The Open Public Meetings Act: What Hospital District Commissioners Need to Know
Questions and Comments

• This is **NOT** an Operator Assisted Webcast … so there will be no opportunity to call in with questions

• **RATHER** … to ask a question or make a comment … use ‘Chat Function’
  – Click ‘**Type Here to Chat**’ box in lower, right of screen
  – Type your question/comment, and
  – Click ‘Send’

• Questions will be collated and answered at end of presentation
Access Later

- A copy of the presentation slides will be available on the AWPHD website tomorrow
- [http://www.awphd.org/Publications/resources_web.aspx](http://www.awphd.org/Publications/resources_web.aspx)
MRSC provides legal and policy assistance to local governments, including Public Hospital Districts.

Call on Joe and MRSC consultants with questions related to governance laws and for assistance with sample policies and other research.
Overview

1. Basic OPMA Requirements and Definitions
2. Regular and Special Meetings
3. Meetings Online: Email and Social Media
4. Executive Sessions
5. Confidential Information
6. Additional Resources
Basic OPMA Requirements

• Under the Open Public Meetings Act (OPMA), all meetings of a governing body of a public agency must be open and all persons permitted to attend.

• All final actions must be adopted at a public meeting or such actions are invalid.

• Secret ballots are prohibited.

The OPMA is codified in chapter 42.30 RCW.
What is a Meeting?

- A meeting of a quorum (i.e., majority) of the governing body where action is taken

- Definition of Action:
  - Includes discussion, deliberations, public testimony, review, evaluations
  - Includes final action – a collective decision or voting on motions or resolutions
  - Is not limited to final action, however
“Meetings” also include:

- Retreats, work sessions, and study sessions
- Telephonic meetings
- Email meetings

**But note:** Administrative staff can meet and not violate the OPMA
A meeting conducted by a committee of the Board is considered a meeting of the Board under the OPMA if:

- The committee consists of a majority of the Board; or

- Even if there is less than a Board majority, if the committee is exercising decision making authority, such as by:
  - Acting on behalf of the Board
  - Taking testimony or public comment
  - Conducting hearings

“Board” = Board of Commissioners
Who Can Attend Meetings?

- No conditions on public attendance
- Cameras and audio recording devices are permitted unless disruptive
- The Board can set reasonable rules of conduct
- Although it is generally advisable to allow for public comment at public meetings, the public has no guaranteed right to comment or discuss at a meeting
  - An exception is a public hearing, the purpose of which is to hear public comment
Penalties under the OPMA

• Resolutions or orders adopted at an illegal meeting are void
• A Board commissioner who knowingly participates in an illegal meeting is subject to a $100 fine
• Judge may award costs and attorneys fees to a citizen who prevails against a public hospital district to enforce the OPMA
Can a majority of the Board participate in a training webcast (or a social gathering, or travel occurrence) and not violate the OPMA?
YES.
If a majority of the Board participates in a training webcast, commissioners are free to ask questions and participate fully in the webcast without implicating the OPMA as long as they don’t transact district business among themselves.
Regular Meetings

- Recurring meetings held in accordance with a regular schedule
- The Board must establish the date and time of regular meetings by resolution, order, or rule
- Limited notice requirements

Regular meetings are defined in RCW 42.30.070
Special Meetings

- Any meeting other than a regular meeting, regardless of label
- May be called by the presiding officer or a majority of the Board

Special meetings are defined in RCW 42.30.080
Notice Requirements for Special Meetings

- Must give written notice delivered in person, by mail, fax, or email at least 24 hours in advance of the meeting to:
  - Each Board commissioner; and to
  - Media that have on file a request to be notified

- Notice must include time, place, and business to be transacted

- Written notice is **not** required to Board commissioners if:
  - A commissioner is present at the time of the meeting; or
  - A commissioner files a written waiver in advance
Special Meetings

- The meeting may be about more than one topic
- However, no final action may be taken on a topic unless the topic was listed in the notice for the meeting
- There is an exception to this rule for emergencies
  - 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
Minutes

• General rule – minutes of all regular and special meetings must be promptly “recorded” and open to public inspection

• “Recorded” means that written minutes must be taken of what was done at the meeting and the minutes must be retained and available for public inspection

• Exception for executive sessions - no minutes required

• Legislative proposal to require tape recording of all executive sessions – not adopted by legislature

Rules for minutes are in RCW 42.32.030
Anytime as a Board commissioner you are sending emails to other commissioners on your Board, remember that a Washington appellate court has ruled that:

Email exchanges involving a majority of members of the governing body can constitute a “meeting” under the OPMA.

Would it constitute a meeting if there is an email exchange between a collective majority of the Board, and Board commissioners make substantive comments on issues?
A: Yes. If a collective majority of the Board is transacting district business through such an email exchange, that would constitute a meeting.

The communications do not have to be conducted simultaneously to constitute a serial or “rolling” meeting.
If Board commissioners use a hospital district social media site to host a discussion about hospital district issues, and the discussion includes comments from Board commissioners, could that constitute a quorum for a meeting?

If the Board provided public notice of this discussion as a meeting, would that make it a public meeting in compliance with the OPMA?
A:

- If the discussion included comments from a majority of the Board, it could constitute a public meeting.
- There is not clear authority under the OPMA regarding what would constitute adequate public notice for this kind of virtual meeting.

Recommendation:

Under current law, social media sites can be effective tools to solicit comments from the public, but not for elected officials to formulate policy.
Executive Sessions

• What is an executive session?
  – Must be part of a regular or special meeting
  – Closed to the public

• Who may attend?
  – Board commissioners
  – Others the Board invites
  – Attorney must attend for discussion regarding litigation or potential litigation/legal risks
Executive Session Procedures

• Presiding officer announces:
  – Purpose of executive session
  – Time it will end

• To extend time, announce to what time

• May not take final action in executive session
Executive Sessions & Public Records

- Just because records are considered in executive session does not mean they are exempt from disclosure under the Public Records Act (PRA)
- A specific exemption must apply under the PRA for the record, or information in a record, to be exempt from disclosure
Overview of Reasons for Executive Sessions

In this section, we’ll look more closely at the following reasons for Executive Sessions:

a. Potential litigation  
b. Clinical or staff privileges  
c. Quality Improvement Committee  
d. Real estate  

e. Complaints against employees  
f. Employee performance  
g. Vacancies in elective office

Find a complete list of allowable reasons for Executive Sessions in RCW 42.30.110
a. Potential Litigation

- May meet with legal counsel in executive session to discuss:
  - Agency enforcement actions
  - Litigation
  - Potential litigation

- Legal counsel must be present – may connect by speakerphone
a. Potential Litigation

An executive session may be held to discuss with legal counsel:

- Litigation that has been specifically threatened to which the district is, or is likely to become, a party
- Litigation the district reasonably believes may be commenced
- Litigation or legal risks of a proposed action or current practice the district has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the district
b. Clinical or Staff Privileges

An executive session may be conducted:

- For the Board, its staff or agents, to meet to consider the status of the clinical or staff privileges of a physician or other health care provider;
  
  – If such other providers, at the Board’s discretion, are considered for such privileges

- Provided that final action of the Board as to the denial, revocation, or restriction of such clinical or staff privileges shall be done in public session
c. Quality Improvement Committee

An executive session may be conducted:

• For the Quality Improvement Committee to meet;

• For the Board, its staff or agents, to meet to review the report or activities of a Quality Improvement Committee;

• However, any final action of the Board on the report of the Quality Improvement Committee shall be done in public session
An executive session may be conducted:

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

- To consider the minimum price at which real estate will be *offered for sale or lease* when public knowledge 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
e. Complaints Against Employees

An executive session may be conducted:

• To receive and evaluate complaints or charges against a public officer or employee
  – However, must first notify officer or employee and, if requested by the officer/employee, a public hearing open to the public must be held regarding such complaint or charge
Q: Can the Board of Commissioners meet in executive session to consider the performance of the CEO?
A: Yes. The Board can meet in executive session to review the performance of a public employee under RCW 42.30.110(1)(g).

This includes the CEO.
f. Employee Performance

An executive session may be conducted:

• To evaluate the qualifications of an applicant for public employment or review the performance of a public employee
  – May interview applicants in executive session
    • But may not select applicant to fill a public employment position in executive session
  – May discuss salary/wages of individual officer/employee, but not overall district salary/wages
  – Conditions of employment to be generally applied must be discussed in open session
g. Vacancies in Elective Office

An executive session may be conducted:

- To evaluate the qualifications of a candidate for appointment to the Board
  - However, any interview of such a candidate must be in open session
  - Final action (i.e., vote) appointing a candidate to fill a vacancy must be done in open session
Meetings Not Covered by the OPMA

• The OPMA (chapter 42.30 RCW) does not apply to some activities, including:
  - Collective bargaining sessions with employee organizations and labor negotiations

See RCW 42.30.140
The only reference to confidentiality in the hospital district statute that relates specifically to hospital districts is in RCW 70.44.062.

But that provision pertains only to holding executive sessions regarding
— the status of clinical or staff privileges of a physician or health care provider
— deliberations of a quality improvement committee
Confidential Information

• *Robert’s Rules of Order* – provision on executive sessions – includes reference to discipline

• RCW 42.23.070(4) – A municipal officer is prohibited from disclosing confidential information gained by reason of the officer’s position, and from otherwise using such information for his or her personal gain or benefit
  
  – Should apply to executive sessions

• If RCW 42.23.070(4) applies, the penalties in RCW 42.23.050 would apply
Penalties for Release of Confidential Information

- Violators of chapter 42.23 RCW are potentially liable for a penalty of $500, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law.

- Also subject to possible forfeiture of office.

See RCW 42.23.050.
The Board can adopt a confidentiality policy that:

- Prohibits Board commissioners from discussing publicly what took place in executive session without prior Board approval
- A bright-line rule is easy to apply and avoids confusion
- If the Board is truly discussing in closed session only what the OPMA allows to be discussed in closed session, there would in most circumstances be no valid reason to disclose publicly what was discussed privately
Additional Resources

- MRSC Website
  - Open Public Meetings Act

- MRSC Publications:
  - The Open Public Meetings Act - How it Applies to Washington Cities, Counties, and Special Purpose Districts (updated May 2008)
  - Knowing the Territory - Basic Legal Guidelines for Washington City, County, and Special Purpose District Officials – discusses the purpose of the OPMA and its application to Washington cities, counties, and special purpose districts
Additional Resources

- Washington State Attorney General’s website:
  - [www.atg.wa.gov](http://www.atg.wa.gov)
  - *Open Government Internet Manual*, prepared with the oversight of the Attorney General’s Office (with assistance from Bob Meinig, MRSC Legal Consultant) – provides an excellent overview of the OPMA and executive sessions
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