County Council & County Executive
Expectations for Boards & Commissions

Thank you for serving as an appointee and member of one of Whatcom County’s Boards & Commissions. You play a vital role by bringing citizens’ perspectives to policy makers by studying critical issues and forming well-developed, thoughtful recommendations that aid us in municipal decision-making. We value the perspectives and services contributed by the many volunteers who contribute to our leadership.

In County government we operate in a complex legal context and follow a series of principles to promote public trust as expectations for your services:

- All board and commission meetings are to be conducted in public session and notice of meetings shall be given in accordance with State law, unless otherwise advised by County legal counsel.

- A majority of members will not deliberate about board or commission work and issues via e-mail or in unnoticed “side meetings” or “gatherings” as these actions may be in violation of open meeting laws.

- Individual board and commission members and the collective group will be fair, impartial, professional, and respectful of the public, staff, and each other.

- Members may not use their position to secure special privileges or exemptions for themselves or others.

- Members may not give or receive any compensation, gifts, or gratuities from entities or individuals who are or have been engaged in items of business under consideration before the board or commission to which they are appointed.

- Members may not formally represent a board or commission unless given express direction to do so by a majority vote of the board or commission.

- Members may not, at any time, formally act as a representative of Whatcom County government unless expressly commissioned to do so in writing by the County Executive or by formal action of the County Council.

Dated this 23rd day of October, 2012.

Jack Louvs, County Executive

Kathy Kershner, Chair, County Council
### CLEARANCES

<table>
<thead>
<tr>
<th>Initial</th>
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### Division Head:

### Dept. Head:

### Prosecutor: 1/17/12

### Purchasing/Budget:

### Executive:

### TITLE OF DOCUMENT:
Resolution regarding procedures for retention of Councilmember email

### ATTACHMENTS:

### SEPA review required? ( ) Yes ( ) NO
SEPA review completed? ( ) Yes ( ) NO

### Should Clerk schedule a hearing? ( ) Yes ( ) NO
Requested Date:

### SUMMARY STATEMENT OR LEGAL NOTICE LANGUAGE:
(If this item is an ordinance or requires a public hearing, you must provide the language for use in the required public notice. Be specific and cite RCW or WCC as appropriate. Be clear in explaining the intent of the action.)
Resolution regarding procedures for retention of Councilmember email

### COMMITTEE ACTION:
1/24/2012: Amended and Approved and forwarded to Council.

### COUNCIL ACTION:
1/24/2012: Council Amended substitute and Approved 7-0
Res. 2012-002

### Related County Contract #:

### Related File Numbers:

### Ordinance or Resolution Number: Res. 2012-002

Please Note: Once adopted and signed, ordinances and resolutions are available for viewing and printing on the County's website at: www.co.whatcom.wa.us/council.
RESOLUTION NO. 2012-002

ESTABLISHING POLICIES AND PROCEDURES FOR RETENTION OF WHATCOM COUNTY COUNCILMEMBER EMAILS

WHEREAS, the Whatcom County Council recognizes that email is a very effective tool for communication; and

WHEREAS, all email created and received by members of the Whatcom County Council in the transaction of the public's business or relating to the conduct or performance of county government is a form of written communication that must be treated in the same manner as a paper document of the same nature; and

WHEREAS, emails are subject to the laws and regulations governing the retention, disclosure, destruction, and archiving of public records; and

WHEREAS, one of the greatest challenges of effectively managing email is ensuring that it is readily available if needed in the future; and

WHEREAS, to provide a process for the management, retention and storage of email, the County Council wishes to adopt a policy to ensure that every email sent or received in connection with official public business is managed in a way that adheres to legal mandates and proper procedures for retention.

NOW, THEREFORE, BE IT RESOLVED by the Whatcom County Council that official policies and procedures for retention of councilmember emails are hereby established as outlined in Exhibit A to this resolution.

APPROVED this 24th day of January, 2012.

ATTEST:

Dana Brown, David, Clerk of the Council

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WASHINGTON

Kathy Kershner, Council Chair

APPROVED AS TO FORM:

Karen "Kiki" Fortun
Civil Deputy Prosecutor
EXHIBIT A
(RULES FOR RETENTION OF COUNTY COUNCIL EMAILS)

PURPOSE

These rules are in place to ensure the retention of public records, specifically email, in accordance with state law.

EMAIL MANAGEMENT – GENERAL RULES

1. Members of the Whatcom County Council will utilize county-provided email accounts when conducting county business via e-mail whenever possible.

2. The use of personal email accounts is highly discouraged. If, for any reason, a councilmember must use a personal account to conduct official county business, that personal account is subject to the Public Records Act. Copies of all emails sent or received must be forwarded to the councilmember’s county-provided email account. Councilmembers will notify anyone who communicates to their personal email account that all future emails regarding county business must be sent to their official county email address.

3. When using an email account, every email message sent or received by a councilmember will be retained in the councilmember’s specified email account and cannot be deleted or retracted. All retained council emails and associated metadata will be stored in original format and remain usable, searchable, retrievable, and authentic for the length of the designated retention period.

4. Councilmembers can access their county email account from a remote location or from a non-county computer that has Internet access using webmail.

5. Councilmembers are responsible for the security of their email account, including their account password.

6. Emails between non-county email addresses (such as citizens, businesses, and other non-county parties), and councilmember email addresses are public records subject to records retention and public records disclosure laws. A disclosure statement shall be posted on the council’s webpage, alerting interested parties to the fact that email messages sent to or received by councilmembers are public records subject to public disclosure upon request. A similar disclosure statement shall be automatically inserted into all email messages originating from a councilmember or a member of the council’s staff.

7. The county uses a third party spam filtering system that quarantines messages based on language, content, or potential virus hazard. Email detected by this service as spam or virus infected are quarantined in a separate off-site account for user review before delivery into the county’s email system. Councilmembers should review and clear out their quarantined messages on a regular basis. Please note, while this service is very effective in filtering spam and virus hazards, it cannot guarantee that all spam or viruses will be intercepted.

8. Councilmembers are individually responsible for the content of every email they send.
9. Email exchanges between councilmembers can create an unintended quorum by "serial communication" and violates the Open Public Meetings Act. Councilmembers should avoid email exchanges that ultimately involve or create a quorum of the entire council or any of its committees. If a councilmember wishes to send an informational email to a majority of the council, he or she must make it abundantly clear in the email that the information is being provided for review only and that no response is desired.

10. Carbon copies (cc) of emails are public records and are fully subject to the Public Records Act.

11. The use of blind copying is highly discouraged, including the use of blind copy distribution lists. A blind copy is a public record subject to public disclosure under the Public Records Act.

12. Personal email should be transmitted via personal email accounts and not from a county-provided email account.

13. Email should be used cautiously when seeking legal advice or to discuss matters of pending litigation or other "confidential" county business. In general, email is discoverable in litigation, and even deleted email is not necessarily removed from the system.

14. Councilmembers understand and acknowledge that all email communications, except where otherwise excluded by law, may be subject to public disclosure under the Public Records Act.
The Open Public Meetings Act
How it Applies to Washington Cities, Counties, and Special Purpose Districts
The Open Public Meetings Act

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Report Number 60 Revised May 2012
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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.

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.
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:\footnote{RCW 42.30.010}

\begin{quote}
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.
\end{quote}

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.\footnote{Throughout this publication, indented quotations in italics are statutory language.}

Codified in chapter 42.30 RCW, the Act applies to all city and town councils,\footnote{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.} 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.
This publication comprehensively reviews the Act as it applies to Washington cities, towns, counties, and special purpose districts. 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.

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.

2 Open Public Meetings Act
Who Is Subject to the Act?

The basic mandate of the Open Public Meetings Act is as follows:

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.⁵

The Act applies to “meetings” of a “governing body” of a “public agency.” A “public agency” includes a city, county, and special purpose district.⁶ A “governing body” is defined in the Act as follows:

“Governing body” means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

The legislative bodies of cities and counties⁷ clearly are governing bodies under this definition, as are the boards or commissions that govern special purpose districts. However, they are not the only governing bodies to which the Act applies. The Act also applies to any “subagency” of a city, county, or special purpose district,⁸ because 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.⁹

Under this definition, the subagency must be created by some legislative act of the governing body, such as an ordinance or resolution. A group established by a mayor to advise him or her

⁵RCW 42.30.030.
⁶RCW 42.30.020(1)(b).
⁷The legislative bodies of cities are the city councils or city commissions, and the legislative bodies of counties are the boards of county commissioners or county councils.
⁸Most special purpose district governing bodies do not have the authority to create such subagencies.
⁹RCW 42.30.020(1)(c).
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.¹⁰

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 authority¹¹ 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:

¹⁰AGO 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.


4 Open Public Meetings Act
• when it acts on behalf of the legislative body\textsuperscript{12}
• when it conducts hearings, or
• when it takes testimony or public comment.

When a committee is not doing any of the above, it is not subject to the Act.\textsuperscript{13}

Keep in mind that it is usually good public policy to open the meetings of city, county, and special district governing bodies to the public, even if it is uncertain or doubtful that the Act applies to them. Secrecy is rarely warranted, and the Act's procedural requirements are not onerous. This approach would be consistent with the Act's basic intent that the actions of governmental bodies "be taken openly and that their deliberations be conducted openly."\textsuperscript{14}

**Further Questions**

*May four councilmembers-elect of a seven-member council meet before taking their oaths of office without procedurally complying with the Act?*

Yes. Councilmembers-elect are not yet members of the governing body and cannot take "action" within the meaning of the Act, and so they are not subject to the Act.\textsuperscript{15}

*Must a committee of the governing body be composed solely of members of the governing body for it to be subject to the Act under the circumstances identified in RCW 42.30.020(2)?*

This statute defines a "governing body" to include a "committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." (Emphasis added.) Does a "committee thereof" include only members of the governing body? This question has not been addressed by the courts. However, the attorney general's office has opined that a "committee thereof" may include individuals who are not members of the governing body when they are appointed by the governing body.\textsuperscript{16}

\begin{footnotesize}
\begin{enumerate}
\item According to the attorney general's office, a committee acts on behalf of the governing body "when it exercises actual or de facto decisionmaking power." AGO 1986 No. 16, at 12. However, in an informal letter to the Central Kitsap School District Board, dated March 21, 2008, the open government ombudsman for the attorney general's office takes a more expansive view than this prior formal opinion regarding when a committee is subject to the Act.
\item While the definition of "governing body" speaks of "when" a committee acts so as to come within that definition, the courts have not been clear about whether a committee is subject to the Act for all of its meetings when it is only at some that it is acting in that manner. See Clark v. City of Lakewood, 259 F.3d 996 (9th Cir. 2001).
\item RCW 42.30.010.
\item AGO 1986 No. 16.
\end{enumerate}
\end{footnotesize}
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."17 "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.18

Since a governing body can transact business when a quorum (majority) of its members are present,19 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.20 See the "Further Questions" at the end of this section. Also, it is not necessary that a governing body take "final action"21 for a meeting subject to the Act to occur.

17RCW 42.30.020(4).
18RCW 42.30.020(3).
19See, e.g., RCW 35A.12.120; 35.23.270; 35.27.280; 36.32.010.
21RCW 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."
Note that it does not matter if the meeting is called a “workshop,” a “study session,” or a “retreat”; it is still a meeting subject to the Open Public Meetings Act if a quorum is addressing the business of the city, county, or special purpose district. If a governing body just meets socially or travels together, it is not having a meeting subject to the Act as long as the members do not discuss agency business or otherwise take “action.”

Further Questions

If a majority or more of the members of a governing body discuss city, county, or district business by telephone or e-mail, are they having a meeting subject to the Act?

Since the members of a governing body can discuss city, county, or district business together by telephone or by e-mail so as to be taking “action” within the above definition, the governing body can conduct a meeting subject to the Act even when the members are not in the physical presence of one another. This type of meeting could take many forms, such as a conference call among a majority or more of the governing body, a telephone “tree” involving a series of telephone calls, or an exchange of e-mails. Since the public could not, as a practical matter, attend this type of “meeting,” it would be held in violation of the Act.

Given the increasingly prevalent use of e-mail and the nature of that technology, members of city councils, boards of county commissioners, and special district governing bodies must be careful when communicating with each other by e-mail so as not to violate the Act. However, such bodies will not be considered to be holding a meeting if one member e-mails the other members merely for the purpose of providing relevant information to them. As long as the other members only “passively receive” the information and a discussion regarding that information is not then commenced by e-mail amongst a quorum, there is no Open Public Meetings Act issue.

May one or more members of a governing body “attend” a meeting by telephone?

Although no courts in this state have addressed this question, it probably would be permissible for a member of a governing body to “attend” a meeting by telephone, with the permission of the body, if that member’s voice could be heard by all present, including

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22RCW 42.30.070; In re Recall of Roberts, 115 Wn.2d 551, 554 (1990).
24Though, at least one local government in this state has held an online meeting of its governing body, providing notice under the Act and giving the public the opportunity to “attend.”
25Id. at 564-65.

Open Public Meetings Act 7
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.36 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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36See AGO 2006 No. 6.

8 *Open Public Meetings Act*
What Procedural Requirements Apply to Meetings?

The Act establishes some basic procedural requirements that apply to all meetings of a governing body, whether they are regular or special meetings. *All meetings of a governing body are, under the Open Public Meetings Act, either regular or special meetings.* It does not matter if it is called a “study session” or a “workshop” or a “retreat,” it is either a regular or special meeting.

What is a regular meeting?

A regular meeting is one that is held according to a schedule adopted by ordinance, resolution, order, or rule, as may be appropriate for the governing body.\(^{27}\)

What is a special meeting?

A special meeting is any meeting that is not a regular meeting. In other words, special meetings are not held according to a fixed schedule. Under the Act, special meetings have specific notice requirements, as discussed below. Also, governing bodies may be subject to specific limitations about what may be done at a special meeting.\(^{28}\)

What procedural requirements apply to all meetings of a governing body?

The following requirements and prohibitions apply to both regular and special meetings of a governing body:

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\(^{27}\)See RCW 42.30.060, 0.70, 0.80. Also, state law, though not the Open Public Meetings Act, may require the governing body of a city, county, or special district to meet with a certain regularity, such as monthly. For example, second class and code city councils, town councils, and the board of directors of any school district must meet at least once a month. RCW 35.23.181; RCW 35.27.270; RCW 35A.12.110; RCW 28A.343.380.

\(^{28}\)For example, second class city councils may not pass an ordinance or approve a contract or a bill for the payment of money at a special meeting. RCW 35.23.181. Town councils may not pass a resolution or order for the payment of money at a special meeting. RCW 35.27.270. Many special purpose districts are subject to requirements that certain actions can be taken only at a regular meeting, i.e., not at a special meeting. See, e.g., RCW 54.16.100 (appointment and removal of public utility district manager); RCW 85.05.410 (setting compensation of board of diking district commissioners). The councils of first class and code cities and county legislative bodies have no specific limitations on actions that may be taken at a special meeting, other than those imposed by the Open Public Meetings Act.
• All meetings must be open to the public.\textsuperscript{29}
• 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.\textsuperscript{30}

• 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.\textsuperscript{31}

• Votes may not be taken by secret ballot.\textsuperscript{32}

• 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.\textsuperscript{33} 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

\textsuperscript{29}RCW 42.30.030.

\textsuperscript{30}RCW 42.30.040.

\textsuperscript{31}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.

\textsuperscript{32}RCW 42.30.060(2). Any vote taken by secret ballot is null and void.

\textsuperscript{33}But, see footnote 44.
town. But county legislative bodies must hold their regular meetings at the county seat, but may hold special meetings in the county outside of the county seat if there are agenda items that are of unique interest or concern to the residents of the area of the county in which the meetings are held. Some special purpose district governing bodies, such as first class school district boards of directors, are specifically required to hold their regular meetings within the district, while others, such as irrigation districts, are specifically required to hold meetings in the county where the district is located. Where the statutes are silent as to where meetings must be held for a particular type of district, they should be held, if possible, within the district or, at the very least, within the county in which the district is located.

**What procedural requirements apply specifically to regular meetings?**

- The date and time of regular meetings must be established by ordinance, resolution, order, or rule, as may be required for the particular governing body.
- If the regular meeting date falls on a holiday, the meeting must be held on the next business day.

**What procedural requirements apply specifically to special meetings?**

The procedural requirements that apply to special meetings deal primarily with the notice that must be provided. These requirements, contained in RCW 42.30.080, are as follows:

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34RCW 36.23.181; 35.27.270; 35A.12.110. Although meetings need not necessarily be held within a city, when a governing body decides to hold one outside the city, it should not site the meeting at a place so far from the city as to effectively prevent the public from attending.

35RCW 36.32.080.

36RCW 36.32.090.

37RCW 28A.330.070.

38RCW 87.03.115.

39The Act does not directly address designating (in the ordinance, resolution, order, or rule designating the date and time of regular meetings) the place at which regular meetings will be held. RCW 42.30.070. However, the statutes governing the particular classes of cities, except those governing first class cities, require designation of the site of regular council meetings. RCW 35A.12.110; 35.27.270. The county statutes and those relating to special purpose districts do not address designating the site of regular meetings. However, counties, first class cities, and special purpose districts should, of course, also designate the site of regular meetings along with the designation of the date and time of those meetings.

40RCW 42.30.070.
- A special meeting may be called by the presiding officer or by a majority of the members of the governing body.\(^{41}\)

- 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.\(^{42}\)

- Notice of the special meeting must be provided to the public as follows:
  - “prominently displayed” at the main entrance of the agency’s principal location, and at the meeting site if the meeting will not held at the agency’s principal location; and
  - posted on the agency’s web site. Web site posting is not required if the agency:
    - does not have a web site;
    - has fewer than 10 full-time equivalent employees; or
    - does not employ personnel whose job it is to maintain or update the web site.

- The notice must specify:
  - the time and place of the special meeting, and
  - the business to be transacted at the special meeting.

\(^{41}\)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.

\(^{42}\)Note also that statutes relating to each class of city require that cities

\begin{quote}
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.
\end{quote}

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, we recommend that counties and special districts establish like procedures for notifying the public.
- The governing body may take final action *only* concerning matters identified in the notice of the meeting.\(^{43}\)

- 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.

- Special meeting notice requirements may be dispensed with when a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when the time requirements of the notice would make notice impractical and increase the likelihood of such injury or damage.\(^{44}\) An emergency meeting must, nevertheless, be open to the public.\(^{45}\)

### What procedural requirements apply to adjournments of regular or special meetings?

A regular or special meeting may be adjourned to a specified time and place, where it will be continued. There are a number of circumstances under which a meeting might be adjourned. A meeting may be adjourned and continued to a later date because the governing body did not complete its business. The Act, in RCW 42.30.090, addresses two other circumstances under which a meeting may be adjourned and continued at a later date:

- When the governing body does not achieve a quorum. In that circumstance, less than a quorum may adjourn a meeting to a specified time and place; or

- When all members are absent from a *regular meeting* or an *adjourned regular meeting*. In that instance, the clerk of the governing body may adjourn the meeting to a stated time and place, with notice provided as required for a special meeting, unless notice is waived as provided for special meetings. However, the resulting meeting is still considered a regular meeting.

Notice of an adjourned meeting is to be provided as follows:

- An order or notice of adjournment, specifying the time and place of the meeting to be continued, must be “conspicuously posted” immediately following adjournment on or

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\(^{43}\)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.

\(^{44}\)The type of emergency contemplated here is a severe one that “involves or threatens physical damage” and requires urgent or immediate action. *Mead Sch. Dist. No. 354 v. Mead Educ. Ass’n*, 85 Wn.2d 140, 144-45 (1975).

\(^{45}\)Teaford v. Howard, 104 Wn.2d 580, 593 (1985)
near the door of the place where the meeting was held.

- Notice of a regular meeting adjourned by the clerk when all members of the governing body are absent must be provided in the same manner as for special meetings.

- If the notice or order of an adjourned meeting fails to state the hour at which the adjourned meeting is to be held, it must be held at the hour specified for regular meetings by ordinance, resolution, or other rule.

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.\(^\text{46}\)

**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.\(^\text{47}\)

\(^{46}\text{RCW 42.30.100.}\)

\(^{47}\text{See AGO 1998 No. 15.}\)
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.
When May a Governing Body Hold an Executive Session?

What is an executive session?

"Executive session" is not expressly defined in the Open Public Meetings Act, but the term is commonly understood to mean that part of a regular or special meeting of a governing body that is closed to the public. A governing body may hold an executive session only for specified purposes, which are identified in RCW 42.30.110(1)(a)-(o), and only during a regular or special meeting. Nothing, however, prevents a governing body from holding a meeting, which complies with the Act's procedural requirements, for the sole purpose of having an executive session.

A governing body should always follow the basic rule that it may not take final action in an executive session. However, there may be circumstances, as discussed below, where the governing body will need to reach a consensus concerning the matter being considered in closed session. Nevertheless, as discussed below, recent case law casts doubt on the authority of a governing body to reach a consensus regarding any matter in executive session.

Who may attend an executive session?

Attendance at an executive session need not be limited to the members of the governing body. Persons other than the members of the governing body may attend the executive session at the invitation of that body. Those invited should have some relationship to the matter being addressed in the closed session, or they should be attending to otherwise provide assistance to the governing body. For example, staff of the governing body or of the governmental entity may

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68 There is at least one statute outside of the Open Public Meetings Act that authorizes an executive session for a purpose not identified in RCW 42.30.110(1)(a)-(o). RCW 70.44.062 authorizes the board of commissioners of a public hospital district to meet in executive session "concerning the granting, denial, revocation, restriction, or other consideration of the status of the clinical or staff privileges of a physician or other health care provider" or "to review the report or the activities of a quality improvement committee."

69 When the governing body is meeting in executive session to discuss litigation or potential litigation, legal counsel must be present and take part in the discussion. RCW 42.30.110(1)(o).
be needed to present information or to take notes or minutes. However, minutes are not required to be taken at an executive session.50

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.

50See RCW 42.32.030.
To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;\(^{51}\)

This provision has two elements:

- the governing body must be considering either purchasing or leasing real property; and

- public knowledge of the governing body's consideration would likely cause an increase in the price of the real property.

The consideration of the purchase of real property under this provision can involve condemnation of the property, including the amount of compensation to be offered for the property.\(^{52}\)

Since this provision recognizes that the process of purchasing or leasing real property or selecting real property to purchase or lease may justify an executive session, it implies that the governing body may need to reach some consensus in closed session as to the price to be offered or the particular property to be selected.\(^{53}\) However, the state supreme court has emphasized that “only the action explicitly specified by [an] exception may take place in executive session.”\(^{54}\) Taken literally, this limitation would preclude a governing body in executive session from actually selecting a piece of property to acquire or setting a price at which it would be willing to purchase property, because such action would be beyond mere “consideration.” Yet, the purpose of allowing this type of consideration in an executive session would be seemingly defeated by requiring a vote in open session to select the property or to decide how much to pay for it, where public knowledge of these matters would likely increase its price. While this issue awaits judicial or legislative resolution, city and county legislative bodies and special district governing bodies should exercise caution.

\(^{51}\)RCW 42.30.110(1)(b).


\(^{53}\)See Port of Seattle v. Rio, 16 Wn. App. at 723-25.

\(^{54}\)Miller v. Tacoma, 138 Wn.2d 318, 327 (1999). See also, Feature Realty, Inc. v. Spokane, 331 F.3d 1082 (9th Cir. 2003).
- 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;\textsuperscript{55}

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;\textsuperscript{56}

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.

\textsuperscript{55}RCW 42.30.110(1)(c).

\textsuperscript{56}RCW 42.30.110(1)(d).
To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge.\(^{57}\)

For purposes of meeting in executive session under this provision, a "charge" or "complaint" must have been brought against a city, county, or special district officer or employee. The complaint or charge could come from within the city, county, or district or from the public, and it need not be a formal charge or complaint. The bringing of the complaint or charge triggers the opportunity of the officer or employee to request that the discussion be held in open session.\(^{58}\)

As a general rule, city governing bodies that are subject to the Act do not deal with individual personnel matters.\(^{59}\) For example, the city council should not be involved in individual personnel decisions, as these are within the purview of the administrative branch under the authority of the mayor or city manager.\(^{60}\) This provision for holding an executive session should not be used as a justification for becoming involved in personnel matters which a governing body may have no authority to address.

To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public.\(^{61}\)

There are two different purposes under this provision for which a governing body may meet in executive session. For both purposes, the references to "public employment" and to "public employee" include within their scope public offices and

\(^{57}\text{RCW 42.30.110(1)(f).}\)

\(^{58}\text{Another possible interpretation of this provision is that the officer or employee subject to the complaint or charge may request that the complaint or charge be heard by the governing body in open session, in addition to rather than instead of a discussion of the complaint or charge in executive session. This provision, however, has not been addressed by the courts.}\)

\(^{59}\text{A civil service commission is an obvious exception. It, however, addresses personnel actions taken against a covered officer or employee, and it does so in the context of a formal hearing. Another exception is where the governing body may be considering a complaint against one of its members. Also, when a city council has confirmation authority over a mayoral appointment, it may discuss the appointment that is subject to confirmation in executive session.}\)

\(^{60}\text{An exception is where the council, in a council-manager city, may be considering a complaint or charge against the city manager.}\)

\(^{61}\text{RCW 42.30.110(1)(g).}\)
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.\textsuperscript{62}

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.\textsuperscript{63}

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.\textsuperscript{64}

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.\textsuperscript{65}

\textsuperscript{62}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.


\textsuperscript{64}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.

\textsuperscript{65}See RCW 42.30.140(4).
- To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public.\(^{66}\)

This provision applies to a city, county, or district governing body only when it is filling a vacant elective position. Under this provision, the governing body may meet in executive session to evaluate the qualifications of applicants for the vacant position. However, any interviews with the candidates must be held in open session. As with all other appointments, the vote to fill the position must also be in open session.

- To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present.\(^{67}\)

For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6\(^\text{68}\) or RCW 5.60.060(2)(a)\(^\text{69}\) concerning:

(A) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

(B) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

(C) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

\(^{66}\)RCW 42.30.110(1)(h).

\(^{67}\)RCW 42.30.110(1)(i).

\(^{68}\)RPC 1.6 is part of the Rules of Professional Conduct for attorneys, and it deals specifically with client confidentiality, generally prohibiting disclosure of client confidences except in certain specific situations.

\(^{69}\)RCW 5.60.060(2)(a) provides that an attorney may not be compelled to be a witness at trial and reveal client confidences.

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

- 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.⁷¹

⁷⁰This 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. No. 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.

⁷¹Recall of Lakewood City Council, 144 Wn.2d 583, 586-87 (2001).
Again, no final action in executive session. The purpose of this executive session provision is to allow the governing body to discuss litigation or enforcement matters with legal counsel; the governing body is not authorized to take final action regarding such matters in an executive session. And, recent case law emphasizes that, in order for any action to take place legally in executive session, authority must be “explicitly specified” in an exemption under RCW 42.30.110(1), though that case law did not address this exemption.* The only action that is specifically authorized in this exemption is discussion.

However, since a basic purpose of shielding these discussions from public view is to protect the secrecy of strategic moves concerning litigation, the scope of a governing body's authority in executive session should be interpreted to afford that protection. So, for example, while this provision does not authorize a governing body to approve a settlement agreement in executive session, it should provide authority for that body to authorize its legal counsel to settle a case for no higher than a certain amount. An interpretation supporting the council's authority to take such action appears warranted, but such an interpretation may not be supported by the strict language in recent case law.

Further Questions

May an executive session be called to discuss “personnel matters”?

No, this would not be a legally sufficient reason to hold an executive session. The purpose for holding an executive session must be within those specifically identified in RCW 42.30.110(1). Although there are personnel issues that may be addressed in an executive session under this statute, such as complaints or charges against an employee or an employee's performance, “personnel matters” is too broad a purpose and could include purposes not authorized by the statute.

May a city council meet in executive session to ask the mayor to resign?

No. Although the council could meet in executive session to discuss complaints or charges against the mayor, the council should take the action of asking for the mayor's resignation in open session. (Of course, a mayor is not legally bound by the council's wishes.)

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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.
What Meetings Are Exempt from the Act?

RCW 42.30.140 sets out four situations where a governing body may meet and not be subject to any requirements of the Open Public Meetings Act. That statute provides that the Act does not apply to:

- The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a member of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary;

  This provision, for the most part, has little, if any, application to any city, county, or special district governing body. One type of proceeding where it has been used is where a city provides for a hearing before revoking a business license.73

- That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group;

  This exception applies when a governing body is acting in a quasi-judicial capacity.74 Typically, a city or county governing body is acting in a quasi-judicial capacity in certain land use actions such as site-specific rezones, conditional use applications, variances, and preliminary plat applications. Other examples include the civil service commission when it is considering an appeal of a disciplinary decision and the LEOFF disability board when it is considering an application for disability benefits.

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74The courts have employed a four-part test to determine whether a matter qualifies under the quasi-judicial action exemption from the Open Public Meetings Act (RCW 42.30.140(2)): (1) whether the action is one a court could have been charged to determine; (2) whether it is one historically performed by courts; (3) whether it involves the application of existing law to past or present facts for purposes of enforcing or declaring liability; and (4) whether it resembles the ordinary business of courts more than that of legislators or administrators. Raynes v. Leavenworth, 118 Wn.2d 237, 244 (1992). See also, RCW 42.36.010 (definition of quasi-judicial land use actions, for purposes of the appearance of fairness doctrine); The Appearance of Fairness Doctrine in Washington State, MRSC Report No. 32 (January 1995), at 6-8 (discussion of quasi-judicial land use actions).
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. 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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75 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).
What Are the Penalties for Violating the Act?

The only avenue provided by the Open Public Meetings Act to enforce its provisions or to impose a penalty for a violation of its provisions is by an action in superior court. "Any person" may bring that action in superior court. If a superior court determines that a violation has occurred, liability may be imposed as follows:

- **Individual liability.** Members of a governing body who attend a meeting where action is taken in violation of the Act are subject to a $100 penalty if they attend with knowledge that the meeting is in violation of the Act.\(^7^6\) Violation of the Act is not a criminal offense. The penalty is assessed by the superior court, and any person may bring an action to enforce the penalty.

Also, a knowing or intentional violation of the Act may provide a legal basis for recall of an elected member of a governing body, although recall is not a penalty under the Act.\(^7^7\)

- **City, county, or district liability.** The city, county, or district is liable for all costs, including reasonable attorney fees.\(^7^8\)

However, if a court determines by written findings that an action for violation of the Act was "frivolous and advanced without reasonable cause," a city, county, or district may be awarded reasonable expenses and attorney fees.\(^7^9\)

In addition to the above, any person may bring an action by mandamus or injunction to stop violations of the Act or to prevent threatened violations.\(^8^0\)

**Actions in violation of the Act are null and void.** Any ordinance, resolution, rule, regulation, order, or directive that is adopted at a meeting that does not comply with the Act, and any secret

\(^7^6\)RCW 42.30.120(1).

\(^7^7\)See Recall of Lakewood City Council, 144 Wn.2d 583, 586 (2001); In re Recall of Kast, 144 Wn.2d 807, 817 (2001).

\(^7^8\)RCW 42.30.120(2).

\(^7^9\)Id.

\(^8^0\)RCW 42.30.130.
vote taken, is null and void.\textsuperscript{81} This does not, however, mean that a subsequent action that complies with the Act is also invalidated.\textsuperscript{82} But, where action taken in open session merely ratifies an action taken in violation of the Act, the ratification is also null and void.\textsuperscript{83}

\textsuperscript{81}RCW 42.30.060.

\textsuperscript{82}\textit{OPAL v. Adams County}, 128 Wn.2d 869, 883 (1996); \textit{Clark v. City of Lakewood}, 259 F.3d 996 (9th Cir. 2001); see also, AGO 1971 No. 33 at 40.

\textsuperscript{83}\textit{Clark v. City of Lakewood}, 259 F.3d at \_\_\_, n. 10; see, \textit{Miller v. Tacoma}, 138 Wn.2d at 329-31.
Selected Cases and Attorney General Opinions

AGO 1971 No. 33 – This AGO contains a comprehensive overview of the scope of the Open Public Meetings Act, as it was enacted in 1971. Although parts of the Act have been amended since 1971, much of it remains the same.

RCW 42.30.010 – Legislative Declaration (Purpose of Act)

RCW 42.30.020 – Definitions
- Clark v. City of Lakewood, 259 F.3d 996 (9th Cir. 2001).
- AGO 2010 No. 9.
- AGO 2006 No. 6.
- AGO 1986 No. 16 – Applicability of Open Public Meetings Act to a committee of the governing body.

RCW 42.30.030 – Meetings Declared Open and Public.

RCW 42.30.040 – Conditions to Attendance Not to be Required.
- AGO 1998 No. 15.

RCW 42.30.060 – Actions in Violation of Act Are Null and Void.
- Recall of Lakewood City Council, 144 Wn.2d 583 (2001).

RCW 42.30.070 – Time and Places for Meetings – Emergencies

RCW 42.30.080 – Special Meetings

RCW 42.30.110 – Executive Sessions
- Recall of Lakewood City Council, 144 Wn.2d 583 (2001).
• Feature Realty, Inc. v. Spokane, 331 F.3d 1082 (9th Cir. 2003).

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

RCW 42.30.130 – Violations - Mandamus or Injunction

RCW 42.30.140 – Chapter Controlling - Application (Exceptions)
Knowing the Territory

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Preface

This is the eleventh revised and updated edition of this handbook, which was first published in 1984.

This publication has a dual purpose: to serve as a primer for newly elected and appointed officials and to be a convenient general handbook for city, county, and special purpose district officials.

We trust that this updated version, reflecting current statutory and case law developments, will continue to be a valuable resource to municipal officials.

We are grateful to Paul Sullivan, Legal Consultant, who worked on this edition. We are also grateful to Holly Stewart, Desktop Publishing Specialist, who prepared the text for publication.
Basic Powers

The Separation and Distribution of Governmental Powers

It is essential for effective local government that municipal officials, especially county commissioners, mayors, councilmembers, city managers, and special purpose district board members or commissioners, understand the roles of their respective offices and their inter-relationships with others. This brief discussion is meant to provide some basic guidelines in order to promote harmony and avoid unnecessary conflicts.

Nature and Powers Generally

Counties, Cities and Special Purpose Districts

Cities and towns are created under our constitution and general laws as municipal corporations. Wash. Const. art. XI, § 10; RCW 35.02.010; McQuillin, Municipal Corporations, § 1.20. (Because their nature and structure are essentially the same, this publication will refer to both cities and towns, generally, as cities.) Counties are also established under the state constitution as political subdivisions of the state. Wash. Const. art. XI, §§ 1, 3. They are considered municipal corporations, or, at least, quasi-municipal corporations. King County v. Tax Commission, 63 Wn.2d 393, 398, 387 P.2d 756 (1963). Special purpose districts are authorized by state legislation and are considered to be municipal corporations.¹

As corporate entities, cities, counties and special purpose districts are capable of contracting, suing, and being sued, like private corporations. As municipal corporations, however, their functions are wholly public. They are, in a sense, incorporated agencies of the state, exercising local governmental powers. McQuillin, supra, § 2.08.

Counties, cities, and special purpose districts are creatures of the state, exercising only powers delegated to them by the constitution and laws of the state. Under article 11, section 11 of the state constitution, cities and counties possess broad police power to legislate for the safety and welfare of their inhabitants, consistent with general law. (Charter cities incorporated under article 11, section 10 of the state constitution, code cities under Title 35A RCW, and charter counties under article 11, section 4 of the state constitution exercise a broader degree of self-government or home rule than do others.) Additionally, when exercising a

¹Lauterbach v. Centralia, 49 Wn. 2d 550, 554 (1956); King County Water District No. 54 v. King County Boundary Review Board, 87 Wn. 2d 536 (1976).
proprietary (business) function, such as the operation of electrical or water service, a government's powers are more liberally construed than when exercising a governmental function, such as taxation. *Tacoma v. Taxpayers*, 108 Wn.2d 679, 693-96, 743 P.2d 793 (1987). All counties, cities, and special purpose districts, however, are subject to limitations imposed expressly or implicitly by state law. *Snohomish County v. Anderson*, 123 Wn.2d 151, 158-59, 868 P.2d 116 (1994); *Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974).

While cities and counties are general purpose municipal corporations and exercise general governmental authority, special purpose districts are created for special purposes and their powers are limited to those areas within their jurisdiction.

**Officers**

Regardless of how broad the powers of a municipal corporation may be, its officers have only those powers that are prescribed by law. McQuillin, *Municipal Corporations*, § 12.126; *State v. Volkmer*, 73 Wn. App. 89, 93, 867 P.2d 678 (1994); *Brougham v. Seattle*, 194 Wash. 1, 6, 76 P.2d 1013 (1938). For example, the powers of a mayor or city manager are, even in a code city, limited to those powers that are delegated by law to that particular officer.

When statutes are unclear as to whether or why the board of county commissioners, city council, special purpose district board member, or the chief executive officer should exercise a particular power or function, resort to fundamental principles may be helpful. One such principle is embodied in the separation of powers doctrine, described in the next section.

**The Separation of Powers Doctrine**

**Background**

Under our political system at both federal and state levels, governmental powers are distributed among three separate branches or departments: legislative, executive, and judicial. In that respect, as in many others, city government is structured like state government. The city council's role is analogous to that of the legislature in establishing local public policy; the mayor or manager, like the governor, heads the executive branch.\(^2\) The municipal court exercises essentially judicial functions; however, its role is more limited than those of state courts.

County government, other than in some charter counties, is structured similarly to the city commission plan of government. The board of county commissioners, like the city commission, possesses both legislative and executive powers. Some of the charter counties have established a board of county commissioners or county council with legislative powers only and have created a county executive position that exercises executive powers.

City and county — and, to a more limited degree, special purpose district — governmental structure reflects the philosophy now firmly embedded in our society known as the separation of powers doctrine. Under that doctrine, each of the three branches exercises certain defined powers, free from unreasonable interference by the other branches; yet, all branches interact with and upon each other as a part of a check and balance system. *In re Juvenile Director*, 87 Wn.2d 232, 238-44, 552 P.2d 163 (1976).

The separation of powers doctrine is embraced in the philosophy of our founding fathers and has been embodied since in the constitutions of all of the states and of the United States. It is an essential part of our form of government, one which is flexible and adaptable to change. While not a definitive guide to intergovernmental relations, it is a dominant principle in our political system.

**Doctrine Application**

The issue in *In re Juvenile Director*, supra, involved the authority of a board of county commissioners, under its generally expressed legislative power, to establish (and, accordingly, limit) the salaries of superior court personnel, as well as the salaries in other county departments. The supreme court held that the board possessed that authority, and that the superior court had not succeeded in demonstrating (as it must) that the board's action in this particular

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\(^2\) In cities having the commission form of government, the law appears to combine legislative and executive functions in the same body. However, those functions are actually still divided as the city's legislative powers are exercised solely by the commission as a body; while each commissioner, in his or her capacity as an executive officer, is also the administrator of a separate city department. RCW 35.17.010. There is only one remaining commission city in the state, Shelton.

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instance had interfered unreasonably with the court’s essential judicial function.

In Washington cities, counties and special purpose districts, the council, board or commission, as the legislative body, establishes local laws and policies, consistent with state law, usually through the enactment of ordinances, orders and resolutions. The council, board or commission also exercises general oversight and control over the jurisdiction’s finances, primarily through the budget process.

In cities, it is ordinarily the council’s function to create subordinate positions, prescribe duties, and establish salaries. See, e.g., RCW 35.23.021; 35.27.070; 35A.12.020; and 35A.13.090. However, assigned to the chief executive officer, subject to any applicable civil service provisions, such as chapters 41.08 and 41.12 RCW. However, in some instances, the law may expressly authorize the city council to appoint or approve (confirm) the appointment of a particular officer. For instance, the council appoints and discharges the city manager. RCW 35A.13.010; 35A.13.120; 35A.18.010; and 35A.18.120. Certain mayoral appointments are or may be made subject to confirmation by the council. See RCW 35.23.021 and 35A.12.090 for other examples of those statutory or optional provisions. On the other hand, a council’s power to confirm an appointment does not include the power to veto a subsequent dismissal of that appointee.

The scheme is somewhat different in counties. The various county elected officials (commissioners, prosecutor, assessor, auditor, clerk, treasurer, coroner, and sheriff) have the authority to establish subordinate positions and appoint people to fill those positions; however, this can be done only with the consent of the board of commissioners.3 RCW 36.16.070. The commissioners fix the salaries for those positions. Id. Each elected official (and the commissioners as a body) has executive authority and supervises the day-to-day administration of their departments. The board of county commissioners has no authority with respect to the daily operation of the offices of the other elected county officials.

The application of the separation of powers doctrine to special purpose districts is more difficult to generalize, since the operation of special purpose districts is more limited and varied. Unlike what is true for cities and counties, special purpose districts do not have judicial departments. Some districts are sufficiently small that their boards may, by statute or necessity, perform both legislative and executive or administrative functions. On the other hand, in some districts, such as school districts, the board exercises authority over policy matters while the superintendent is in charge of executive or administrative duties. And, as to some districts, governance is through the county legislative body.

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3The board of county commissioners may create and fund employee positions in the offices of the other elected county officers, but it may not decide who can be hired to fill those positions. Osborn v. Grant County, 130 Wn.2d 615, 622, 926 P.2d 911 (1996).
Basic Duties, Liabilities and Immunities of Officers

Holding a public office requires the trust of the public. Actions that betray that trust can result in liability, either for the municipality or the officeholder. However, court decisions have carved out exceptions to strict liability, allowing officeholders and government employees to exercise some discretion in their actions without undue fear of incurring liability. And local governments are able to defend officials against lawsuits, and indemnify them if an adverse decision is reached in a lawsuit, provided the officials perform their official duties in good faith.

Duties

Courts have held public office to be synonymous with public trust and that a public officer’s relationship with the public is that of a fiduciary. *Northport v. Northport Townsite Co.*, 27 Wash. 543, 548-50, 68 Pac. 204 (1902). The state legislature expressly recognizes that relationship in various statutes discussed in this work: e.g., ch. 42.23 RCW; and the Open Public Meetings Act, ch. 42.30 RCW. The people themselves, in passing Initiative 276 (ch. 42.17 RCW) by a 72 percent popular vote in 1972, likewise declared trust to be the public policy of the State of Washington. For example, RCW 42.17A.001 states in part:

1. That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty and fairness in their dealings.

2. That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interests. (Emphasis supplied.)

Liability

Public officers and employees are generally accountable for their actions under civil and criminal laws. See *Babcock v. State*, 112 Wn.2d 83, 105-06, 768 P.2d 481 (1989). There are additional statutory provisions and case law governing the conduct of public officials, including: state and federal civil rights laws such as 42 U.S.C. § 1983; ethics and conflict of interest laws (chs. 42.20 and 42.23 RCW); penalties for violations
of the Open Public Meetings Act (ch. 42.30 RCW), or for violations of competitive bid laws (RCW 39.30.020), to name only some of them.

Under the common law principle that "The king can do no wrong," which prevailed in Washington until 1961, the state and its municipalities were themselves immune from civil liability for their negligent acts or omissions ("torts"). *Kelso v. Tacoma*, 63 Wn.2d 913, 914, 390 P.2d 2 (1964). However, by a series of enactments between 1961 and 1967, the legislature virtually abolished that concept. Section 1, chapter 164, Laws of 1967 (RCW 4.96.010) provides:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

Case law continued to recognize a narrow ground of immunity for a municipality and its officials from tort actions, but only for what was described as a "discretionary act involving a basic policy determination by an executive level officer which is the product of a considered policy decision" (e.g., a decision by a city council to enact a particular ordinance). *Chambers-Castanes v. King County*, 100 Wn.2d 275, 282, 669 P.2d 451 (1983).

In 1987, the state legislature enacted what is now RCW 4.24.470, providing in part as follows:

(1) An appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity, but liability shall remain on the public agency for the tortious conduct of its officials or members of the governing body.

This new statutory language appears to grant somewhat broader immunity to officials than the supreme court's language did in previous cases summarized earlier in this section.

**Public Duty Doctrine**

Some additional immunity is provided in case law by the "public duty doctrine." Under that doctrine, when a city, county, or special purpose district's duty is owed to the public at large (such as for general law enforcement), an individual who is injured by a breach of that duty has no valid claim against the city, county, or district, its officers, or employees. There are certain exceptions; e.g., in

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**Public officers and employees are generally accountable for their actions under civil and criminal laws.**

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cases where a special relationship is created (such as when an officer or employee makes direct assurances to a member of the public under circumstances where the person justifiably relies on those assurances); or when an officer or employee, such as a building official, knows about an inherently dangerous condition, has a duty to correct it, and fails to perform that duty. *Taylor v. Stevens County*, 111 Wn.2d 159, 171-72, 759 P.2d 447 (1988).

There are other protections from tort liability, such as insurance and indemnification, which are available to municipal officers and employees, even though the municipality itself may be liable. These other protections will be discussed under a later heading.

**Custodians of Public Funds**

Understandably, the law places upon treasurers and other custodians of public funds the strictest of all duties. Case law in Washington and other states holds that custodians of public funds are actually insurers; they and their bonding companies are absolutely liable for any losses of public funds in their
custody, except for "acts of God" (floods and similar natural catastrophes), or "acts of a public enemy" (war). State ex rel. O'Connell v. Engen, 60 Wn.2d 52, 55, 371 P.2d 638 (1962). The surety bonds ("official" bonds) that must be posted by those and other officers are to protect the public, not the officer. RCW 42.08.080; Nelson v. Bartell, 4 Wn.2d 174, 185, 103 P.2d 30 (1940). For personal protection, insurance may be available for officers and employees who act in good faith. This subject will be discussed in more detail in a later section of this handbook.

**Immunities from Tort Liability**

Appointed and elected officials (mayors, councilmembers, commissioners, board members) are immune from civil liability under state law to third parties for making or failing to make a discretionary decision in the course of their official duties. RCW 4.24.470. See also Evangelical United Brethren Church v. State, 67 Wn.2d 246, 255, 407 P.2d 440 (1965). However, be aware that, for other than legislative officials, this immunity is qualified, because damages can be assessed for violation of the Federal Civil Rights Act (42 U.S.C. §1983) if their conduct violates clearly established statutory or constitutional rights of which a reasonable person should have known. Sintra v. Seattle, 119 Wn.2d 1, 25, 829 P.2d 765 (1992). The U.S. Supreme Court has held that local legislators are entitled to absolute immunity from civil liability under 42 U.S.C. § 1983. Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed.2d 79 (1998).

Courts have also recognized certain immunities under the Federal Civil Rights Act (42 U.S.C. 1983) such as absolute prosecutorial immunity, e.g., when a city attorney prosecutes a defendant for allegedly violating a city ordinance or when a county prosecutor does so for violation of a state or county law. Tanner v. Federal Way, 100 Wn. App. 1, 997 P.2d 932 (2000). That absolute immunity is limited, however, to when the criminal prosecutor is performing the traditional functions of an advocate. Kalina v. Fletcher, 522 U.S. 118 (1997).

However, the municipal corporation itself may be held liable even though those individual officers may be protected. RCW 4.24.470(1) and 4.96.010(1). See also Babcock v. State, 116 Wn.2d 596, 620, 809 P.2d 143 (1991).

Cities, counties, and special purpose districts, like the state, have the authority to provide liability insurance to protect their officers and employees from loss due to their acts or omissions in the course of their duties. See RCW 35.21.205; 35.21.209; 36.16.136 and, e.g., as to special purpose districts, RCW 52.12.071; 53.08.205; and 54.16.095.

There is an indemnification provision in state law for good faith actions of officers, employees and volunteers while performing their official duties. RCW 4.96.041. This statute provides that when an action or proceeding for damages is brought against any past or present officer, employee, or volunteer of a city, county, or special purpose district, which arises from an act or omission while performing his or her official duties, then such officer, employee, or volunteer may request the city, county, or special purpose district, to authorize the defense of the action at public expense. If the legislative body finds that the actions or omissions were within the scope of his or her official duties, then the request for payment of defense expenses must be granted. In addition, any monetary judgment against the officer, employee, or volunteer shall also be paid.

Local governments should adopt local ordinances or resolutions providing terms and conditions for the defense and indemnification of their official, employees, and volunteers.

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4The law requires the premiums on such official bonds to be paid by the county, city, or other public agency served. RCW 48.28.040.
Potential Conflicts and Ethical Guidelines

Holding the public trust requires maintaining high ethical standards. To help assure the public's trust, court decisions, state laws and local codes have placed limits on the personal interests and relationships officeholders can have with subjects and actions under their control. Violations can have serious consequences, both to the officeholders and their local jurisdictions.

Prohibited Uses of Public Office

Our state supreme court, citing principles "as old as the law itself," has held that a councilmember may not vote on a matter where he or she would be especially benefitted. Smith v. Centralia, 55 Wash. 573, 577, 104 Pac. 797 (1909) (vacation of an abutting street). With some limited exceptions statutory law strictly forbids municipal officials from having personal financial interests in municipal employment or other contracts under their jurisdiction, regardless of whether or not they vote on the matter.

The public's concern is also reflected in several sections of the "Open Government Law"; a major segment of that act (RCW 42.17A.700) is devoted to requiring candidates and public officials to make financial disclosures at various times so that the public can be informed about potential conflicts.

Code of Ethics

State law, codified at RCW 42.23.070, provides a code of ethics for county, city, and special purpose district officials. The code of ethics has four provisions, as follows:

1. No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself or others;

2. No municipal officer may, directly or indirectly, give or receive any compensation, gift, gratuity, or reward from any source, except the employing municipality, for a matter connected with or related to the officer's services unless otherwise provided by law;
3. No municipal officer may accept employment or engage in business that the officer might reasonably expect would require him or her to disclose confidential information acquired by reason of his or her official position;

4. No municipal officer may disclose confidential information gained by reason of the officer’s position, nor may the officer use such information for his or her personal gain.

This last provision is particularly significant because it potentially applies to disclosure of information learned by reason of attendance at an executive session. Clearly, executive sessions are meant to be confidential, but the Open Public Meetings Act does not address this issue. Arguably, RCW 42.23.070(4) is applicable to information received in an executive session. See the section of this booklet on Open Public Meetings for more information on executive sessions.

**Statutory Prohibition Against Private Interests in Public Contracts**

**Basics**

The principal statutes directly governing the private interests of municipal officers in public contracts are contained in ch. 42.23 RCW, which is entitled “Code of Ethics for Municipal Officers – Contract Interests.” RCW 42.23.030 sets out the general prohibition that:

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through, or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein.

**General Application**

1. The act applies to all municipal and quasi-municipal corporations, including cities, towns, counties, special purpose districts, and others. As to a charter city or county, however, charter provisions are permitted to control in case of conflict, if the charter provisions are more stringent. The standards contained in the act are considered to be minimum ones. RCW 42.23.060.

2. Although the act refers to “officers,” rather than employees, the word “officers” is broadly defined to include deputies and assistant officers, such as a deputy or assistant clerk, and any others who undertake to perform the duties of an officer. RCW 42.23.020(2).

**Question:** Does the statute prohibit a local official from accepting gifts of minimal intrinsic value from someone who does or may seek to do business with his or her office?

**Answer:** Many officials, either because of the broad language of that statute or on principle, refuse to accept even a business lunch under those circumstances. Others regard items of only token or trivial value to be de minimis, i.e., of insufficient amount to cause legal concern.

3. The word “contract” includes employment, sales, purchases, leases, and other financial transactions of a contractual nature. (There are some monetary and other exceptions and qualified exceptions, which will be described in later paragraphs.)

4. The phrase “contracting party” includes any person or firm employed by or doing business with a municipality. RCW 42.23.020(4).

**Interpretation**


2. The statutory language of RCW 42.23.030, unlike earlier laws, does not prohibit an officer from being interested in any and all contracts with the municipality. However, it does apply to the control or supervision over the making of those contracts (whether actually exercised or not) and to contracts made for the benefit of his or her particular office. In other words, assuming that the clerk or treasurer of a particular city has been given no power of supervision or control over that city’s contracts, he or she would be prohibited from having an interest.
only in contracts affecting his or her own office, such as the purchasing of supplies or services for that office's operation. Members of a council, commission, or other governing body are more broadly and directly affected, because the municipality's contracts are made, as a general rule, by or under the supervision of that body, in whole or in part. It does not matter whether or not the member of the governing body voted on the contract in which he or she had a financial interest; the prohibition still applies. *City of Raymond v. Runyon*, 93 Wn. App. 127, 137, 967 P.2d 19 (1998). The employment and other contracting powers of executive officials, such as city managers, mayors, and county or other elected officials, also are generally covered by the broad provisions of the act.

3. Subject to certain "remote interest" exceptions, explained later in this section, a member of a governing body who has a forbidden interest may not escape liability simply by abstaining or taking no part in the governing body's action in making or approving the contract. Nor does it matter that the contract was let through the use of competitive bidding. *See AGO 53-55 No. 317*.

4. Both direct and indirect financial interests are prohibited, and the law also prohibits an officer from receiving financial benefits from anyone else having a contract with the municipality, if the benefits are in any way connected with the contract. In an early case involving a similar statute, where a mayor had subcontracted with a prospective prime contractor to provide certain materials, the state supreme court struck down the entire contract with the following eloquent expression of its disapproval:

> Long experience has taught lawmakers and courts the innumerable and insidi-ous evasions of this salutary principle that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.


**Question:** May a local official permit an individual or company to pay his or her expenses for travel to view a site or plant in connection with business related to the official's office?

**Answer:** The statute can be construed to prevent an official from being "compensated" in that manner. On the other hand, payment of expenses for a business trip arguably does not constitute compensation. Prudence suggests that if the trip is determined to be innocent (and assuming that there is no potential violation of the appearance of fairness doctrine, described in a later chapter), the city, county, or district itself should pay the expenses and any payment or reimbursement from a private source should be made to the jurisdiction.

5. The statute ordinarily prohibits a public officer from hiring his or her spouse as an employee because of the financial interest each spouse possesses in the other's earnings under Washington community property law. However, a bona fide separate property agreement between the spouses may eliminate such a prohibited conflict if the proper legal requirements for maintaining a separate property agreement are followed. *State v. Miller*, 32 Wn.2d 149, 157-58, 201 P.2d 136 (1948). Because of a similar financial relationship, a contract with a minor child or other dependent of the officer may be prohibited. However, chapter 42.23 RCW is not an anti-nepotism law and, absent such a direct or indirect financial interest, does not prohibit employing or contracting with an official's relatives. A mere emotional or sentimental interest is not the type of interest prohibited by that chapter. *Mumma v. Brewster*, 174 Wash. 112, 116, 24 P.2d 438 (1933).

As indicated in earlier paragraphs, individual local jurisdictions commonly adopt supplementary codes of ethics.
A question often arises when the spouse of a local government employee or contractor is elected or appointed to an office of that local government that has authority over the spouse's employment or other contract:

**Question:** Must the existing employment or contract be terminated immediately?

**Answer:** The answer to the question is, ordinarily, "no". However, any subsequent renewal or modification of the employment or other contract probably would be prohibited. For example, in a letter opinion by the attorney general to the state auditor, the question involved the marriage of a county commissioner to the secretary of another official of the same county. If the employment had occurred after the marriage, the statute would have applied because of the community property interest of each spouse in the other's earnings. The author concluded that the statute was not violated in that instance because the contract (employment) pre-existed and could not have been made "by, through, or under the supervision of", the county commissioner for the benefit of his office. However, the letter warned, the problem would arise when the contract first came up for renewal or amendment. That might be deemed to occur, for instance, when the municipality adopts its next budget. Or, in a case where the spouse is an employee who serves "at the pleasure of" the official in question, the employment might be regarded as renewable at the beginning of the next monthly or other pay period after the official takes office. Attorney General's letter to the State Auditor, dated June 8, 1970.

### Exceptions

RCW 42.23.030 exempts certain types of contracts from the provisions of the Act, such as:

1. The furnishing of electrical, water, or other utility services by a municipality to its officials, at the same rate and on the same terms as are available to the public generally.

2. The designation of public depositaries for municipal funds. Conversely, this does not permit an official to be a director or officer of a financial institution which contracts with the city or county for more than mere "depository" services.

3. The publication of legal notices required by law to be published by a municipality, upon competitive bidding or at rates not higher than prescribed by law for members of the general public.

4. Except in cities with a population of over 1,500, counties with a population of 125,000 or more, irrigation district encompassing more than 50,000 acres, or in a first-class school district; the employment of any person for unskilled day labor at wages not exceeding $200 in any calendar month.

5. Other contracts in cities with a population of less than 10,000 and in counties with a population of less than 125,000, except for contracts for legal services, other than for the reimbursement of expenditures, and except sales or leases by the municipality as seller or lessor, provided:

   That the total amount received under the contract or contracts by the municipal officer or the municipal officer's business does not exceed $1,500 in any calendar month.

However, in a second class city, town, noncharter code city, or for a member of any county fair board in a county which has not established a county purchasing department, the amount received by the officer or the officer's business may exceed $1,500 in any calendar month but must not exceed $18,000 in any calendar year. The exception does not apply to contracts with cities having a population of 10,000 or more or with counties having a population of 125,000 or more. This exemption, if available, is allowed with the following condition:

A municipal officer may not vote in the authorization, approval, or ratification of a contract in which he or she is beneficially interested even though one of the exemptions allowing the awarding of such a contract applies. The interest of the municipal officer must be disclosed to the governing body of the municipality and noted in the official minutes or similar records of the municipality before the formation of the contract.

It is important to note that the language of this section is so structured that the statute cannot be evaded by making a contract or contracts for larger amounts than permitted in a particular

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5From the legal phrase de minimis non curat lex (the law does not concern itself with trite).
period and then spreading the payments over future periods.

6. In a rural public hospital district (see RCW 70.44.460) the total amount of a contract or contracts authorized may exceed $1,500 in any calendar month, but shall not exceed $24,000 in any calendar year, with the maximum calendar year limit subject to additional increases determined according to annual changes in the consumer price index (CPI).  

7. The leasing by a port district as lessor of port district property to a municipal officer or to a contracting party in which a municipal officer may be beneficially interested, if in addition to all other legal requirements, a board of three disinterested appraisers and the superior court in the county where the property is situated finds that all terms and conditions of such lease are fair to the port district and are in the public interest.

8. Other exceptions apply to the letting of contracts for: school bus drivers in a second class school district; substitute teachers or substitute educational aid in a second-class school district; substitute teachers, if the contracting party is the spouse of an officer in a school district; certificated or classified employees of a school district, if the contract is with the spouse of a school district officer and the employee is already under contract (except, in second class districts, the spouse need not already be under contract).  

9. Under certain defined circumstances, any employment contract with the spouse of a public hospital district commissioner.  

If an exception applies to a particular contract, the municipal officer may not vote for its authorization, approval, or ratification and his or her interest of the municipal officer must be disclosed to the governing body and noted in the official minutes or other similar records before the contract is formed.

Qualified Exceptions

RCW 42.23.040 permits a municipal officer to have certain limited interests in municipal contracts, under certain circumstances. Those types of interest are as follows:

1. The interest of a nonsalaried officer of a nonprofit corporation.

2. The interest of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salaries (i.e., without commissions or bonuses). For example, a councilmember may be employed by a contractor with whom the city does business for more than the amounts allowed under RCW 42.23.030(6) (if they apply), but not if any part of his or her compensation includes a commission or year-end bonus.

3. That of a landlord or tenant of a contracting party; e.g., a county commissioner who rents an apartment from a contractor who bids on a county contract.

4. That of a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.

The conditions for the exemption in those cases of “remote interest” are as follows:

1. The officer must fully disclose the nature and extent of the interest, and it must be noted in the official minutes or similar records before the contract is made.

2. The contract must be authorized, approved, or ratified after that disclosure and recording.

3. The authorization, approval, or ratification must be made in good faith.

4. Where the votes of a certain number of officers are required to transact business, that number must be met without counting the vote of the member who has a remote interest.

5. The officer having the remote interest must not influence or attempt to influence any other officer to enter into the contract.

It is accordingly recommended that the officer with a remote interest should not participate, or even appear to participate, in any manner in the governing body’s action on the contract.
Penalties

1. A public officer who violates chapter 42.23 RCW may be held liable for a $500 civil penalty "in addition to such other civil or criminal liability or penalty as may otherwise be imposed."

2. The contract is void, and the jurisdiction may avoid payment under the contract, even though it may have been fully performed by another party.

3. The officer may have to forfeit his or her office.

Dual Office-Holding

Basics

The election or appointment of a person to public office, unlike "public employment," is not considered to be a "contract" within the meaning of chapter 42.23 RCW and similar statutes. McQuillin, Municipal Corporations, § 12.29; see also Powerhouse Engineers v. State, 89 Wn.2d 177, 184, 570 P.2d 1042 (1977). Under case law, however, it is unlawful for a public officer to appoint himself or herself to another public office unless clearly authorized by statute to do so. See McQuillin, Municipal Corporations, § 12.75. There are also statutory provisions and case law governing the holding of multiple offices by the same person. To apply those general principles, it is necessary to know the distinction between a public "office" and "employment." See, for a detailed analysis, McQuillin, Municipal Corporations, § 12.30. In State ex rel. Brown v. Blew, 20 Wn.2d 47, 51, 145 P.2d 554 (1944), the Washington State Supreme Court, quoting from another source, held the following five elements to be indispensable in order to make a public employment a "public office":

1. It must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;

2. It must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;

3. The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority;

4. The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the legislature and by it placed under the general control of a superior officer or body; and

5. It must have some permanency and continuity and not be only temporary or occasional.

As the cases also point out, usually a public officer is required to execute and file an official oath and bond.

Statutory Provisions

There is no single statutory provision governing dual office-holding. In fact, statutory law is usually silent on that question except where the legislature has deemed it best either to prohibit or permit particular offices to be held by the same person regardless of whether they may or may not be compatible under common law principles. For example, see RCW 35.23.142, 35A.12.020, and 35.27.180, which expressly permit the offices of clerk and treasurer to be combined in certain cases. On the other hand, RCW 35A.12.030 and 35A.13.020 prohibit a mayor or councilmember in a code city from holding any other public office or employment within the city's government except as permitted under the provisions of chapter 42.23 RCW.

A statute expressly permits city councilmembers to hold the position of volunteer fire fighter (but not chief), volunteer ambulance personnel, or reserve law enforcement officer, or two or more of such positions, but only if authorized by a resolution adopted by a two-thirds vote of the full city council. RCW 35.21.770 and RCW 35A.11.110; see also RCW 35.21.772 which allows volunteer members of a fire department, except a fire chief, to be candidates for elective office and be elected or appointed to office while remaining a fire department volunteer.

In addition, RCW 35A.13.060 expressly authorizes a city manager to serve two or more cities in that capacity at the same time, but it also provides that a
city council may require the city manager to devote his or her full time to the affairs of that code city.

**Incompatible Offices**

In the absence of a statute on the subject, the same person may hold two or more public offices unless those offices are incompatible. A particular body of judicial decisions (case law "doctrine") prohibits an individual from simultaneously holding two offices that are "incompatible."

Although the Washington State Supreme Court has never had the occasion to apply the doctrine in a situation actually involving two "offices," the court in *Kennett v. Levine*, 50 Wn.2d 212, 310 P.2d 244 (1957) cited the doctrine approvingly and applied it in a different context. The court explained in its opinion:

> Offices are incompatible when the nature and duties of the offices are such as to render it improper, from considerations of public policy, for one person to retain both.

The question is whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.

(Citations omitted.) *Kennett v. Levine*, supra, at 216-217.

Other authorities point out that the question is not simply whether there is a physical impossibility of discharging the duties of both offices at the same time, but whether or not the functions of the two offices are inconsistent, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both. Incompatibility may arise where the holder cannot in every instance discharge the duties of both offices. *McQuillin, Municipal Corporations*, § 12.67.

Applying those tests, the Washington State Attorney General’s Office has found various offices to be incompatible with each other, such as mayor and county commissioner (AGO 57-58 No. 91), county engineer and city engineer (letter to the Prosecuting Attorney of Douglas County, July 16, 1938), mayor and port commissioner (AGO 1978 No. 12), commissioner of a fire protection district and the district’s civil service commission (AGO 1968 No. 16), and others. Courts in other jurisdictions have held incompatible the positions of mayor and councilmember, mayor and city manager, city marshal and councilmember, to mention only a few. *McQuillin, Municipal Corporations*, § 12.67(a).

**Prohibition Against Pay Increases**

As a means of preventing the use of public office for self-enrichment, the state constitution (article 11, section 8) initially prohibited any changes in the pay applicable to an office having a fixed term, either after the election of that official or during his or her term. However, by Amendment 54 (article 30), adopted in 1967, and an amendment to article 11, section 8 (Amendment 57) in 1972, the rule was modified to permit pay increases for officials who do not fix their own compensation. More recently, the ability to receive mid-term compensation increases was expanded to include councilmembers and commissioners, provided a local salary commission is established and the commission sets compensation at a higher level. See *RCW 35.21.015* and 36.22.024. Otherwise, members of governing bodies who set their own compensation still cannot, during the terms for which they are elected, receive any pay increase enacted by that body either after their election or during that term. The prohibition is not considered to apply, however, to a mayor's compensation, unless the mayor actually casts the tie-breaking vote on the question. Mid-term or post-election decreases in compensation for elective officers are entirely forbidden by article 11, section 8 of the constitution.

The term "compensation," as used in that constitutional prohibition, includes salaries and other forms of "pay," but does not include rates of reimbursement for travel and subsistence expenses incurred on behalf of the municipality. *State ex rel. Jaspers v. West*, 13 Wn.2d 514, 519, 125 P.2d 694 (1942); see also *State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 461, 110 P.2d 162 (1941). The cost of hospitalization and medical aid policies or plans is not considered additional compensation to elected officials. *RCW 41.04.190*. 

*Knowing the Territory | Potential Conflicts and Ethical Guidelines*
Appearance of Fairness Doctrine in Hearings

Until 1969, Washington law dealing with conflicts of interest generally applied only to financial interests, as opposed to emotional, sentimental, or other biases. The "appearance of fairness doctrine," however, which governs the conduct of certain hearings, covers broader ground. That doctrine was first applied in this state in 1969. In two cases decided in that year, the Washington State Supreme Court concluded that, when boards of county commissioners, city councils, planning commissions, civil service commissions, and similar bodies are required to hold hearings that affect individual or property rights ("quasi-judicial" proceedings), they should be governed by the same strict fairness rules that apply to cases in court. See Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969); State ex rel. Beam v. Fulwiler, 76 Wn.2d 213, 456 P.2d 322 (1969). Basically, the rule requires that for justice to be done in such cases, the hearings must not only be fair, they must also be free from even the appearance of unfairness. The cases usually involve zoning matters, but the doctrine has been applied to civil service and other hearings as well.

For additional information on this doctrine, see the MRSC publication entitled The Appearance of Fairness Doctrine in Washington State, Report No. 32 Revised, April 2011. Also, there is a listing of appellate court decisions showing the history of the appearance of fairness doctrine in the Appendix to this publication.

As the listing also indicates, the appearance of fairness doctrine has been used to invalidate proceedings for a variety of reasons; for example, if a member of the hearing tribunal has a personal interest of any kind in the matter or takes evidence improperly outside the hearing (ex parte). In those cases, that member is required to completely disassociate him or herself from the case, or the entire proceeding can be overturned in court.

In 1982, the legislature reacted to the proliferation of appearance of fairness cases involving land use hearings by enacting what is now chapter 42.36 RCW. This RCW chapter defines and codifies the appearance of fairness doctrine, insofar as it applies to local land use decisions. In substance, those statutes now provide that in land use hearings:

1. The appearance of fairness doctrine applies only to "quasi-judicial" actions of local decision-making bodies. "Quasi-judicial" actions are defined as:

   actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.

   RCW 42.36.010.

2. The doctrine does not apply to local "legislative actions"

   adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance.

   RCW 42.36.010.

3. Candidates for public office may express their opinions about pending or proposed quasi-judicial actions while campaigning (but see paragraph 9 below), without being disqualified from participating in deciding those matters if they are later elected;

4. Acceptance of campaign contributions by candidates who comply with the public disclosure and ethics laws will not later be a violation of the appearance of fairness doctrine. Snohomish County Improvement Alliance v. Snohomish County, 61 Wn. App. 64, 73-74, 808 P.2d 781 (1991) (but see paragraph 9 below);

5. During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte (outside the hearing) communications with proponents or opponents about a proposal involved in the pending proceeding, unless that member:

   However, in Bunka v. Puyallup Civil Service Commission, 95 Wn. App. 495, 975 P.2d 1055 (1999), the state court of appeals applied the statutory doctrine to the proceedings of a civil service commission.
a. Places on the record the substance of such oral or written communications; and

b. Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is taken or considered on that subject. This does not prohibit correspondence between a citizen and his or her elected official if the correspondence is made a part of the record (when it pertains to the subject matter of a quasi-judicial proceeding).

6. Participation by a member of a decision-making body in earlier proceedings that result in an advisory recommendation to a decision-making body does not disqualify that person from participating in any subsequent quasi-judicial proceedings (but see paragraph 9 below);

7. Anyone seeking to disqualify a member of a decision-making body from participating in a decision on the basis of a violation of the appearance of fairness doctrine must raise the challenge as soon as the basis for disqualification is made known or reasonably should have been known prior to the issuance of the decision; upon failing to do so, the doctrine may not be relied on to invalidate the decision;

8. A challenged official may participate and vote in proceedings if his or her absence would cause a lack of a quorum, or would result in failure to obtain a majority vote as required by law, provided a challenged official publicly discloses the basis for disqualification prior to rendering a decision; and

9. The appearance of fairness doctrine can be used to challenge land use decisions where a violation of an individual's right to a fair hearing is demonstrated. For instance, certain conduct otherwise permitted by these statutes may nevertheless be challenged if it would actually result in an unfair hearing (e.g., where campaign statements reflect an attitude or bias that continues after a candidate's election and into the hearing process). RCW 42.36.110. Unfair hearings may also violate the constitutional "due process of law" rights of individuals. State ex rel. Beam v. Fulwiler, 76 Wn.2d 313, 321-22, 456 P.2d 322 (1969) (cited in Appendix). Questions of this nature may still have to be resolved on a case-by-case basis.
Prohibited Uses of Public Funds, Property or Credit

To help safeguard the public treasury, the state constitution limits the use of public monies, prohibiting gifts and the lending of credit. State laws prohibit the use of public office facilities for the support or opposition of ballot measures and the political campaigns of those who seek elected office.

Constitutional Prohibitions

Basics

Article 7, section 1 (Amendment 14) of the Washington State Constitution requires that taxes and other public funds be spent only for public purposes. See also State ex rel. Collier v. Yelle, 9 Wn.2d 317, 324-26, 115 P.2d 373 (1941); AGO 1988 No. 21.

Article 11, section 15 further provides as follows:

The making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.

Suits or prosecutions involving violations of that policy are ordinarily brought under specific civil or criminal statutes.

Prohibition Against Gifts or Lending of Credit

On the other hand, article 8, section 7 of the state constitution has been the direct basis of several lawsuits against local governmental entities. That provision is as follows:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.
Local governments are often asked to use their funds, property, or borrowing power (credit) to subsidize or assist endeavors by individuals or private organizations, such as the construction or operation of recreational facilities, economic development, or tourist promotion, and other civic or charitable works. However, the Washington State Supreme Court has long held that no matter how public the purpose may be, it may not be accomplished by public gifts or loans to private persons or organizations except certain aid to the poor or infirm.\footnote{Although the language in the constitution reads "poor and infirm" (emphasis added), the courts have held that this should be interpreted in the disjunctive ("poor or infirm."). Healthy Charities v. Ray, 93 Wn.2d 108, 115-16, 605 P.2d 1260 (1980).} Johns v. Wadsworth, 80 Wash. 352, 354-55, 141 Pac. 892 (1914) (the legislature may not authorize the use of public funds to aid a private fair); Lassila v. Wenatchee, 89 Wn.2d 804, 812-13, 576 P.2d 54 (1978) (a city may not buy a building for resale to a private movie theater operator).

In recent years, by constitutional amendment or judicial decision, municipalities have been authorized to engage in several programs that previously were held or thought to be unconstitutional under article 8, section 7. For example, by several elections in 1979, 1988, and 1989, the electorate approved and added section 10 to article 8 of the Washington Constitution, permitting counties, cities, towns, and similar operators of municipal electric and water utilities, as authorized by the legislature, to use their operating revenues from the sale of energy or water to assist homeowners in financing conservation measures on a charge-back basis. In 1981, the people adopted a constitutional amendment authorizing the legislature to permit the state, counties, cities, towns, and port districts, and public corporations established thereby, to issue non-recourse revenue obligations (not funded or secured by taxes or state or municipal credit) to finance industrial development projects. Wash. Const. art. 32, § 1.

Other programs utilizing non-recourse revenue bond funding may be authorized by the legislature without violating the constitution. However, municipal corporations (including "home rule" cities and counties) may need such express statutory authorization to do so (see attorney general's advisory memorandum to the state auditor dated March 10, 1989).

Our supreme court has found that some expenditures for economic development are made

for a public purpose. See Anderson v. O'Brien, 84 Wn.2d 64, 70, 524 P.2d 379 (1974). Accordingly, our state legislature has declared certain economic development programs to be a "public purpose." See ch. 43.160 RCW. However, the characterization of a program as a "public purpose" may not justify a gift or loan of credit to a private entity for that purpose, except in aid of the poor or infirm.

As a measure of "aid to the poor," the legislature has authorized cities and counties to assist in low income housing by loans or grants to owners or developers of such housing. See RCW 35.21.685; RCW 36.32.415; see also RCW 84.38.070 (all municipal corporations to provide their utility services at reduced rates for low income senior citizens). In

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**Public gifts or loans to private persons or organizations are not permitted except certain aid to the poor or infirm.**

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Tacoma v. Taxpayers, 108 Wn.2d 679, 743 P.2d 793 (1987), the Washington State Supreme Court also upheld, on statutory grounds, a Tacoma ordinance authorizing Tacoma's electric utility to finance energy conservation measures in private buildings. The ordinance was also held constitutional even though it did not fall within the authorization of article 8, section 10, discussed earlier. The court accepted the cities' arguments (several cities joined as intervenors in the case) that the installation of conservation measures involved a repurchase of electric energy by the city and was not an unconstitutional gift to the private owner. Tacoma v. Taxpayers, 108 Wn.2d at 703-05.

Often in cases where a loan or where a grant to a private organization may be prohibited, an appropriate contract can often accomplish the desired outcome by which the private organization provides the services in question as an agent or contractor for the county, city or district. For instance, a city, having authority to provide recreational programs for its residents, may do so by contracting with a youth agency or senior citizens’ organization to operate recreational programs for those groups, under appropriate city supervision. The contract should
be carefully drawn, however, so that the program or project remains the city’s own operation and is not an unlawfully broad delegation of city authority, or grant of city funds, to a private agency. Payments should be made pursuant to vouchers reflecting the satisfactory performance of services, as provided in Chapter 42.24 RCW.

Public Facilities Use Forbidden for Political Purposes

There is a special statutory provision, somewhat similar to the constitutional prohibitions just discussed, which forbids the use of public facilities for certain political purposes. RCW 42.17A.555, a section of the open government law, provides as follows:

No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. Provided, That the foregoing provisions of this section shall not apply to the following activities:

1. Action taken at an open public meeting by members of an elected legislative body to express a collective decision or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

2. A statement by an elective official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

3. Activities which are a part of the normal and regular conduct of the office or agency.

Elected municipal officers are prohibited from speaking or appearing in a public service announcement that will be broadcast, shown, or distributed in any form during the period beginning January 1st and continuing through the general election, if that official or officer is a candidate. RCW 46.01.240.

13A city, county, or special district may, however, make “an objective and fair presentation of facts relevant to a ballot proposition,” if such an action is part of the normal and regular conduct of the agency. WAC 390-05-271(2)(b).

14The term “normal and regular conduct” is defined by regulation. See WAC 390-05-273 (conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner).
Competitive Bidding Requirements

To help assure fairness in the award of public contracts and to achieve lower prices for the goods and services the local government requires, the state has adopted procedures that must be followed for the construction of public works and the purchase of supplies, materials, and equipment and for the acquisition of some services.

The Procedural requirements for municipal purchasing and public works projects are extensive and varied; consequently they are treated separately and in depth in other publications. See, e.g., The Bidding Book for Washington Cities and Towns, Municipal Research and Services Center, Report No. 52 Revised (January 2010) and The Bidding Book for Washington Counties, Report No. 56 Revised (November 2009). The following discussion is to acquaint readers generally with those requirements and the penalties for intentionally not following them.

Basics

Even when it is not legally required, the submission of municipal purchases and contracts to competitive bidding is generally favored in order to secure the best bargain for the public and to discourage favoritism, collusion, and fraud. Edwards v. Renton, 67 Wn.2d 598, 602, 409 P.2d 153 (1965). Accordingly, requirements in statutes, charter provisions, and ordinances to that effect are liberally construed in favor of bidding, and exceptions are narrowly construed. See Gostovich v. West Richland, 75 Wn.2d 583, 587, 452 P.2d 737 (1969).

In this state, most major purchases and public works projects by local governments are subject to statutory competitive bidding requirements. See, e.g., as to purchases and public works by second class cities, towns, and code cities, RCW 35.23.352 and RCW 35A.40.210; as to purchases and public works by counties, see RCW 36.32.235-.270. A county’s or a city’s charter or ordinances may provide additional bidding requirements. Other statutes set out the bid requirements for special purpose districts. See, e.g., RCW 54.04.070
and .082 for public utility districts; RCW 70.44.140 for public hospital districts; RCW 28A.335.190 for school districts; RCW 53.08.120 for port districts.\textsuperscript{15}

In cases where competitive bidding is not required, the law still may necessitate notice or other less stringent procedures. See, e.g., chapter 39.04 RCW and also, in connection with the procurement of architectural and engineering services, chapter 39.80 RCW.

**Competitive Bid Law Violation Penalties**

RCW 39.30.020 provides as follows:

In addition to any other remedies or penalties contained in any law, municipal charter, ordinance, resolution or other enactment, any municipal officer by or through or under whose supervision, in whole or in part, any contract is made in wilful and intentional violation of any law, municipal charter, ordinance, resolution or other enactment requiring competitive bidding upon such contract shall be held liable to a civil penalty of not less than $300 and may be held liable, jointly and severally with any other such municipal officer, for all consequential damages to the municipal corporation. If, as a result of criminal action, the violation is found to have been intentional, the municipal officer shall immediately forfeit his office. For purposes of this section, “municipal officer” shall mean an “officer” or “municipal officer” as those terms are defined in RCW 42.23.020(2). (Emphasis supplied.)

\textsuperscript{15}See, also RCW 52.14.110 for fire protection districts; and RCW 57.08.050 for water-sewer districts.
Open Public Meetings Act

The days of backroom decisions made in smoke-filled rooms are over. Today, the public demands that the decisions reached by their officials occur in meetings open to the public, thus providing an opportunity for those decisions to be scrutinized and for the officials who have made them to be held accountable for their actions.

Basics

Before 1971, this state had an "open meetings" law which was then codified as chapter 42.32 RCW. It was ineffective, however, because it required only the "final" action of the council, board, or other body to be taken in public (such as the final vote on an ordinance, resolution, motion, or contract). The Open Public Meetings Act of 1971 (now chapter 42.30 RCW) made significant changes. Most importantly, it requires that all meetings of state and municipal governing bodies be open and public, with the exception of courts and the legislature.

Furthermore, a "meeting" generally includes any situation in which a majority (a quorum) of the council, board of commissioners, or other "governing body" (including certain kinds of committees) meets and discusses the business of that body. Social gatherings are expressly excepted, unless the body's business is discussed at the gatherings. What follows is an outline of the 1971 Act, chapter 42.30 RCW. For a more detailed treatment of the Open Public Meetings Act, see the MRSC publication, The Open Public Meetings Act – How it Applies to Washington Cities, Towns, and Counties, Report No. 60 (May 2008).16

Open Public Meetings Act Purpose

The declared purpose of the Act is to make all meetings of the governing bodies of public agencies, even informal sessions, open and accessible to the public, with only minor specific exceptions.

1. The legislature intends that public agencies' actions and deliberations be conducted openly.
   RCW 42.30.010.

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16See also AGO 1971 No. 33, in which the state attorney general answered numerous questions posed by legislators immediately after the Act was passed.
2. Meetings must be open and public; all persons must be allowed to attend unless otherwise provided by law. RCW 42.30.030.

3. Ordinances, resolutions, rules, regulations, orders, and directives must be adopted at public meetings; otherwise they are invalid. RCW 42.30.060.17

4. A vote by secret ballot at any meeting that is required to be open is also declared null and void. RCW 42.30.060(2).

The act must be liberally construed to accomplish its purpose. RCW 42.30.910.

Applications

The Act applies to all meetings of, among others:

1. All multi-member governing bodies of state and local agencies, and their subagencies. RCW 42.30.020.

   The days of backroom decisions made in smoke-filled rooms are over.

   a. “Subagency” means a board, commission, or similar entity created by or pursuant to state or local legislation, including planning commissions and others. RCW 42.30.020(1)(c).18

   b. “Governing body” includes a committee of a council or other governing body “when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.” RCW 42.30.020.19

   c. Certain policy groups representing participants who have contracted for the output of an operating agency’s (WPPSS') generating plant. RCW 42.30.020(1)(d).

The Act does not apply to:

1. Courts or the state legislature. RCW 42.30.020(1)(a).

2. Proceedings expressly excluded by RCW 42.30.140, namely:

   a. Certain licensing and disciplinary proceedings.

   b. Certain quasi-judicial proceedings that affect only individual rights; e.g., a civil service hearing affecting only the rights of an individual employee, and not the general public.

   c. Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; also, that portion of a meeting held during labor or professional negotiations, or grievance or mediation proceedings, to formulate strategy or to consider proposals submitted.

   d. Generally, matters governed by the State Administrative Procedure Act (ch. 34.05 RCW).

3. Social gatherings, if no “action” (as defined in RCW 42.30.020(3)) is taken. RCW 42.30.070. Note, however, the ensuing explanation of the term “action.”

Key Definitions

“Meeting” means meetings at which “action” is taken. RCW 42.30.020(4).

“Action” means all transacting of a governing body’s business, including receipt of public testimony, deliberations, discussions, considerations,


In apparent reaction to that case, however, section 1, chapter 98, Laws of 1990 (RCW 42.30.140(4)) broadened the Act’s exemptions to include all collective bargaining sessions and related meetings and discussions with employee organizations.

18The term “subagency” does not include a purely advisory body unless it is legally required that its recommendations be considered by the parent body. AGO 1971 No. 33.

19A committee “acts on behalf of the governing body” only when it exercises delegated authority, such as fact finding. AGO 1986 No. 16.
reviews, and evaluations, as well as "final" action. RCW 42.30.010; 42.30.020(3).

Two Kinds of Meetings
Regular Meetings

1. Definition: A recurring meeting held according to a schedule fixed by statute, ordinance, or other appropriate rule.

2. If the designated time falls on a holiday, the regular meeting is held on the next business day.

3. There is no statutory limitation as to the kind of business that may be transacted at a "regular" (as distinguished from "special") meeting.

The Open Public Meetings Act itself does not require any special notice of a regular meeting. However, later statutory enactments require municipal governing bodies to establish a procedure for notifying the public of all meeting agendas. RCW 35.27.300; 35.24.220; 35.23.310; 35.22.288; 35A.12.160.

Special Meetings

1. Definition: Any meeting other than "regular".

2. May be called by the presiding officer or a majority of the members.

3. Must be announced by written notice to all members of the governing body; also to members of the news media who have filed written requests for such notice. The notice of a special meeting:

a. Must specify the time and place of the meeting and the business to be transacted.

b. Must be delivered personally, by mail, by fax, or by e-mail 24 hours in advance.

c. May be waived by a member.

d. Is not necessary in specified emergencies. See also RCW 42.30.070.

Meeting Place

1. As far as the Open Public Meetings Act is concerned, a meeting may be held at any place within or outside the territorial jurisdiction of the body unless otherwise provided in the law under which the agency was formed. RCW 42.30.070. However, the meeting place should not be selected so as to effectively exclude members of the public. RCW 42.30.030.

2. The place of a special meeting must be designated in the notice. RCW 42.30.080.

3. In certain emergencies requiring expedited action, the meeting or meetings may be held in such place as is designated by the presiding officer and notice requirements are suspended. RCW 42.30.070 and 42.30.080.

4. An unintended meeting may occur by electronic or e-mail if a quorum of the body discusses a topic of business through an active exchange of information and opinions by e-mail.

RCW 42.30.060-075.

Failure to provide public notice of the preliminary agenda of a city council or board of county commissioners meeting and even of an item which is to be considered at the meeting may, in certain circumstances, invalidate action taken at that meeting. Part of Edmonds v. Far Breeders, 63 Wn. App. 159, 166-67, 816 P.2d 1268 (1991). The notice given must fairly apprise the public of the action to be taken at the meeting.

RCW 42.30.080.

RCW 42.30.080.

A board of county commissioners or county council must hold its regular meetings at the county seat. RCW 36.32.080. However, it may hold special meetings at some other location in the county "if the agenda item or items are of unique interest or concern to the citizens of the portion of the county in which the special meeting is to be held." RCW 36.32.090.

Meeting Conduct

1. All persons must be permitted to attend (RCW 42.30.030) except unruly persons as provided in RCW 42.30.050.

2. Attendance may not be conditioned upon registration or similar requirements. RCW 42.30.040. (The Act does not prohibit a requirement that persons identify themselves prior to testifying at hearings.)

3. In cases of disorderly conduct:
   a. Disorderly persons may be expelled.
   b. If expulsion is insufficient to restore order, the meeting place may be cleared and/or relocated.
   c. Non-offending members of the news media may not be excluded.
   d. If the meeting is relocated, final action may be taken only on agenda items. RCW 42.30.050.

4. Adjournments/Continuances (RCW 42.30.090-100):
   a. Any meeting (including hearings) may be adjourned or continued to a specified time and place.
   b. Less than a quorum may adjourn.
   c. The clerk or secretary may adjourn a meeting to a stated time and place, if no members are present, thereafter giving the same written notice as required for a special meeting.
   d. A copy of the order or notice must be posted immediately on or near the door where the meeting was being (or would have been) held.
   e. An adjourned regular meeting continues to be a regular meeting for all purposes.

Executive Sessions

1. Definition (as commonly understood): That portion of a meeting from which the public may be excluded.

2. Permissible When:
   a. To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;
   b. To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property must be taken in a meeting open to the public;
   c. To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;
   d. To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or meeting open to the public must be conducted upon such complaint or charge;
   e. To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, "[except when certain exempted labor negotiations are involved], discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public . . . ." Furthermore, the final action of hiring, setting the salary of an individual employee or class of employees, or discharging or

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26The listing of matters for which a local governing body may meet in executive session includes here only those that such a body would address. There are others identified in the statute (e.g., financial and commercial information supplied by private persons to an export trading company) not identified here.

27A 1985 amendment (ch. 366, Laws of 1985), together with some contemporaneous circumstances (see AGO 1985 No. 4), raised a question as to whether or not this section continued to allow executive sessions to review applications for appointive public offices that are not also employee positions, or the performance of such appointees, as distinguished from "public employment" or "employees". However, attorneys for many public agencies, including members of the attorney general's staff, take the position that the Act continues to allow executive sessions for those purposes. (Memorandum to MRSC's general counsel from Senior Assistant Attorney General Richard M. Montecucco, dated March 15, 1990.)
disciplining an employee, must also be taken in an open public meeting;

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

e. To discuss with legal counsel representing the agency matters relating to: agency enforcement actions; or litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency. RCW 42.30.110(1).

Potential litigation is defined as being matters protected under the attorney-client privilege and as either: specifically threatened; reasonably believed and may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or as litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency. The mere presence of an attorney at a session does not in itself allow the meeting to be held as an executive session.28

3. Conduct of Executive Sessions:

   a. An executive (closed) session must be part of a regular or special meeting. RCW 42.30.110.29

   b. Before convening an executive session, the presiding officer must publicly announce the purpose for excluding the public and the time when the executive session will conclude. The executive session may be extended by announcement of the presiding officer. RCW 42.30.120(2).

c. Final adoption of an “ordinance, resolution, rule, regulation, order or directive” must be done in the “open” meeting. RCW 42.30.120.

4. Improper Disclosure of Information Learned in Executive Session:

   a. It is the clear intent of the provisions relating to executive sessions that information learned in executive session be treated as confidential. However, there is no specific sanction or penalty in the Open Public Meetings Act for disclosure of information learned in executive session.

   b. A more general provision is provided in RCW 42.23.070 prohibiting disclosure of confidential information learned by reason of the official position of a city officer. This general provision would seem to apply to information that is considered confidential and is obtained in executive sessions.

**Minutes**30

1. Minutes of regular and special meetings must be promptly recorded and open to public inspection. (The statute does not specify any particular kind of “recording.”)

2. No minutes are required to be recorded for executive sessions. (However, prudence may suggest that a record of some kind be kept for the protection of the governing body.)

3. Notes and tapes are not “minutes” but are “public records.” See RCW 42.17A.005(42), (49). They may be exempt from public disclosure for particular reasons; e.g., notes or tapes of executive sessions may be withheld while the “vital governmental interest” or “personal privacy” reason for the executive session itself continues to exist. RCW 42.17.310.

**Violations**

1. Ordinances, rules, resolutions, regulations, orders, or directives adopted or secret ballots taken, in violation of the Act, are invalid.

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28RCW 42.30.110(1)(a).

29There is no prohibition against holding a special meeting solely to consider one or more subjects in executive session, but the subject matter must be identified at least in general terms in the meeting notice; e.g., “to consider a building site,” or “to consider applicants for employment.” RCW 42.30.080.

30This section is not a part of chapter 42.30 RCW, but a section preserved from the earlier act.
RCW 42.30.060. Agreements negotiated or adopted in closed meetings held in violation of the act also may be invalid. *Mason County v. PERC*, 54 Wn. App. 36, 40-41, 771 P.2d 1185 (1989). (But see footnote 19, supra, regarding collective bargaining and related matters.)

2. A member of a governing body who knowingly participates in violating the Act is subject to a $100 civil penalty. RCW 42.30.120.

3. Mandamus or injunctive action may be brought to stop or prevent violations. RCW 42.17.130.

4. Any person may sue to recover the penalty or to stop or prevent violations. RCW 42.30.120-.130.

5. A person prevailing against an agency is entitled to be awarded all costs including reasonable attorneys' fees. However, if the court finds that the action was frivolous and advanced without reasonable cause, it may award to the agency reasonable expenses and attorneys’ fees. RCW 42.30.120(2).

6. A knowing or intentional violation of the Act may provide a legal basis for recall of an elected member of a governing body, although recall is not a penalty under the Act.\(^{31}\)

\(^{31}\)See In re Beasley, 128 Wn.2d 419 (1996); In re Roberts, 115 Wn.2d 556 (1990); Easley v. Dempsey, 104 Wn.2d 597 (1985); Teaford v. Howard, 104 Wn.2d 580 (1985); In re Recall Charges Against Davis, 164 Wn.2d 361 (2008).
Open Government, Public Records and Privacy

The public, through legislation adopted by initiative, requires that records prepared or used by their government officials be made available for inspection and copying. The rules that have been developed by the courts and through legislative amendments to help gain the required openness are sometimes complex; they balance the public's need to know with the rights of privacy associated with some of the records. Failure to provide records as required by law can be expensive, both monetarily and in the loss of public trust.

Basics

This multi-faceted subject heading reflects the complex provisions of Initiative 276 (the "Act"), referenced earlier in this bulletin, which the people approved into law in 1972. The Act (now split between chapters 42.17A and 42.56 RCW) contains several subchapters, seemingly diverse but all properly falling under the category of "openness in government." Fritz v. Gorton, 83 Wn.2d 275, 290, 517 P.2d 911 (1974).

Three of the subchapters deal separately with the subjects of campaign financing, legislative lobbying (including lobbying by municipal and other governmental agencies), and personal financial disclosure by public officials and candidates. The fourth subchapter, modeled after the federal "Freedom of Information Act," deals with the public's right to inspect and/or copy public records. The Act also contains administrative provisions, including the establishment of the Public Disclosure Commission as a state agency to administer and enforce the provisions of the Act. Candidates and public officials, as one of the first steps in their election process, become familiar with the commission and the wealth of information and assistance that it provides, including detailed instructions regarding political campaigns and personal financial disclosure requirements of the Act. Similar information as to regulations on municipal lobbying is readily available from the same source. Consequently, we will not attempt to duplicate that information in this publication.

However, the substantive provisions of the Act dealing with public records, RCW 42.56.001 through 42.56.610, are mainly "self enforcing," and there is relatively little administrative law on that subject. The following brief outline and discussion is intended to supply a basic working knowledge of those "freedom
of information” provisions. For a more detailed treatment of the public records disclosure law, see the MRSC publication, Public Records Act for Washington Cities and Counties, Report No. 61 Revised (November 2009); the Act, and therefore the information found in the publication, is also applicable to special purpose districts.

Public Disclosure Law Purpose

1. “[M]indful of the right of individuals to privacy and the desirability of efficient administration of government, full access to information concerning the conduct of government on every level must be assured...

   The provisions of this chapter shall be liberally construed to promote full access to public records so as to insure continuing public confidence... and so as to assure that the public interest will be fully protected...” RCW 42.17A.001(11); see also RCW 42.17A.904 and RCW 42.56.030.

2. Conflicting provisions of other laws are superseded. RCW 42.17A.904.

3. Absent statutory provisions to the contrary, agencies (this term expressly includes all counties, cities, towns, and special purpose districts) may not release or withhold records based upon the identity of the requestor, and must rely solely on statutory exemptions and prohibitions for refusing to disclose public records. RCW 42.17A.001 and RCW 42.56.080.

Public Records Definition

1. “Public record’ includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(2) and RCW 42.17A.005(42).

2. “Writing’ means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including letters, words, pictures, sounds, or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents, including existing data compilations from which information may be obtained or translated.” RCW 42.17A.005(49) and RCW 42.56.010(4).

Public Agency Duties

1. Agencies are required to establish procedures for access to their records. Indexes should be developed and published. RCW 42.56.040 and .070.

2. Agencies must appoint and publicly identify a public records officer whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency’s compliance with the public records disclosure requirements. The name and contact information of the public records officer shall be publicized in a way reasonably calculated to provide notice to the public, including posting at the local agency’s place of business, posting on its internet site, or including in its publications. RCW 42.56.580

3. Records must be made available for public inspection and copying during customary office hours. If an agency does not have regular office hours, they are set by statute. RCW 42.56.090.

4. Agencies must make their facilities available for copying their records, or make copies upon request; they must also honor requests by mail.

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32 Although not discussed here, local officials should have some familiarity with the Criminal Records Privacy Act, ch. 10.97 RCW. This Act provides for the dissemination (or withholding) of criminal history record information and for the correction of such information.
They may charge for the copies, but only a “reasonable charge” representing the amount necessary to reimburse the city or town for the actual costs incident to the copying. RCW 42.56.080 and RCW 42.56.120.

Charges for photocopying must be imposed in accordance with the actual per page cost or other costs established and published by the agency. If the agency has not determined actual per page costs, the agency may not charge in excess of fifteen cents per page. RCW 42.56.120.

If the requesting person makes a request for a large amount of records, the agency may respond on a partial or installment basis, providing the records as they are assembled or made ready for inspection or disclosure.

If a person requests copies of records, an agency may require the person make a deposit for the cost of the copies, in an amount not to exceed ten percent of the estimated cost. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request. RCW 42.56.120.

Also, cities may not charge for staff time in locating records or mere inspections of records. RCW 42.56.100; RCW 42.56.120; see also AGO 1991 No. 6.

Records That May Be Withheld

1. RCW 42.56.070(9) forbids public agencies from providing lists of individuals “requested for commercial purposes” unless specifically authorized or directed by law. For example, in a 1975 letter opinion, the attorney general concluded that a request by a business promotional organization for a list of individuals’ names to enable that organization to distribute advertising materials had to be denied. AGLO 1975 No. 38.

   However, lists of professional licensees and applicants are available to recognized professional associations or educational organizations.

2. There is no general “right of privacy” exemption, aside from specific statutory exemptions from public disclosure. Furthermore, a right of privacy is violated only if disclosure (1) would be highly offensive to a reasonable person and (2) is not of legitimate concern to the public. RCW 42.56.050. Mere inconvenience or embarrassment is not sufficient in itself to constitute a violation of privacy. Police Guild v. Liquor Control Board, 112 Wn.2d 30, 38, 769 P.2d 283 (1989).

3. RCW 42.56.210-.480 grant a qualified exemption from public inspection for certain specific types of records. Some of the more important exemptions from the standpoint of a municipality include the following:

   a. Personal information in files maintained for students in public schools, patients or clients of public institutions or public health agencies, welfare recipients, prisoners, probationers, or parolees.

   b. Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.33

   c. Certain taxpayer information.

   d. Intelligence and investigative records compiled by investigative, law enforcement and penology agencies.

   e. Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies (other than the Public Disclosure Commission) if disclosure would be a danger to a person’s life, safety, or property. If at the time a complaint is filed the complainant, victim or witness indicates a desire

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33Whether information is “personal” depends mainly on whether or not the information pertains to the public’s business versus the individual’s business. AGO 1973 No. 4. In Tacoma Public Library v. Woessner, 90 Wn. App. 205, 951 P.2d 357, rev. denied, 136 Wn.2d 1030 (1998), the court of appeals explained that the determination on whether this exemption applies focuses on whether the requested file contains personal information that is normally maintained for the benefit of employees, disclosure of which would “violate their right to privacy.” For example, records showing salaries, fringe benefits, and numbers of hours worked by named employees are not exempt, but private information such as employee non-public job evaluations, charitable contributions, private addresses, and phone numbers can be withheld to protect privacy. 90 Wn. App. at 218-223.
for disclosure or nondisclosure, that desire shall govern.

f. Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination.

g. Certain real estate appraisals.

h. Valuable formulae, designs, drawings, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.

i. Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

j. Records that are relevant to a controversy to which the agency is a party but which would not be available to another party under pre-trial court discovery rules.

k. Records of archeological sites.

l. Certain library information.

m. Financial information required in connection with prequalifying bidders on certain state contracts.

n. All applications for public employment including names, resumes, and other related information.

o. Residential addresses and residential telephone numbers, electronic mail addresses, social security numbers, emergency contact information of employees or volunteers of a public agency held in personnel records and other employment related records or volunteer rosters, or are included in any mailing list of employees or volunteers.

p. Residential addresses and telephone numbers of utility customers.

q. Credit and debit card numbers, electronic check numbers, and card expiration dates.

These exemptions are qualified, however. They generally do not apply to disclosable information that can be separated from nondisclosable information. Furthermore, when the reason for the exemption ceases, the records or files may lose their exemptions. *Heard v. Hoppe*, supra.

4. A law enforcement authority is prohibited from requesting disclosure of records belonging to a municipal utility unless the authority provides a written statement that it suspects the utility customer has committed a crime and the authority has a reasonable belief that the records could determine the truth of the suspicion. RCW 42.56.335.

5. Information on concealed pistol licenses is exempt from disclosure except that such information may be released to law enforcement or corrections agencies.

6. Medical Records – Public inspection and copying of health care information of patients is covered by chapter 70.02 RCW. That chapter generally provides that a health care provider, a person who assists as a health care provider in the delivery of health care, or an agent or employee of a health care provider may not disclose information about a patient to any other person without the patient’s written authorization. RCW 70.02.020. There are some exceptions to this rule, and, although not discussed here, these provisions may become applicable to cities and counties in some situations. See RCW 70.02.050.

Access Procedures

1. Agencies are required to make their records available "promptly" on request. They must, within five business days of the request, either (1) provide the record, (2) acknowledge the request and give an estimate of when the response will be made, or (3) deny the request. They must give written reasons for denials of access.

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24Reasons justifying additional time to respond include time needed to clarify the intent of the request, to locate and assemble information requested, to notify third persons and agencies affected by the request, or to determine whether any of the information is exempt. RCW 42.56.550. A person who believes the estimate of time required to respond is unreasonable may petition the superior court to have the agency justify the response time as reasonable. The burden of proof to show reasonableness in on the agency. RCW 42.56.550(2).
or copies. There must be procedures for reviewing decisions denying requests. If a request is denied, the review of the denial is considered complete at the end of the second business day following the denial. RCW 42.56.520.

Agencies should adopt procedures to protect their records and prevent interference with agency functions. An agency may seek a court order to protect a particular record. RCW 42.56.540.

2. A person whose request for inspection or copying is wrongly denied can sue on his or her own behalf. The court may order the record to be produced. The successful citizen is then entitled to be reimbursed for all costs of the suit, including a reasonable attorney’s fee, and will be awarded an amount which does not exceed $100 per day for each day the request was denied. The burden of proof is generally on the agency to justify its decision on the basis of a specific statutory exemption from disclosure.

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31See Yousoufian v. Office of the King County Executive, 168 Wn. 2d 444 (2010).
36RCW 42.56.550.
City Attorney, Prosecuting Attorney and Legal Counsel Roles

City attorneys, county prosecuting attorneys, and legal counsel for special purpose districts have similar roles as legal advisors to their respective local governments. Also, such legal positions have duties relating to advising local officials, prosecuting actions on behalf of their jurisdictions, and defending in actions against their jurisdictions.

Washington State law requires that every city and town in the state have a city or town attorney. In some cities, the attorney will be a full-time, in-house officer of the city. In other cities, the city attorney will maintain a private practice of law but be on retainer to the city to perform the required duties. In either case, the city attorney advises city officials and employees concerning all legal matters pertaining to the business of the city. The city attorney generally is to represent the city in all actions brought by or against the city or against city officials in their official capacity. Of course, other attorneys may be hired to handle specific cases because of the nature of the case or because the city attorney has a conflict or other reason he or she cannot become involved. The city attorney also is to perform such other duties as the city council may by ordinance direct.

All counties have an elected prosecuting attorney. Unlike the city attorney, the duties of the prosecuting attorney are extensively set out by statute. See RCW 36.27.020. In addition to having the authority to appoint deputies, the county prosecuting attorney has the authority to contract with “special deputy prosecuting attorneys” for limited and identified purposes. RCW 36.27.040. A county legislative authority may also appoint a “special attorney” “to perform any duty which any prosecuting attorney is authorized or required by law to perform,” but only if the appointment is approved by the presiding superior court judge. RCW 36.32.200. The prosecuting attorney provides legal advice and assistance to some special purpose districts, such as school districts; other special purpose districts may have in-house attorneys or hire outside legal counsel for assistance.  

\[\text{37RCW 36.27.020(2).}\]

\[\text{38See, e.g. RCW 70.44.060(10) as to public hospital districts.}\]
Although there is no specific authority for a city council to hire outside legal counsel separate and apart from the city attorney, the courts have permitted a council to do so in certain circumstances. Normally, the city attorney advises all city officials, including council members, and the city council should not hire separate outside counsel to receive advice on city affairs. In rare cases, the city attorney may have a conflict and not be in a position to advise both the city council and the mayor. In State v. Volkmer, 73 Wn. App. 89, 95 (1994), the court of appeals held:

If extraordinary circumstances exist, such that the mayor and/or town council is incapacitated, or the town attorney refuses to act or is incapable of acting or is disqualified from acting, a court may determine that a contract with outside counsel is both appropriate and necessary.


Recognize also that there are situations where the city attorney, county prosecutor, or the attorney for a special purpose district will not be in a position to advise all the officials who are or may be involved in a case or hearing. As an obvious example, if the police chief has been terminated by the city and requests a hearing before the civil service commission, the city attorney cannot ethically advise the city administration, the civil service commission, and the police chief. When analyzing a problem, the legal practitioner should always ask if there is more than one “client” involved (council, mayor, commissioners, board, and city manager) and whether there is a conflict between these “clients.”

It is beyond the scope of this publication to review these issues in detail. For more information, see the Public Law Ethics Primer for Government Lawyers, Washington State Municipal Attorneys Association (1998), which may be ordered from MRSC. There have been a number of articles written on aspects of this subject that have been presented at meetings of the Washington State Association of Municipal Attorneys and the Washington Association of Prosecuting Attorneys in the last several years. Any of these articles may be obtained from MRSC on request.

39The city attorney’s client is actually the city as an entity. Similarly, the county prosecutor’s client is the county as an entity. In both cases, the public attorney’s relationship to the local government is similar in a number of respects to that of an attorney who represents a corporation. See Upjohn Co. v. U.S., 449 U.S. 383, 66 L.Ed.2d 584, 101 S. Ct. 677 (1981) for a model of who is the lawyer’s client for purposes of the attorney-client privilege in the corporate context.
Conclusion

The purpose of this publication is to help avoid certain trouble areas most frequently encountered by local officials. Although it is meant to be comprehensive, it does not necessarily include all statutes and regulations that possibly may apply. Furthermore, as is indicated at the outset, the law frequently changes with new enactments and interpretations, and even legal interpretations may vary depending upon the facts of a particular case. Therefore, it is important to develop a healthy working relationship with the various offices available to you. Do not hesitate to seek information and advice, especially on legal matters. The result may make the difference between success or failure in asserting a claim or defense, particularly when the good faith of the official may be an issue in the lawsuit.

We emphasize, in addition, that the legal and other professional staff of the Municipal Research and Services Center are constantly available to serve city attorneys, county prosecutors, attorneys representing special purpose districts, and all other city, county, and district officials in this important work.

We are grateful for the continuing interest of public officials in this publication. We hope that these updated guidelines will continue to be a useful source of information and benefit.
# Appendix

## Washington Appearance of Fairness Doctrine Case Summaries

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<td>Planning commission/rezone</td>
<td>Chairman of planning commission owned property adjoining property to be rezoned. Property could have been indirectly affected in value.</td>
<td>Violation of appearance of fairness doctrine. Overrules Chestnut Hill Co. v. Snohomish County. Action by city council rezoning property on planning commission recommendation improper.</td>
</tr>
<tr>
<td>Anderson v. Island County, 81 Wn.2d 312, 501 P.2d 594 (1972)</td>
<td>Board of county commissioners/rezone</td>
<td>Chairman of county commission was former owner of applicant's company. Chairman told opponents at public hearing they were wasting their time talking.</td>
<td>Violation of appearance of fairness doctrine. Reversed and remanded for further proceedings.</td>
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### Washington Appearance of Fairness Doctrine Case Summaries

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<tr>
<td>Narrowview Preservation Association v. Tacoma, 84 Wn.2d 416, 526 P.2d 897 (1974)</td>
<td>Planning commission/rezone</td>
<td>Member of planning commission was a loan officer of bank which held mortgage on property of applicant. Member had no knowledge his employer held the mortgage on the property.</td>
<td>Appearance of fairness doctrine violation; thus zoning ordinance invalid. Court also held, however, acquaintances with persons or casual business dealings insufficient to constitute violation of doctrine.</td>
</tr>
<tr>
<td>Byers v. The Board of Clallam County Commissioners, 84 Wn.2d 796, 529 P.2d 823 (1974)</td>
<td>Planning commission/adoption of interim zoning ordinance</td>
<td>Members owned property 10-15 miles from area zoned and there was no indication that such property was benefited directly or indirectly by rezone.</td>
<td>No violation of appearance of fairness doctrine. Ordinance held invalid on other grounds.</td>
</tr>
<tr>
<td>Local Union 1296 v. Kemewa, 86 Wn.2d 156, 542 P.2d 1252 (1975)</td>
<td>Arbitration board/arbitration hearing</td>
<td>Arbitrator had drinks with union representative after oral decision but before written decision. Decision was unchanged.</td>
<td>Court found indiscretion on part of arbitrator but affirmed the arbitrator’s decision. By statute appearance of fairness doctrine inapplicable because by statute can use only test of whether decision arbitrary and capricious.</td>
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<tr>
<td>Seattle v. Louis Investment Co., Inc., 16 Wn. App. 158, 554 P.2d 379 (1976)</td>
<td>City/certiorari to review findings of public use and necessity by court in condemnation action</td>
<td>Alleged illegal copy made of a copy to the condemned premises and unauthorized entries by city employees and other arbitrary conduct by city employees violated appearance of fairness doctrine.</td>
<td>Court held appearance of fairness doctrine applies only to hearings and not to administrative actions by municipal employees. Cites Fleming v. Tacoma.</td>
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<tr>
<td>King County Water District No. 54 v. King County Boundary Review Board, 87 Wn.2d 536, 554 P.2d 1060 (1976)</td>
<td>Boundary review board/assumption by city of water district</td>
<td>Alleged ex parte conversations between member of the board and persons associated with Seattle Water District and Water District 75 about the proposed assumption by city of Water District No. 54.</td>
<td>No appearance of fairness violation. Record does not indicate conversations took place and court could not conclude there was any partiality or entangling influences which would affect the board member in making the decision.</td>
</tr>
<tr>
<td>Swift, et al. v. Island County, et al., 87 Wn.2d 348, 552 P.2d 175 (1976)</td>
<td>Board of county commissioners/overruling planning commission and approving a preliminary plat</td>
<td>A county commissioner was a stockholder and chairman of the board of a savings and loan association which had a financial interest in a portion of the property being platted.</td>
<td>Violated appearance of fairness doctrine.</td>
</tr>
<tr>
<td>Milwaukee B.R. v. Human Rights Commission, 87 Wn.2d 802, 557 P.2d 307 (1975)</td>
<td>State human rights commission special hearing tribunal/complaint against railroad for alleged discrimination</td>
<td>Member of hearing tribunal had applied for a job with the commission.</td>
<td>The board’s determination held invalid because it had appearance of unfairness.</td>
</tr>
<tr>
<td>Fleck v. King County, 16 Wn. App. 668, 558 P.2d 254 (1977)</td>
<td>Administrative appeals board/permit to install fuel tank</td>
<td>Two members of the board were husband and wife.</td>
<td>Fact that two members of board were husband and wife created appearance of fairness problem.</td>
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<td>SAVE (Save a Valuable Environment) v. Bothell, 89 Wn.2d 862, 576 P.2d 401 (1978)</td>
<td>Bothell planning commission/rezone</td>
<td>Planning commission members were executive director and a member of the board of directors, respectively, of the chamber of commerce which actively promoted the rezone.</td>
<td>Violation of appearance of fairness. Trial court found that the proposed shopping center which would be accommodated by the rezone would financially benefit most of the chamber of commerce members and their support was crucial to the success of the application. The planning commission members' associational ties were sufficient to require application of the doctrine.</td>
</tr>
<tr>
<td>Polygon v. Seattle, 90 Wn.2d 59, 578 P.2d 1309 (1978)</td>
<td>City of Seattle, superintendent of buildings/application for building permit denied</td>
<td>Announced opposition to the project by the mayor, and a statement allegedly made by the superintendent, prior to the denial, that because of the mayor's opposition, he would announce that the permit application would be denied.</td>
<td>The appearance of fairness doctrine does not apply to administrative action, except where a public hearing is required by law. The applicable fairness standard for discretionary administrative action is actual partiality precluding fair consideration.</td>
</tr>
<tr>
<td>Hill v. Dept. L &amp; I, 90 Wn.2d 276, 580 P.2d 636 (1978)</td>
<td>Board of industrial insurance appeals/appeal by industrial insurance claimant</td>
<td>The chairman of the appeals board had been supervisor of industrial insurance at the time the claim had been closed.</td>
<td>No violation of appearance of fairness doctrine. The chairman submitted his uncontested affidavit establishing lack of previous participation or knowledge of the case.</td>
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<tr>
<td>City of Bellevue v. King County Boundary Review Board, 90 Wn.2d 856, 586 P.2d 470 (1978)</td>
<td>Boundary review board/approval of annexation proposal</td>
<td>Use of interrogatories on appeal to superior court to prove bias of board members.</td>
<td>Holding that the use of such extra-record evidence was permissible under the specific circumstances present, the majority opinion observed: &quot;Our appearance of fairness doctrine, though relating to concerns dealing with due process considerations, is not constitutionally based ....&quot;</td>
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<tr>
<td>Evergreen School District v. School District Organization, 27 Wn. App. 836, 621 P.2d 770 (1980)</td>
<td>County committee on school district organization/adjustment of school district boundaries</td>
<td>Member of school district board which opposed transfer of property to the proponent school district participated as a member of the county committee on school district organization.</td>
<td>Decision to adjust school district boundaries is a discretionary, quasi-legislative determination to which the appearance of fairness doctrine does not apply.</td>
</tr>
<tr>
<td>Hayden v. Port Townsend, 28 Wn. App. 192, 622 P.2d 1291 (1981)</td>
<td>Planning commission/rezone</td>
<td>Planning commission chairman, who was also branch manager of S &amp; L which had an option to purchase the site in question, stepped down as chairman but participated in the hearing as an advocate of the rezone.</td>
<td>Participation of planning commission chairman as advocate of rezone violated appearance of fairness doctrine.</td>
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<td>Somer v. Woodhouse, 28</td>
<td>Department of licensing/adoption of administrative rule</td>
<td>During two rules hearings the Director of the Department of Licensing sat at the head table with the representatives of an organization which was a party to the controversy some of whom argued for adoption of the rule proposed by the department. The minutes of the rules hearings also bore the name of the same organization.</td>
<td>The appearance of fairness doctrine is generally not applicable to a quasi-legislative administrative action involving rule making.</td>
</tr>
<tr>
<td>Westside Hilltop Survival Committee v. King County, 96</td>
<td>County council/comprehensive plan amendment</td>
<td>Prior to modification of the comprehensive plan there were ex parte contacts between one or two councilmembers and officials of the proponent corporation and two councilmembers had accepted campaign contributions in excess of $700 from employees of the proponent corporation. These councilmembers actively participated in and voted for adoption of the ordinance modifying the comprehensive plan to allow construction of an office building on a site previously designated as park and open space.</td>
<td>Comprehensive plans are advisory only and a local legislative body's action to determine the contents of such a plan is legislative rather than adjudicatory. Legislative action in land use matters is reviewed under the arbitrary and capricious standard and is not subject to the appearance of fairness doctrine.</td>
</tr>
<tr>
<td>Hoquiam v. PERC, 97</td>
<td>Public Employment Relations Commission (PERC)/unfair labor practice complaint</td>
<td>Member of PERC was partner in law firm representing union.</td>
<td>Law firm's representation of the union did not violate the appearance of fairness doctrine where commissioner who was a partner in the law firm representing the union disqualified herself from all participation in the proceedings.</td>
</tr>
<tr>
<td>Dorsten v. Port of Skagit County, 32</td>
<td>Port commission/increase of moorage charges at public marina</td>
<td>Alleged prejudgment bias of commissioner who was an owner or part owner of a private marina in competition with the port's marina.</td>
<td>The port's decision was legislative rather than judicial and the appearance of fairness doctrine did not apply.</td>
</tr>
<tr>
<td>Harris v. Hornbaker, 98</td>
<td>Board of county commissioners/boards determination of a freeway interchange - adoption of six-year road plan</td>
<td>Alleged prejudgment bias of certain county commissioners.</td>
<td>Deciding where to locate a freeway interchange is a legislative rather than an adjudicatory decision and so the appearance of fairness doctrine does not apply.</td>
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<td>Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983)</td>
<td>Medical disciplinary board/ revocation of medical license</td>
<td>Challenge to the same tribunal combining investigative and adjudicative functions, and the practice of assigning a single assistant attorney general as both the board's legal advisor and prosecutor.</td>
<td>The appearance of fairness doctrine is not necessarily violated in such cases. The facts and circumstances in each case must be evaluated to determine whether a reasonably prudent disinterested observer would view the proceeding as a fair, impartial, and neutral hearing and, unless shown otherwise, it must be presumed that the board members performed their duties properly and legally. (In a concurring opinion, Justices Utter, Dolliver, and Dommnick asserted that the majority's analysis of the appearance of fairness doctrine merely reiterates the requirements of due process and thereby causes unnecessary confusion.) (In a dissenting opinion Justices Rosellini and Dore argued that the combination of investigative, prosecutorial, and adjudicative functions within the same tribunal constitutes an appearance of fairness violation.)</td>
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<tr>
<td>Side v. Cheney, 37 Wn. App. 199, 679 P.2d 403 (1984)</td>
<td>Mayor/promotion of police officer to sergeant</td>
<td>Mayor passed over officer first on civil service promotion list who had also filed for election for position of mayor.</td>
<td>Appearance of fairness doctrine does not apply to mayor who did not act in role comparable to judicial officer. Mayor's promotion decision was not a quasi-judicial decision.</td>
</tr>
<tr>
<td>Zehring v. Bellevue, 103 Wn.2d 588, 694 P.2d 638 (1985)</td>
<td>Planning commission/design review</td>
<td>Member of commission committed himself to purchase stock in proponent corporation before hearing held in which commission denied reconsideration of its approval of building design.</td>
<td>Appearance of fairness doctrine does not apply to design review because doctrine only applies where a public hearing is required and no public hearing is required for design review. Court vacates its decision in earlier case (Zehring v. Bellevue, 99 Wn.2d 488 (1983), where it held doctrine had been violated.)</td>
</tr>
<tr>
<td>West Main Associates v. Bellevue, 49 Wn. App. 513, 742 P.2d 1266 (1987)</td>
<td>City council/denial of application for design approval</td>
<td>Councilmember attended meeting held by project opponents and held conversation with people at meeting, prior to planning director's decision and opponent's appeal of that decision to council.</td>
<td>Appearance of fairness doctrine prohibits ex parte communications between public quasi-judicial decision makers only where communication occurs while quasi-judicial proceeding is pending. Since communication at issue occurred one month prior to appeal of planning director's decision to the council, it did not occur during the pendency of the quasi-judicial proceeding and doctrine was thus not violated.</td>
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<td>Suquamish County Improvement Alliance v. Suquamish County, 63 Wn. App. 64, 808 P.2d 781 (1991)</td>
<td>County council/denial of application for rezone approval</td>
<td>Two councilmembers received campaign contributions during pendency of appeal.</td>
<td>Contributions were fully disclosed. The contributions were not ex parte communications as there was no exchange of ideas. RCW 42.36.050 provides that doctrine is not violated by acceptance of contribution.</td>
</tr>
<tr>
<td>Baynes v. Leavenworth, 118 Wn.2d 237, 821 P.2d 1204 (1992)</td>
<td>City council/amendment of zoning code</td>
<td>Councilmember was real estate agent for broker involved in sale of property to person who was seeking amendment of zoning code. Councilmember participated in council’s consideration of proposed amendment.</td>
<td>Text amendment was of area-wide significance. Council action thus was legislative, rather than quasi-judicial. Appearance of fairness doctrine does not apply to legislative action. Limits holding of Fleming v. Tacoma, 81 Wn.2d 292, 502 P.2d 327 (1972) through application of statutory appearance of fairness doctrine (RCW 42.36.010), which restricts types of decisions classed as quasi-judicial.</td>
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<td>Treganiere v. Everett, 64 Wn. App. 380, 824 P.2d 524 (1992)</td>
<td>City council/determination that environmental impact statement not required for proposed zoning ordinance</td>
<td>City both proposed new zoning code and acted as lead agency for SEPA purposes in issuing determination of nonsignificance (DNS).</td>
<td>Person who drafted new code was different from person who carried out SEPA review. In addition, there was no showing of bias or circumstances from which bias could be presumed in council’s consideration of legislation proposed by executive.</td>
</tr>
<tr>
<td>State v. Post, 118 Wn.2d 596, 837 P.2d 599 (1992)</td>
<td>Community corrections officer/presentation of presentence report</td>
<td>Presentence (probation) officer is an agent of the judiciary; that officer’s alleged bias is imparted to judge.</td>
<td>Probation officer is not the decisionmaker at sentencing hearing; judge is. Appearance of fairness does not apply to probation officer. In addition, no actual or potential bias shown.</td>
</tr>
<tr>
<td>Jones v. King Cnty., 74 Wn. App. 467, 874 P.2d 853 (1994)</td>
<td>County council/area-wide rezone</td>
<td>Action has a high impact on a few people and therefore it should be subject to appearance of fairness doctrine.</td>
<td>Area-wide rezoning constitutes legislative, rather than quasi-judicial action under RCW 42.36.010 regardless of whether decision has a high impact on a few people or whether local government permits landowners to discuss their specific properties.</td>
</tr>
<tr>
<td>Lake Forest Park v. Shorelines Hearings Board, 76 Wn. App. 212, 884 P.2d 614 (1994)</td>
<td>Shorelines Hearings Board/shoreline substantial development permit</td>
<td>Reconsideration of the record allegedly prejudiced the SHB against the city.</td>
<td>When acting in a quasi-judicial capacity, judicial officers must be free of any hint of bias. However, a party claiming an appearance of fairness violation cannot indulge in mere speculation, but must present specific evidence of personal or pecuniary interest.</td>
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<td>Bjarnson v. Kitsap County, 78 Wn. App.</td>
<td>Board of county commissioners approval of a rezone and planned unit development for a regional shopping center</td>
<td>Ex parte communications during the pendency of the rezone</td>
<td>Any appearance of fairness problems arising from allegedly improper conduct by a member of a decision-making board are cured if the remaining members of the board conduct a re hearing and there is no question of bias or the appearance of bias of the remaining members</td>
</tr>
<tr>
<td>OPAL v. Adams County, 128 Wn.2d 869,</td>
<td>Board of county commissioners disapproval of application for an unclassified use permit for a proposed regional solid waste landfill and recycling facility</td>
<td>Ex parte communications between commissioners and an interested party</td>
<td>Challenger must demonstrate that the communication concerned the proposal which is the subject of the quasi-judicial proceeding. Also, the decisionmaker's failure to disclose ex parte communication does not render the administrative decision invalid if the communication has, in fact, been rebutted in the course of the proceedings.</td>
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<td>913 P.2d 793 (1996)</td>
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<tr>
<td>King County v. Central Puget Sound GMHB,</td>
<td>County council/project permit approval</td>
<td>Councilmembers did not adequately disclose ex parte communications; project opponents allegedly did not have opportunity to rebut.</td>
<td>By not seeking recusal of the councilmembers who had offered what had been alleged as inadequate disclosure of ex parte contacts, the appearance of fairness challenge is waived.</td>
</tr>
<tr>
<td>Bunko v. City of Payette, 95 Wn. App.</td>
<td>Civil service commission order affirming employment termination of police officer</td>
<td>Ex parte communication with a key witness.</td>
<td>Statutory doctrine applied for first time to matter other than land use. The appearance of fairness doctrine is not violated when ex parte communications do not concern the matter before the quasi-judicial body.</td>
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<td>495, 975 P.2d 1055 (1999)</td>
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<td>State v. Finch, 137 Wn.2d</td>
<td>Prosecuting attorney</td>
<td>Statement to press made by prosecuting attorney</td>
<td>Decisions to charge or seek death penalty are executive in nature, not quasi-judicial.</td>
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<td>792, 975 P.2d 967 (1999)</td>
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<td>State v. Gonzales-Morales, 91 Wn. App.</td>
<td>Supreme court judge</td>
<td>Interpreter for defense used to interpret testimony</td>
<td>Evidence of judges actual or potential bias must be shown before doctrine applies.</td>
</tr>
<tr>
<td>Swoboda v. LaConner, 97 Wn. App. 613,</td>
<td>Planning commission/hearing examiner</td>
<td>Decision biased because they accorded too much weight to testimony unfavorable to appellant</td>
<td>No evidence of actual or potential bias.</td>
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<td>987 P.2d 103 (1999)</td>
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**Note:** Adapted from a chart originally prepared by Lee Kraft, former City Attorney of Bellevue. Court's decision may have rested on grounds other than appearance of fairness doctrine alone, in some cases.