30. **May the city council meet privately to review the progress in collective bargaining negotiations?**

The city council can meet in closed session to review the progress in collective bargaining negotiations. RCW 42.30.140(4)) provides that the Open Public Meetings Act (OPMA) does not apply to the following:

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.

So, as long as the council is considering any of the above types of actions relating to collective bargaining sessions, then the OPMA does not apply. This means that no specific notice of the meeting must be given, the public is not entitled to attend, no minutes need to be kept of the meeting, and so on. It is simply outside the OPMA requirements.