OPMA Court Decisions and AG Opinions

This page highlights key court decisions and attorney general opinions regarding the Washington State Open Public Meetings Act (OPMA).

It is part of MRSC's series on the Open Public Meetings Act.

Purpose of the OPMA

The OPMA's purpose statement "employs some of the strongest language used in any legislation."

Equitable Shipyards v. State (1980)

The purpose of the OPMA is to permit the public to observe all steps in the making of government decisions.

Cathcart v. Andersen (1975) – Meetings of the university's law school faculty are subject to the OPMA, despite the power of the board of regents to ultimately overrule the law school faculty's decisions. The Act entitles the public to be present at all stages of the decision-making process.

Comprehensive overview of the scope of the OPMA, as it was enacted in 1971.

AGO 1971 No. 33 – This comprehensive overview of the OPMA, written the same year the law was enacted, is helpful because much of the OPMA remains as it was adopted in 1971.

Governing Bodies Subject to the OPMA

The OPMA does not apply when a state agency undertakes rulemaking under the Administrative Procedure Act (APA).

West v. WDFW (2022) – Involved the question of whether a state agency's rulemaking process is subject to the Open Public Meetings Act (OPMA). The court noted that the APA, which applies to state agencies, provides the procedure for

agency rulemaking, from inception to publication, including notice, public participation, and publication of final rules. The APA does not mention the OPMA and the OPMA specifically indicates that it shall not apply to matters governed by the APA. Therefore, rulemaking under the APA is exempt from the requirements of the OPMA.

A Faculty Senate that develops and recommends university policies for the university president's approval is not subject to the OPMA.

AGO 2022 No. 2 – This opinion involves applicability of the Open Public Meetings Act (OPMA) to the Academic Senate of Eastern Washington University ("EWU"). EWU is governed by a Board of Trustees ("Board") and its statutory duties including consultation with the Academic Senate when considering change to policies or procedures. The Academic Senate is part of a separate governance body within the university known as the Faculty Organization, which has its own constitution and bylaws. The Academic Senate is the legislative arm of the Faculty Organization, and its responsibilities include formulation and recommendation of university-related policies for the president's approval and advice and counsel to the president and others regarding interpretation and implementation of the policies.

The question considered in the AGO is whether the Academic Senate is considered a "committee thereof" and "acts on behalf" of the Board. Ultimately, the AGO concluded that the Academic Faculty is not a committee and it does not act on behalf of the Board.

Committee Thereof

Unlike other university-level faculty bodies, there is no statute that creates EWU's Faculty Organization or its Academic Senate or grants governing authority to these groups. The Board did not formally create or ratify the existence of the Academic Senate; rather, the Faculty Organization formed itself and is a self-governing body. The AGO also noted that, while the OPMA specifically applies to Associated Students of EWU (see RCW 42.30.200), it does not specifically apply to faculty bodies like the Academic Senate.

Acts on Behalf

The AGO then looked to whether the Academic Senate acts on behalf of the Board by exercising "actual or de facto decision-making authority on behalf of the governing body." The Board has delegated to the university president the authority to adopt academic policy changes recommended by the Academic Senate. While the president rarely rejects the academic policies proposed by the Academic Senate, the Academic Senate's actions are ultimately recommendations, not final decisions. Therefore, the AGO concluded that the Academic Senate does not have actual or de facto decision-making authority.

Complaints about state conservation district supervisors are subject to the Administrative Procedures Act (APA), not the OPMA.

Johnson v. Washington State Conservation Commission (2021) – A hearing on removal of state conservation district supervisors that was held in response to complaints should be held under the APA, not the OPMA.

The OPMA doesn't apply to the Washington State Bar Association.

Beauregard v. Washington State Bar Association (2021) – The Washington State Bar Association is not subject to the OPMA because it does not fall under the definition of a "public agency" under the OPMA.

When does a committee of a governing body "act on behalf of" the governing body?

Citizens Alliance for Property Rights Legal Fund v. San Juan County (2015) – The State Supreme Court held that:

- A "meeting" of a governing body for purposes of the OPMA occurs when a majority of its members gathers with the collective intent of transacting the governing body's business;
- A "committee thereof" with respect to a given governing body is an entity that the governing body created or specifically authorized, regardless of whether the committee includes members of the governing body; and
- A committee "acts on behalf of" a governing body when the committee exercises actual or de facto decision-making authority on behalf of the governing body.
    - The OPMA does not apply to advisory committees and other entities that do nothing more than conduct internal discussions and provide advice or information to the governing body.

Meeting between two port districts was governed by federal law, not the OPMA.

West v. Seattle Port Commission (2016) – The Federal Shipping Act of 1984 preempted a provision of the OPMA requiring that meetings of a governing body be open to the public, as to meeting between ports.

The OPMA applies to the Washington Association of County Officials.

West v. Wash. Ass'n of County Officials (2011) – The application of the OPMA to any "other state agency which is created by or pursuant to statute" includes "an association or organization created by or pursuant to statute which serves a statewide public function." The court held that the Washington Association of County Officials is subject to the Act under this definition because it was created by statute and because elected public officials performed its activities financed by public money with an express legislative mandate to act as a coordinating agency for all of Washington's 39 counties.

The OPMA applies to a quorum of members attending a meeting not called by their governing body only if "action" is taken.

AGO 2006 No. 6 – Addresses the applicability of OPMA when a quorum of the members of a governing body are present at a meeting not called by that body. It concludes that the presence of a quorum of the members of a city or county council at a meeting not called by the council does not, in itself, make the meeting a "public meeting" of that city or county council for purposes of the OPMA. The Act would apply if the councilmembers took any "action" as defined in RCW 42.30.020(3) at the meeting, such as voting, deliberating together, or using the meeting as a source of public testimony for council action.

The OPMA doesn't apply to election workers, as they are not a governing body.

Loeffelholz v. C.L.E.A.N. (2004) – A group of election workers were not the "governing body" of a "public agency." They were not organized, by statute or any other provision of law, into either a "public agency" or a "governing body." A "meeting" could not be subject to the OPMA unless it was the "meeting" of the "governing body" of a "public agency." The election workers could not be a "governing body" unless they had policy-making or rule-making authority, which they did not possess.

The OPMA doesn't apply to "members-elect" of a governing body.

Wood v. Battle Ground School District (2001) – The OPMA does not apply to members-elect of a governing body, because they have no authority to transact the official business of the public agency.

The OPMA applies to meetings of the university's law school faculty.

Cathcart v. Andersen (1975) – Monthly meetings of the University of Washington (UW) law school faculty are subject to the OPMA, as UW (and the law school) are public agencies created "pursuant to" a statute and the faculty is a "governing body" because they have policy or rule-making authority. "Pursuant to" under the

OPMA means “in conformity with or in the course of carrying out a statute, implying that what is done is in accordance with an instruction or direction."

What Constitutes an "Action"?

Collective intent to take action is required in order for there to be a serial meeting in violation of the OPMA.

Egan v. City of Seattle (2020) – A governing body that collectively commits (outside of a public meeting) to vote, as a group, in favor or against a matter at a future public meeting violates the OPMA because they have attended a meeting with the collective intent to take action. Questions of fact existed regarding whether a series of communications between councilmembers and city staff about repealing an employee head tax constituted a serial meeting in violation of the OPMA (including whether the city council collectively committed or promised to each other to vote – as a group – in favor or in opposition of pending legislation at a future public meeting).

Individual councilmember communications with members of the public is not action under the OPMA.

City of Seattle v. Kaseburg (2018) – Where there is no evidence that a majority of the governing body communicated with each other on the matter, communications about eminent domain between individual councilmembers and members of the public is not an “action” under the OPMA

Final action can occur without a formal vote.

Eugster v. City of Spokane (2002) – For purposes of the OPMA, an "action" taken by a governing body can constitute final action where the members of the governing body arrive at a consensus position or agree to a collective positive or negative decision; a final action does not always require a formal vote.

A quorum is required before official “action” can occur, with some exceptions.

Eugster v. City of Spokane (2005) – The general rule is that a quorum (or a majority) of the governing body is required for the body to take “action” and be subject to the OPMA.

Citizens Alliance for Property Rights Legal Fund v. San Juan County (2015) – The OPMA can apply to a meeting of a committee of a governing body consisting of less than a quorum of the governing body when that committee acts on behalf of the governing body by exercising actual or de facto decision-making authority for the

governing body. (Under RCW 42.30.020(2), a committee of a governing body is also subject to the OPMA If it conducts a hearing or takes testimony or public comment.)

What Constitutes a Meeting of a Quorum?

Meetings subject to the OPMA can occur over email.

Citizens Alliance for Property Rights Legal Fund v. San Juan County (2015) – Members of a governing body "must *collectively intend to meet* to transact the governing body's official business" for their communications to constitute a meeting. The passive receipt of emails and other one-way forms of communication does not, by itself, amount to participation in a meeting because such passive receipt of information does not demonstrate the necessary intent to meet. If communications – email or otherwise - do not reflect the requisite collective intent to meet, no "meeting" has occurred and the OPMA does not apply.

Wood v. Battle Ground School District (2001) – The OPMA can apply, depending on the circumstances, to email communications between a majority of the members of a governing body. An exchange of email can constitute a "meeting" under the OPMA, if a majority of the members "collectively intend to meet [by email] to transact the governing body's official business" and they "communicate about issues that may or will come before the [governing body] for a vote." However, the OPMA is not violated when the members of a governing body merely receive information by email about upcoming issues.

Does a "negative quorum" constitute a quorum for purposes of the OPMA?

Citizens Alliance for Property Rights Legal Fund v. San Juan County (2015) – A negative quorum refers to the situation where the number of members present would be sufficient to block the passage of legislation – in this case, three members of the county council. (When this case was brought, the county council had six members.) Noting that it might be difficult to apply a negative quorum rule because different measures being discussed by a governing body might require the approval of different numbers of members for passage, the court declined to overturn prior precedent and reaffirmed that the OPMA applies to meetings of a governing body when a majority of the governing body's members are present.

Meeting Notice

Notice required for committee meeting attended by a quorum of governing body.

AGO 2010 No. 9 – The OPMA requires that notice be properly given of a meeting of the governing body, and concludes that this requirement is not satisfied by notice given for a meeting of a standing committee of a city council as a governing body, where a quorum of members of the city council attend the meeting and take action as defined in the act, such that a meeting of the city council as a governing body takes place.

Meetings must be properly noticed but public attendance is not required for the meeting to occur.

AGO 1992 No. 21 – The OPMA only requires that an agency properly notices it public meetings and ensures they are open to the public; it makes no difference whether any members of the press or the public actually attend the meetings.

Media must request notice of special meetings; attendance by councilmembers cures failure to provide notice.

Estey v. Dempsey (1985) – Local media had not requested notice of special meetings and failure to provide them with notice of the meeting with no request on file did not violate the OPMA. Failure to notify the council members of the board members of the meeting was cured by their attendance at the meeting.

Emergency Meetings

Emergency must be a severe one.

Mead Sch. Dist. No. 354 v. Mead Educ. Ass'n (1975) – The type of emergency contemplated by RCW 42.30.070 and RCW 42.30.080 to justify meeting without having to comply with the OPMA is a severe one that "involves or threatens physical damage" and requires urgent or immediate action. Thus, a teachers' strike does not justify an "emergency" meeting by the school board.

Executive Sessions and Closed Sessions

City could not unilaterally decide collective bargaining sessions are subject to the OPMA.

Washington State Council of County and City Employees v. City of Spokane (2022) – Unilateral city ordinance requiring all collective bargaining contract negotiations take place at an open public meeting is preempted by state law and is unconstitutional.

Quasi-judicial hearings are not subject to the OPMA.

Tateuchi v. City of Bellevue (2020) – The city council deliberated on an application to revoke a conditional use hearing in closed session; this type of hearing is a quasi-judicial hearing and can be held in closed session pursuant to RCW 42.30.140.

Confidentiality of executive sessions.

AGO 2017 No. 5 – Addresses four questions relating to whether information learned in an executive session is confidential.

1. **Are the members of the governing body of a public agency prohibited by the OPMA from disclosing information shared during executive sessions?** Yes. Participants in an executive session have a legal duty under the OPMA to hold in confidence information that they obtain in the course of a properly convened executive session, but only if the information at issue is within the scope of the statutorily authorized purpose for which the executive session was called.
2. **Are the members of the governing body of a public agency prohibited by the Code of Ethics for Municipal Officers from disclosing information shared during executive sessions?** Yes. RCW 42.23.070(4) prohibits a municipal officer from disclosing confidential information learned in an executive session or otherwise using such information for personal gain. The term "confidential information" for purposes of RCW 42.23.070(4) therefore means: "(a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law." RCW 42.52.010(5).
3. **If the law prohibits public officials from disclosing information exchanged during executive sessions, would a violation of that prohibition constitute a misdemeanor under RCW 42.20.100 and/or "official misconduct" under RCW 9A.80.010?** The opinion concludes that it is conceivable that facts could arise under which the disclosure of information learned in an executive session under the OPMA might constitute a misdemeanor or official misconduct but that such cases would be difficult to prove and should rarely arise.
4. **May the governing body of a public agency exclude an elected member from executive session because of concerns about confidential information?** A governing body may ask a court to enforce the confidentiality of an executive session through a writ of mandamus or injunction, pursuant to RCW 42.30.130. The opinion also notes that it may be possible for some governing bodies to exclude one of its members through its own rules without an injunction.

Discussions of sale or lease of real estate are limited to minimum price; factors affecting minimum price must be discussed in open session.

Columbia Riverkeepers v. Port of Vancouver USA (2017) – Executive session discussions related to sale or lease of real estate is limited to the minimum acceptable price to sell or lease the property. General discussion of the contextual factors affecting the minimum price must occur at an open public meeting; once that occurs, the governing body may discuss in executive session how those various factors directly impact the minimum price.

The OPMA does not expressly exempt written materials from public disclosure.

ACLU of WA v. City of Seattle (2004)

Only the action explicitly authorized may take place in an executive session.

Miller v. Tacoma (1999) – Balloting by city councilmembers when meeting in executive session to evaluate the qualifications of applicants for appointment to the planning commission violates the OPMA. Council balloting to achieve a consensus on a candidate for appointment to the commission was beyond the scope of the action that may take place in executive session for the purpose of evaluating candidate qualifications. The council's secret balloting was illegal even though it took a final vote on the appointment in open session.

Settlement agreements must be approved in open session.

Feature Realty, Inc. v. Spokane (9th Cir. 2003) – Action taken in executive session by a city council to approve a settlement agreement (a "collective positive decision") is beyond the scope of action that may be taken in executive session under RCW 42.30.110(1)(i) for discussion of litigation, potential litigation, or enforcement actions.

Discussion of potential litigation in executive session.

Recall of Lakewood City Council (2001) – The authorization in the OPMA for a governing body to meet in executive session to discuss potential litigation applies when a governing body engages in a candid discussion with legal counsel regarding the legal risks and consequences of potential litigation. RCW 42.30.110(1)(i) does not require a governing body to determine beforehand whether disclosure of the discussion would or would not likely cause adverse legal consequence. This statutory exception to the open meeting requirement is unavailable only if, from an objective standard, the governing body should know beforehand that the discussion is benign and will not likely result in adverse consequences. (Note: The 2001 legislature amended RCW 42.30.110(1)(i) by defining "potential litigation." This

amendment did not apply to this case, but, in any event, it does not appear that the amendment would have changed the court's holding if it had applied.)

Public Conduct in an Agency Meeting

Removal of disruptive person is allowed.

In re Recall of Kast (2001) – If members of the public in attendance at a meeting are disruptive and make further conduct of the meeting infeasible, they may be removed. However, the discretion to order removal of a disruptive person from a meeting must be exercised reasonably.

Video or Sound Recordings at Meetings

Video or sound recordings are allowed.

AGO 1998 No. 15 – A governing body does not have authority to ban video or sound recording of a meeting required to be open under the Act; it may regulate recording only to the extent necessary to preserve order at the meeting and facilitate public attendance.

Under the Open Public Meetings Act, a member of the public has the right to record public meetings provided that it is done in a way that does not disrupt the meeting.

Zink v. City of Mesa (2021) – A city resident sought to video record a city council meeting. She set up a mini-recorder with a tripod a few minutes before the start of the meeting. A councilmember and the mayor claimed that the resident needed permission to record and they indicated they did not want to be recorded. The resident refused to stop recording and the mayor called the police and requested that the resident be removed from City Hall. A sheriff's deputy erroneously took the position that consent was required to record the meeting, told the resident she was trespassing and would be arrested if she did not either leave or stop recording. The resident continued to record, so the deputy arrested her and transported her to jail, where she was issued a citation and released. The resident later sued the city, alleging OPMA violations among other things.

The court noted that under RCW 42.30.040, an agency may not place a "condition precedent" on attending a public meeting. Although an agency may remove individuals who disrupt the ordinary conduct of business, there was no claim that the recording activity was done in a disruptive manner. Accordingly, the court found that the city violated the OPMA for prohibiting the resident from engaging in

non-disruptive recording and removing her from the meeting. The court upheld a trial court ruling that the mayor and councilmembers had not received OPMA training and were not personally liable because they did not knowingly violate the OPMA. That finding should be taken with a grain of salt since the meeting in question occurred prior to the adoption of training requirements in 2014 pursuant to RCW 42.30.205.

Invalidating Actions

Ratification of invalid act is null and void.

Clark v. City of Lakewood (9th Cir. 2001) – Although RCW 42.30.060(1) provides that any action taken at a meeting held in violation of the OPMA is null and void, the statute does not require that subsequent actions taken in compliance with the Act are also invalidated. But, where action taken in open session merely ratifies an action taken in violation of the Act, the ratification is also null and void.

Previous discussion does not necessarily invalidate an otherwise proper formal action.

OPAL v. Adams County (1996) – Although two commissioners discussed their intention to issue a permit over the telephone the night before a public hearing on the matter, the court determined that invalidation of an otherwise proper formal action of a public body is not required merely because the subject matter of that formal action was previously discussed at a nonpublic meeting.

Passage of ordinances and other formal actions must be taken at public meetings.

Slaughter v. Fire District No. 20 (1988) – Ordinances, resolutions, and other regulations or rules must be adopted at open public meetings; otherwise they are invalid.

Standing

Standing to bring action for sanctions or injunctions for the purpose of stopping violations or preventing threatened violations of the OPMA.

West v. Pierce County Council (2017) – Any person has standing to bring an action for sanctions or an injunction under RCW 42.30.120 or .130.

Violations

Incorrect legal advice may protect against OPMA violations.

In re Recall of Boldt (2017) – County commissioners relied on the county attorney's advice that they could vote in executive session to approve a contract with outside counsel; since they did not knowingly violate the OPMA, the unlawful vote provides insufficient basis for a recall petition.

Cathcart v. Andersen (1974) – No civil penalties imposed on governing body because they were advised by the attorney general that their meetings were not in violation of the OPMA.

An OPMA violation can support a recall petition.

In re Recall of Pepper (2017) – Charge against city council member that as part of the council majority the member violated the OPMA by convening and conducing closed meetings and taking action outside a public meeting is legally and factually sufficient to support a recall petition.

Estey v. Dempsey (1985) – Holding that a violation of the OPMA does not constitute a crime, so the OPMA shouldn't be liberally construed as a ground for recall unless the alleged violations actually form the underlying basis of the recall charges.

Attorney fees and fines are only warranted if an improper meeting took place.

Eugster v. City of Spokane (2002) – If at fact-finding, no improper meeting is found, then the plaintiff is not entitled to attorney fees or a civil penalty under the OPMA. If an improper meeting took place, even without the councilmembers' knowledge that the meeting violated the OPMA, attorney fees are warranted.

Injunctive relief is not appropriate when there was no evidence that meetings were regularly held in violation of the OPMA.

Protect the Peninsula's Future v. Clallam Cy. (1992) – Although commissioners violated the OPMA, injunctive relief not granted when there was no evidence that suggested the commissioners regularly held meetings in violation of the OPMA or that they had threatened to do so in the future.