

Making Your Board and Management Team Meetings OPMA Compliant

Thursday, September 25, 2008

Noon to 1 p.m.

“Transparency” is a word used today as shorthand for good or open government. And the public’s in-person “gateway” to learning about the operations of its public hospital district—and yours—is through the Open Public Meetings Act (OPMA).

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Ramsey specializes in representing public hospital districts, ports, cities, counties and other municipal entities on open government issues, including the Open Public Meetings Act, the Public Records Act and the Public Disclosure Act. He chairs Foster Pepper’s Public Disclosure Team and serves as the unofficial local government representative on the “Sunshine Committee” that is currently reviewing the exemptions to the Public Records Act. He also lectures on the Public Records Act at the University of Washington School of Law, and regularly teaches courses for other lawyers and other industry groups on open government issues. Ramsey’s experience has given him broad exposure to the conflicts between confidentiality and open access.

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OPMA – General Application To Committees And Subagencies

The OPMA requires that all (1) “meetings” of the (2) “governing body” of a (3) “public agency” be open to the public. RCW 42.30.030. To understand the broad scope of the OPMA, it is necessary to understand the expansive definitions given to each of these three terms.

A. “Meeting”

“Meeting” occurs when a majority of the governing body meets to take an “action”

- The governing body does NOT need to take a “final action” to trigger the OPMA requirements

“Action” is broadly defined¹ as “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 &
- final actions

B. “Governing body”

“Governing body” means²

- the multimember board or other policy or rule-making body

OR

- any committee thereof IF the committee at least one board member and
 - acts on behalf of the governing body, or
 - conducts hearings, or
 - takes testimony or public comment

1. “Acts On Behalf Of”

A committee acts on behalf of the governing body:

- “when it exercises actual or de facto decisionmaking authority for the governing body.”³
- **NOT** simply because the committee “performs a specified function in the interest of the governing body.”⁴

2. “Conducts hearings”

Hearings means

- “a session in which official testimony and argument are presented.”⁵ OR

¹ RCW 42.30.020(3). For a more detailed discussion of what constitutes “action” see below.

² RCW 42.30.020(2)

³ AGO 1986 No. 16 at 11; see also Municipal Research Center, *The Open Public Meetings Act* at 2-3 (MRSC Report No. 60, June 2004) (same); *Public Records Act Deskbook: Washington’s Public Disclosure And Open Public Meetings Laws* at 21-4 to 21-5 (WSBA 2006) (same).

⁴ AGO 1986 No. 16 at 8 rejecting this broader definition).

- “A proceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence is presented.”⁶
 - But NOT a simple conference or discussion.⁷
3. “Takes testimony and public comment”

Testimony means:

- “a declaration or statement made under oath or affirmation by a witness in a court, often in response to questioning, to establish a fact.”⁸ OR
- “Evidence given by a competent witness, under oath or affirmation; as distinguished from evidence derived from writings and other sources.”⁹

“Takes ... public comment” is not easily defined, but likely means receipt of general input from the public at large rather than a more directed method of gathering evidence like the taking of testimony from a selected individual.

C. Public Agency

The definition of “public agency” includes “any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies.”

RCW 42.30.020(1)(c). Two elements must be present

1. Must be created by “statute, ordinance or other legislative act.”¹⁰
 - Ad hoc committee not created by a legislative act is not a “subagency.”
2. Must be a “policy or rule-making body,”¹¹ which means:
 - Subagency must provide advice that is “legally necessary antecedent to that agency’s action.”¹²
 - In other words, is the board required to allow this subagency to weigh in on an issue before the board itself can act?

⁵ *The Random House Dictionary* 405 (1980).

⁶ *Black's Law Dictionary* 497 (6th ed. rev., abridged 1991)

⁷ *Harris v. Grange Ins. Ass'n*, 73 Wn. App. 195, 197 n.2, 868 P.2d 201 (1994) (defining “hearing” in other statute and refusing to apply to simple conference or discussion); *Watt v. Weyerhaeuser Co.*, 18 Wn. App. 731, 739, 573 P.2d 1320 (1977) (same).

⁸ *Nationwide Ins. v. Williams*, 71 Wn. App. 336, 342, 858 P.2d 516 (1993) (quoting WEBSTER'S NEW WORLD DICTIONARY 1470 (2d College ed. 1976)).

⁹ *Nationwide Ins. v. Williams*, 71 Wn. App. 336, 342, 858 P.2d 516 (1993) (quoting Black's Law Dictionary 1646 (4th ed. rev. 1968))

¹⁰ *Cathcart v. Andersen*, 85 Wn.2d 102, 105-06, 530 P.2d 313 (1975); *AGO 1971 No. 33* at 8.

¹¹ *Cathcart*, 85 Wn.2d at 106; see also *AGO 1971 No. 33* at 8-9.

¹² *AGO 1971 No. 33* at 8-9.

The Open Public Meetings Act and Electronic Communications

Communicating with today's technology is faster and easier than ever. But this ease poses new pitfalls for officials subject to the Open Public Meetings Act, 42.30 RCW ("OPMA" or the "Act"). Unless proper safeguards are in place, the careless use of emails, instant message, chat rooms, electronic bulletin boards and other electronic communications can lead to the unintended and unknowing violation of the OPMA. Accordingly, public entities subject to the Act should have rules and procedures in place to ensure that unintended violations do not occur.

The OPMA requires that all "meetings" of a "governing body" be open to the public unless expressly exempt. RCW 42.30.030. Most multimember bodies of public agencies will be subject to the statute. RCW 42.30.020(1)(b). A meeting occurs when a majority of the government body meets to take "action." RCW 42.30.020(4). The term "action" is expansive and includes not only the transaction of official business, but also simple discussion about official business, and the taking of testimony about official business. Accordingly, the OPMA will usually apply when a majority of any board, commission or council gathers for any official purpose.

Under the plain language of the statute, as well as opinions from the Supreme Court, the Act does not apply if less than a majority meet. The Attorney General and Supreme Court have also recognized that the Act does not apply, even when a majority gathers, if no "official business" – business that could come before the governing body of a vote – is conducted. But the Act is not limited to in-person gatherings – a conference call could also amount to a meeting.

Conceptually, emails land in a gray area. Like letters, emails create their own record that is subject to disclosure under the Public Records Act, so they will already be exposed by the sunshine laws. For example, the Virginia Supreme Court held that an email exchange is like an exchange of letters, already subject to public disclosure, but not amounting to a "meeting." Unlike letters, however, the exchange of emails can be nearly instantaneous, allowing for a practically real-time exchange. For other forms of communication, like chat rooms and instant message, the exchange is instantaneous, and no "record" is necessarily kept.

The one appellate court in Washington to address this issue has found that emails more closely resemble phone calls, and can therefore amount to a "meeting" under the OPMA in some circumstances. *See Wood v. Battleground Sch Dist.*, 107 Wn. App. 550, 565 (2001) (holding email exchange between majority of board amounted to a meeting).

To amount to a meeting, the email exchange must involve active participation in the exchange by a majority of the governing body. "[T]he mere passive receipt of email does not automatically constitute a 'meeting.'" The Washington Supreme Court has long recognized that "independent and individual examination of documents by commission members prior to [an] open meeting" does not violate the Act. Thus, as long as a majority of the governing body does not respond, exchange will not violate the Act.

The *Woods* court, however, did not require any instantaneous timing as a requirement for finding a violation of the Act. Instead, it looked to a series of emails over a four-day period to

find an illegal meeting. In contrast, former state legislator and current President of the Washington Coalition for Open Government recently asserted that an email exchange could qualify as a meeting if it was a “near-real-time email conversation[.]” Whether future courts will limit email meetings to near-real-time exchanges is uncertain, but any email sent to a majority of a governing body creates a risk that one too many members will hit “reply all” and create a potential meeting.

To avoid these risks, governing bodies and those who work with governing bodies, should avoid group emails. If email is to be used to communicate with members of a governing body, the emails should be sent to each member individually. That will not make the use of email foolproof however. If a majority responds, and especially if these responses are shared, it could create the risk of a “chain” meeting. As part of their orientation, members should be instructed not to reply to such informational emails. Any email communication that is sent to a majority of a governing body, even if the emails are sent independently, should also contain an express instruction to the councilmembers not to reply. While such precautions lessen the beneficial uses of emails, they are necessary to ensure there is no unintentional violation of the OPMA.

The OPMA's Broad Definition of "Action"

Under the Open Public Meetings Act ("OPMA" or "Act") "action" is broadly defined as "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."¹³ RCW 42.30.020(3). A "meeting" occurs when a majority of the governing body meets to take an "action" – application of the Act is not limited to "final actions." The case law demonstrates that courts have taken a broad view as to what qualifies as action.

A. OPMA Broadly Defines "Action"

Originally, the OPMA defined "action" to be limited to what is now defined as final action. But in 1985, the Act was amended to include a much broader set of activities "including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations." Laws of 1985, ch. 366, § 1.

With the amendment, courts have noted, "the plain language of the OPMA does not distinguish between 'action' and discussions short of actions because the definition of action includes 'discussions.'" *Eugster v. City of Spokane*, 110 Wn. App. 212, 225 (2002). "[A]ll action, including final actions, must be done in a meeting open to the public." *Eugster*, 110 Wn. App. at 225.

B. Case Law Broadly Interprets "Action"

The following are examples of "action" that would violate the OPMA if not transacted consistent with the Act:

Eugster v. City of Spokane, 110 Wn. App. 212, 225 (2002):

- To qualify as action, members of the governing body "need merely 'communicate' about issues that may or will come before the Board for a vote."
- Council member would have violated the Act if he "gathered a collective position on an issue from a majority of Council Members."

Wood v. Battle Ground School District, 107 Wn. App. 550, 565-66 (2001):

- Exchange of emails between a majority of the board discussing the superintendent's contract was a "meeting" because the discussions were "action."

Miller v. City of Tacoma, 138 Wn.2d 318, 325 (1999):

- Reaching a consensus on a hiring decision, even though no formal vote was taken, qualified as "final action."

In re Recall of Anderson, 131 Wn.2d 92, 95-96 (1997):

- "Study session" was a "meeting" because council members discussed town business.

¹³ "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 42.30A.020(3).

OPAL v. Adams County, 128 Wn.2d 869, 883 7 n.2 (1996):

- Substantive telephone discussion between two members of a three-member board about issue that would be raised at the next meeting qualified as “action.”

In re Recall of Beasley, 128 Wn.2d 419, 426 (1996):

- Discussion among the majority of a board about whether to modify superintendent’s contract was action.

Protect the Peninsula’s Future v. Clallam County, 66 Wn. App. 671, 676 (1992):

- Holding that “discussion and review of the draft [document] at the closed meeting was ‘action’ that constituted a violation of the Open Public Meetings Act.”

Feature Realty, Inc. v. City of Spokane, 311 F.3d 1082, 1089 (9th Cir. 2003):

- Discussion about and approval of settlement agreement was action.

Clark v. City of Lakewood, 259 F.3d 996, 1013 (9th Cir 2001):

- Taking testimony and public comment, and conducting hearings qualified as “action.”

C. Examples of “Action” from the Office of the Attorney General

In addition to cases, the Attorney General has provided the following examples of “actions” subject to the OPMA in an Attorney General Opinion and the Open Government Internet Manual:

- “A meeting occurs if a quorum of the members of the governing body were to discuss or consider, for instance, the budget, personnel, or land use issues no matter where that discussion or consideration might occur.” *Open Government Internet Manual* §1.3.a.
- “The OPMA does not allow for ‘study sessions’, ‘retreats’, or similar efforts to discuss agency issues without the required notice.” *Open Government Internet Manual* §1.3.a.
- “Examples of an ‘action’ include members deliberating or discussing a decision they might eventually make.” *AGO 2006 No. 6*.
- “‘Action’ includes ‘receipt of public testimony’, so council members attending a third party’s public meeting would need to consider whether they are receiving public testimony.” *AGO 2006 No. 6*.

D. Not Everything Is an “Action”

There are three situations where an “action” will not occur.

First, even if a majority of the governing body is together in one place, as long as they do not discuss official business (or hear testimony, conduct hearings, etc.), then there is no action or illegal meeting. *AGO 2006 No. 6*.

Second, the Act at least implicitly recognizes that procedural discussions about issues, like what should be on an agenda, do not amount to “action.”

Third, the courts have recognized that governing boards do not violate the OPMA when each member receives the same information individually. But see the discussion below on serial meetings.

E. Serial Discussions Can Be Meetings Subject to the OPMA

The “serial meeting” is a concept recognized in Washington case law, but not very well developed. A serial meeting would occur when a majority of members of a governing body have a series of smaller gatherings or use a go-between, so that a majority of the body is never together, but through this series of meetings, the majority collectively intends to take “action.” Courts in other states have consistently held that if serial meetings were permitted, it would be too easy to evade the requirements of open public meeting act laws. *Wood*, 107 Wn. App. at 562. The *Wood v. Battle Ground School District* case provides four examples of what might qualify as a serial meeting:

- “series of telephone calls between individual members and attorney to develop collective commitment or promise on public business violated [the law]”
- “successive meetings between school superintendent and individual school board members violated Sunshine Law”
- “use of serial electronic communication by quorum of public body to deliberate toward or to make a decision violates state open meeting law”
- “‘telephone trees,’ where members repeatedly phone each other to form a collective decision, are inappropriate under the OPMA.”

Wood, 107 Wn. App. at 563 n.4.

Assistant Attorney General Suggests that the Open Public Meetings Act Applies to Advisory Boards

In an informal letter opinion dated March 21, 2008 (“Letter”), an Assistant Attorney General wrote that a citizen’s advisory board created by a school superintendent qualified as a “committee” of the school board, and was thus subject to the Open Public Meetings Act (“OPMA”). The Letter demonstrates the current philosophy at the Attorney General’s office, which has taken a more expansive view of the OPMA in recent years. The Letter, however, conflicts with prior formal and informal Attorney General Opinions (AGOs), and is not a formal opinion of the Office of Attorney General. This article discusses the Letter and the formal position of the Attorney General.

The advisory committee at issue was formed by a school superintendent to make recommendations on school closures. The school board did not authorize the committee and no board members were on the committee. The board did approve the process used by the committee and provided criteria to the superintendent for the committee to consider.

The OPMA applies to governing bodies and “committees thereof” if the committee “acts on behalf of” the governing body or takes testimony or conducts hearings. RCW 42.30.020(2).

The Letter asserts the primary purpose of the superintendent’s committee was to make recommendations that “may affect a school district’s decisions or policies.” As a result, the committee was “acting on behalf of” the school board. The Letter does not directly address whether the committee was a “committee of the school board.” But instead cavalierly declares, “I’m not certain it makes too much difference how the committee was created.”

In reaching the conclusion that the advisory committee is subject to the OPMA, the Letter appears in direct contradiction to 1986 AGO No. 16 and the Attorney General’s “Open Government Internet Manual.” The Letter suggests in a footnote that the Attorney General’s prior opinions erred by not considering the 1983 amendment to the OPMA definition “governing body.” But in 1986 AGO No. 16, the Attorney General provided an extensive analysis of that very amendment. The Letter’s interpretation of “acts on behalf of” is directly contrary to that controlling opinion of the Attorney General.

In the prior AGO, the Attorney General’s office had opined that a committee “acts on behalf of” a governing body only if “it exercises actual or de facto decision-making authority for the governing body.” AGO No. 16 at 11. Thus, the Letter’s conclusion that a committee “acts on behalf of” a governing body anytime its recommendations “may affect” the governing body’s decision does not appear supported by law.

Further, the Letter’s conclusion that it does not matter how the committee was created conflicts with the same formal AGO and the Attorney General’s Internet Manual. 1986 AGO No. 16 provides that a committee must be created by the governing body to be a “committee thereof.” The Attorney General’s Internet Manual makes this same point. It also notes that a committee must have at least one member of the governing body to be a “committee thereof” (although the fact that non-members are also on the committee would not make a difference).

The March 21, 2008 Letter is not the first informal letter opinion in the last few years that has taken a greatly expanded view of the applicability of the OPMA to committees. And while it may not be fully supported by the law, it may be risky in today's climate to ignore even an informal opinion.