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Katherine A. George

To: Patricia Pepper and Erika Morgan
From: Katherine A. George, WSBA # 36288
Re: Application of Open Public Meetings Act, Chap. 42.30 RCW
Date: February 4, 2016

Thank you for seeking guidance about how to comply with the Open Public Meeting Act (OPMA), Chapter 42.30 RCW, as members of the Black Diamond City Council. I regularly practice law in the area of open government, advocating for the right of citizens to know what their governments are doing. I also serve on the board of the Washington Coalition for Open Government and chair its legal committee. I commend you for making an exceptional effort to clarify a statute that is often muddled in confusion.¹

I. Brief Summary of the OPMA

In adopting the OPMA decades ago, the Legislature expressed the following intent:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees...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.

See RCW 42.30.010.

To carry out that intent, the Legislature adopted RCW 42.30.030, which says:

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.

Thus, openness is required if: 1) a “governing body” of a public agency 2) has a “meeting.” These terms are defined in RCW 42.30.020. In a nutshell, a governing body meets when its conducts official business, including discussing or considering policies.

¹ The OPMA is notorious for its lack of clarity. Consider, for example, the circular language in RCW 42.30.020(3), which says: “‘Meeting’ means meetings at which action is taken.” OPMA suits are relatively rare, resulting in little guidance from the courts. In light of the scant definitions in the statute, the paucity of case law, and the strong public interest in transparency, it is prudent to err on the side of openness.

A governing body's meeting must be regularly scheduled or announced at least 24 hours in advance, so that the public has a meaningful opportunity to observe the policymaking process. See RCW 42.30.060, RCW 42.30.070 and RCW 42.30.080. If the meeting is specially scheduled, the governing body cannot take final action on any business that was not included in the meeting announcement.

There are 15 exceptions permitting closed meetings ("executive sessions") for specific, limited purposes such as reviewing an employee's performance. See RCW 42.30.110. Before closing a meeting, the governing body chair must announce the purpose of closure and how long it will last. Under RCW 42.30.120, any member of a governing body who knowingly violates the OPMA may be personally liable for a \$100 civil penalty, and the agency must pay attorney fees for any lawsuit that proves an OPMA violation.

II. Can Standing Committees Have a Quorum of Council Members?

You asked whether it is legal under the OPMA for a majority of council members to serve on a standing committee of a council. The answer is **yes**, as long as the committee's meetings meet the same openness requirements that apply to full council meetings.

Washington courts have consistently held that a "meeting" of a "governing body" occurs when a majority of the full body's members gather with the intent to conduct official business. See, for example, *Wood v. Battle Ground School District*.² Thus, when at least three members of a five-member council gather to consider official business, it doesn't matter whether it's called a committee meeting or a council meeting – the presence of a council majority makes it a "meeting" for purposes of requiring openness under RCW 42.30.030.

If the council plans to meet regularly as a standing committee, it should adopt a regular schedule so that the public can anticipate opportunities to attend committee meetings. RCW 42.30.070 says, "The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body." Also, agendas for regular meetings should be posted online at least 24 hours in advance pursuant to RCW 42.30.077.

Alternatively, the council's presiding officer or a majority of council members can call a "special meeting" each time the council meets as a standing committee. A special meeting requires public notice to be posted 24 hours in advance on the agency's Web site and at the meeting site, at a minimum. See RCW 42.30.080(2). Unlike at a regular meeting, final action at a special meeting is limited to the matters specifically mentioned in the public notice.

There is nothing in the OPMA that limits the size of a council committee. In fact, it is not unusual for a council to have "a committee of the whole" consisting of all council members. As long as the public has the requisite notice and opportunity to attend, the

² 107 Wn.App. 550 (Div. 2, 2001).

governing body's meetings will satisfy the OPMA.

III. Can A Majority of Members, Acting As a Committee, Recommend Legislation to the Full Council?

You also asked whether the OPMA permits a majority of the council, acting as a standing committee, to recommend adoption of a proposal by the full council. The answer is yes, again assuming that notice and openness requirements are met.

RCW 42.30.020(2) defines “governing body” as the “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.” So in order to constitute a “governing body” for OPMA purposes, a committee must hold a public hearing, take testimony or comments, or “act on behalf of” the full body. Last October, in *Citizens Alliance for Property Rights Legal Fund v. San Juan County*,³ the Washington Supreme Court addressed for the first time what it means to “act on behalf of” a full council. If a committee was “created or specifically authorized” by the council, and “exercises actual or de facto decision-making authority on behalf of the governing body,” then it is a governing body itself for open-meeting purposes.

That decision and the statutory definition of “governing body” seem to contemplate that a full council may grant its decision-making authority to a committee. Whether that is a good idea, or even permissible under applicable city and state codes, is beyond the scope of this memo. But if all the committee does is *recommend* passage by the full council, then regardless of whether the full council has formally granted any decision-making authority to the committee, the council still retains the *final* decision-making authority. It is certainly possible for committee resolutions to be drafted so that recommendations are not binding, and to make clear that the committee is merely assisting in, but not assuming control of, decision-making by the full council.

A committee recommendation process can improve opportunities for public participation. Standing committees can develop an expertise in a particular policy area and hold more in-depth public meetings than the full council can. Also, a “do pass” recommendation is a clear signal to the public as to which way the political wind is blowing, and can help mobilize concerned citizens to point out information or considerations that have been overlooked.

I hope this brief memo has been helpful, and look forward to answering any additional questions you may have.