

# **Open Public Meetings Scrutiny and Compliance**

**Washington Public Ports Association  
Fall CLE  
November 19, 2013  
Tacoma, Washington**

# So, Why Should We Care?

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1. Protecting the port's "political bank account"
2. Protecting the port's real bank account
3. Saving staff time
4. Preventing political posturing at government expense
5. If you find the OPMA cumbersome now, wait until the legislature addresses a perceived problem

# THE OPEN PUBLIC MEETINGS ACT

**RCW 42.30 *et seq.***

# The Open Public Meetings Act – Overview

“All meetings of the governing body of a public agency shall be open and public...” RCW 42.30.030

## Meeting

- “Meeting” is defined as meetings at which action is taken. RCW 42.30.030(4)
- “Action” means the transaction of the official business, including receipt of public testimony, discussions, evaluations and final actions. RCW 42.30.020(3)
- The members do not need to be in the physical presence of one another – the exchange of emails can constitute a meeting
- What about telephonic attendance?

## Advisory Committees

- OPMA does not apply to commission appointed advisory committees – unless they are a “functional equivalent” of a governing body
- However, the Public Records Act **does** apply to advisory committees
- But why not make them public meetings?

# Regular and Special Meetings

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- **Regular meetings** are held according to schedule adopted by the governing body (typically at the beginning of the year). RCW 42.30.070
- The schedule must include the **date** and **time**
- No agenda is required, but it is a really good idea
- **Special meetings** are meetings that are not regular meetings. RCW 42.30.080
- May be called by the presiding officer or the majority of the governing body's members

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- Written notice (time, place and agenda) must be delivered personally, by mail, fax or email at least 24 hours in advance of the meeting to:
    - Each member of the governing body
    - Each local newspaper of general circulation
    - Each local radio or television station that has on file with the governing body a written request to be notified

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■ Notice must also be:

- Posted on the agency's website
- Prominently displayed at the main entrance of the agency's principal location
- Prominently displayed at the meeting site, if it is not held at the principal location



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- The governing body is limited to matters identified in the notice.
  - Waiver of Notice; Written notice to the members of the governing body is not required when:
    - The member files at or prior to the meeting a written waiver of notice with the clerk or secretary of the body
    - Or the member is present at the meeting at the time it convenes

**WAIVER OF NOTICE  
OF  
SPECIAL MEETINGS**

Pursuant to RCW 42.30.080, \_\_\_\_\_, the undersigned, a Commissioner of \_\_\_\_\_, Port of \_\_\_\_\_, hereby waives notice of all special meetings which are held between \_\_\_\_\_, 20\_\_\_\_ and \_\_\_\_\_, 20\_\_\_\_.

DATED this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_, Commissioner

Received by the Board Secretary this \_\_\_\_ day of \_\_\_\_\_  
20\_\_\_\_.

\_\_\_\_\_, Board Secretary

# Rules Applicable to Both Regular and Special Meetings

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- All meetings must be open to the public but this does not give the public a right to speak at meetings
- Once there, the public can videotape and record the meeting
- The governing body may meet in executive session, but only for limited reasons set forth in the statute

# Implications of Using Technology to Communicate

- Communicating with today's technology is faster and easier than ever; however, the use of e-mails, texting, chat rooms, and electronic bulletin boards could lead to a violation of the Open Public Meetings Act
- What is a “serial meeting”?
  - A serial meeting is recognized by Washington courts and occurs when a majority of members of a governing body have a series of small gatherings or use a go-between, so that a majority of the body is never physically together, but through the series of meetings the majority collectively intends to take an “action.”

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- The *Wood v. Battle Ground School District*, 107 Wn. App. 550 (2001) case gives four examples of what could be a “serial meeting”:
    - Series of telephone calls between individual members and attorney to develop collective commitment or promise on public business violated the OPMA
    - Successive meetings between executive and individual members violates OPMA

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- Use of serial electronic communication by a quorum of a governing body to deliberate toward or to make decisions violates the OPMA.
  - “Telephone trees” where members of the governing body repeatedly phone (or e-mail) each other to form a collective decision, are inappropriate under the OPMA.

- What should you do – annotate your e-mails
  - *Commissioners I have provided the information in this e-mail to all of you to make sure you have the same information. Please note that it is a violation of the Open Public Meetings Act for commissioners to exchange thoughts and discuss Port business using e-mails. Therefore please do not “Reply All” to this e-mail. You can send your views to me. Your views can be discussed with the other commissioners in a public meeting.*

# Penalties for Violating the Act

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- All actions in violation of the Act are null and void.
- Individual commissioners are subject to \$100 fine and potential recall. RCW 42.30.120



# The Open Public Meeting – A Few Practical Tips

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Establish a commission meeting culture by design and not by default

- No single decision is more important than the port and the functioning of the port commission

Manage public comment

- It is not the forum for a “debate with the public”
- It is not “public question hour”

## Lead the staff at the commission meetings

- It is not the time to play “stump the staff”
- Praise in public and criticize (if you must), carefully in public

# Commissioners set the culture and tone of the port at the commission meeting

- The public reflects this tone
- The press reflects this tone
- The staff reflects this tone

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What culture and tone does your commission have now and want?

## The “Functional Equivalent” test

- Advisory boards which exercise government functions and spend government money

# Executive Sessions- Why They Need Your Attention

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- An executive session is a part of a regular or special meeting of a governing body that is closed to the public. Think of executive session as exceptions to the requirement that all meetings must be open to the public. RCW 42.30.110
- They can only be held for specified purposes and only during a regular or special meeting
- What you can discuss:
  - Consideration of real estate for lease, purchase or sale

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- Receiving and evaluating complaints or charges brought against a public officer or employee
    - Make sure the commission has the authority to address the personnel matter at issue
    - The employee has the right to a public hearing
  - Evaluating the qualifications of an applicant for public employment or to review the performance of a public employee
    - Salary must be set in public

- Discussing with legal counsel litigation or potential litigation when the governing body is or is likely to become a party
  - This is an area of abuse. Potential litigation means litigation has been threatened, the commission reasonably believes it may be commenced, or legal risks of a specific practice
- **A governing body MUST NOT take final action in an executive session.**
- The “sense of the commission” is okay.

# Calling Executive Sessions

The presiding officer must announce the executive session to those attending the meeting by stating:

- The time when it will end
- The purpose. Be precise.
  - Real estate for sale
  - Personnel evaluation
  - Qualifications of an applicant
  - Potential litigation



# Practical Advice on Executive Sessions

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1. Executive sessions should be the exception and not the rule
2. Only port employees and consultants should attend an executive session—no third parties
3. Limit attendance on each topic
4. Prepare an agenda and stick to it
5. Executive sessions should not precede every meeting as a standard event

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6. Commissioners can provide “direction” but no votes—this is an opportunity for “the sense of the commission”
  7. Do not publicly reference discussions in executive session
  8. Consider documentation with a memo from the executive director to the commissioners or attorney of opinions of what transpired
  9. Make the purpose of the executive session precise in the notice of executive session. “Personnel issues” is too vague

# The Bottom Line for Public Records Act and the Open Meetings Act

- Each port has a “political bank account” don’t spend it on dumb stuff
- The commission must set the culture that it wants for open meetings and the culture of public service for making public records available
- If the “culture” is not established by design it will be established by default

**AT THE END OF THE DAY, THE OPEN MEETINGS ACT AND THE PUBLIC RECORDS ACT REQUIRE A “CULTURE OF COMPLIANCE”**

# QUESTIONS