

AN OVERVIEW OF WASHINGTON'S OPEN PUBLIC MEETINGS ACT

Washington State Open Government Conference
January 16, 2010
Seattle, WA

**Michele L. Earl-Hubbard and
David M. Norman**



2200 Sixth Avenue, Suite 770
Seattle, WA 98121

Phone: (206) 443-0200

Fax: (206) 428-7169

Email: michele@alliedlawgroup.com

Email: david@alliedlawgroup.com

MICHELE EARL-HUBBARD is principal and media law attorney at Allied Law Group LLC in Seattle. She is listed in *Best Lawyers in America* for First Amendment Law. She has handled numerous public record, open meetings, and open court matters in the trial and appellate courts and administers hotlines for several news organizations on media law subjects. She is a frequent presenter at seminars and CLEs on Washington's open government laws, the Senior Editor and an author of the WSBA's *Public Records Deskbook* and a contributing author and editor of numerous other open government resource books. She is also a former founding member and former president of the Washington Coalition for Open Government, a recently-retired member of the National Freedom of Information Coalition, and the Washington State Freedom of Information Delegate for the Society of Professional Journalists. She obtained her J.D. from Northwestern University and her B.A. in Journalism from San Francisco State University.

DAVID M. NORMAN is a second-year associate at Allied Law Group in Seattle and has been involved with Allied Law Group since September of 2008. He graduated *magna cum laude* from Seattle University School of Law, where he served as a Research and Technical Editor for the school's Law Review from 2007-08. He also served as an extern for the Honorable Marsha J. Pechman at the U.S. District Court for the Western District of Washington in 2008. He has been involved in several public record, open public meeting, and constitutional open court record cases, including multiple cases at the appellate and State Supreme Court levels.

This material is © 2010 Allied Law Group, LLC and is reprinted herein with permission. All rights reserved.

WASHINGTON'S OPEN PUBLIC MEETINGS ACT

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.

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 retain control over the instruments they have created.

RCW 42.30.010.

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives.

Letter to W.T. Barry, Aug. 4, 1822, 9, *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910).

“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (access to information essential “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).

I. THE PURPOSE OF THE OPMA

Washington's first open meetings act was adopted in 1953, requiring that final decisions be made in public. A broader act, the Open Public Meetings Act (“OPMA”), was enacted in 1971, requiring that “[a]ll 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.” RCW 42.30.030. The purpose of the OPMA is to permit the public to observe all steps in the making of governmental decisions. *Cathcart v. Andersen*, 85 Wn.2d 102, 530 P.2d 313 (1975). The explicit policy statement contained within the OPMA, RCW 42.30.010 (shown above), was described by the State Supreme Court as “some of the strongest language we have ever seen in any legislation.” *Cathcart*, 85 Wn.2d at 107; *see also Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 482, 611 P.2d 396 (1980) (citing *Cathcart*). The State Supreme Court in *Cathcart* continued, stating:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country.... One purpose of [open meetings acts] was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Id. at 108 (discussing analogous law of another state).

II. WHICH GOVERNMENTAL BODIES ARE COVERED BY THE OPMA?

The OPMA applies to the “governing body” of any public agency or subagency at the state, local, county, municipal or local level. RCW 42.30.020(1). A “public agency” includes any state board, commission, committee, department, educational institution or other state agency created by or pursuant to statute other than courts and the legislature; any county, city, school district, special purpose district (*e.g.*, fire or weed control), or other municipal corporation or political subdivision of the state; any subagency of a public agency that 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; and any policy group whose membership includes representatives of publicly-owned utilities formed by or pursuant to state law. RCW 42.30.020(1); *see also* PUBLIC RECORDS ACT DESKBOOK: WASHINGTON’S PUBLIC DISCLOSURE ACT AND OPEN PUBLIC MEETINGS ACT (Wash. State Bar Assoc. 2006) (“DESKBOOK”), § 21.2.

A “governing body” is any multimember¹ board, commission, committee, council or other policy or rulemaking body of a public agency or any committee of any governing body whenever it acts on behalf of the governing body, conducts hearings or takes testimony or public comment. RCW 42.30.020(2); *see also* DESKBOOK, § 21.2(3), at 21-4. An advisory board or committee that is created by or pursuant to statute, ordinance or other legislative act or that sets policy for an agency is treated like a governing body under the OPMA. RCW 42.30.020(1). The governing body is the body that actually makes the policy and rules of the agency, notwithstanding the capability of a higher agency to overrule such decisions. *Cathcart*, 85 Wn.2d at 107. For example, the following have been ruled to be governing bodies requiring that their meetings be open to the public: faculty meetings at a public college or university, *id.*; meetings of a student board of a recognized student association at a public college or university, RCW 42.30.200; meetings of services and activities fees committees at state higher educational institutions, Op. Atty. Gen. 1983, No.1; and school boards, Op. Atty. Gen. No. 33 at 7. In comparison, in *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902, 86 P.3d 835 (2004), a meeting between the mayor and special counsel regarding pending litigation was found not to come within the definition of “public agency” or “governing body” under the OPMA. Nor are private third-party entities subject to the OPMA. *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004); *see also* DESKBOOK, § 21.2(1).

¹ Agencies governed by a single individual do not fall within the “governing body” definition. *Salmon for All v. Dept. of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (1992).

If a majority of a governing body of a particular agency meets with anyone else concerning agency business, the meeting is still considered a meeting of the governing body and is subject to the OPMA.

III. WHAT CONSTITUTES A MEETING?

Except for specific statutory exemptions, all meetings of the “governing body” must be open to the public. To constitute a “meeting,” the event need not take place in a formal setting. A “meeting” is any occasion at which “action” is taken. RCW 42.30.020(4). “Action” is defined as the “transaction of official business” and includes discussion, consideration, public testimony, review, evaluation and other deliberation, as well as “final action.” RCW 42.30.020(3). “Action” is thus defined broadly and is not limited to “final action.” *Eugster v. City of Spokane*, 110 Wn. App. 212, 225, 39 P.3d 380 (2002); *see also* Attorney General Open Government Manual (“Att’y Gen. Open Gov’t Manual”), Chapter 3, § 3.4(B); *see also* *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 883, n.2, 913 P.2d 793 (1996) (“The plain language of the statute does not support [the] distinction between action and discussions short of action, as the definition of ‘action’ includes ‘discussion.’”). The OPMA specifically states in its definition of “action,” that what constitutes “action” is not limited to the examples in the statute. *See* RCW 42.30.020(3). Instead, the relevant inquiry in finding “action” is whether the activity relates to “the transaction of the official business of a public agency by a governing body.” *See* 1971 Att’y Gen. Op. No. 33 at 11-12; *see also* DESKBOOK, § 21.3(1), at 21-5). Final action is a collective positive or negative decision, by formal motion or informal proposal, or vote by the majority of members of the governing body. RCW 42.30.020(3); *Miller v. City of Tacoma*, 138 Wn.2d 318, 331, 979 P.2d 429 (1999); *see generally* DESKBOOK, § 21.3(1), at 21-5–21-6 (citing cases); *see also* Att’y Gen. Open Gov’t Manual, Chapter 3, § 3.4(B). An action to adopt an ordinance that takes place at a proper meeting is valid, even if previous action that led up to its adoption are held to violate the OPMA. *Heesan v. City of Lakewood*, 118 Wn. App. 341, 357, 75 P.3d 1003 (2005) (citing *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 882-84, 913 P.2d 793 (1996)). “Reaching a consensus on a position to be voted on at a *later* meeting qualifies as a collective decision and, consequently, as ‘final action.’” DESKBOOK, § 21.3(1), at 21-5–21-6 (citing *Miller*, 138 Wn.2d at 327; *Eugster*, 110 Wn. App. at 225) (emphasis added).

A “meeting” occurs whenever members of a governing body discuss agency business—even if no decisions are made. Courts in Washington, and in other jurisdictions, have repeatedly recognized a broad interpretation of “meeting” in open public meeting laws. *See* *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 562-63, 27 P.3d 1208 (2001) (“[C]ourts have generally adopted a broad definition of ‘meeting’ to effectuate open meetings laws that state legislatures enacted for the public benefit.”) (citation omitted). For example, the state auditor held in 1998 that the Algona Economic Development Corporation Public Development Authority violated the OPMA when it held dinner meetings on the Spirit of Washington Dinner Train and on cruises in the Puget Sound. In 1999, the auditor held that some members of the Monroe City Council violated the OPMA when they met at a local restaurant after public meetings. In both cases the members of the governing body discussed business in addition to

socializing. The business discussions constituted “action,” and thus the gatherings were “meetings” held in violation of the OPMA.²

Therefore, a meeting need not be a formal meeting, but rather can include briefing sessions and informal discussions or gatherings—as long as “action,” such as “discussion” of official business, takes place. 1971 Op. Att’y Gen. No. 33 at 11. This interpretation of the OPMA has also been accepted by an association made up of local governments. *See* MUNICIPAL RESEARCH AND SERVICES CENTER, *The Open Public Meetings Act: How it Applies to Washington Cities, Counties, and Special Purposes Districts (“MRSC Report”), Report Number 60 (May 2008), at 6*. Indeed, unintentional meetings may occur whenever a quorum of the members of a governing body gathers in an informal setting. *See* 1971 Op. Atty. Gen. No. 33 at 19 (concluding that social function involving governing body members can be a “meeting” if it is scheduled or designed to discuss official business).

There is no quorum requirement within the statute for non-final action, though agencies often argue that “action” cannot be taken absent attendance by a majority of the members. Judicial decisions lend further support to this view. The Court of Appeals has held, “A ‘meeting takes place when a majority of the governing body meets and takes ‘action.’” *Eugster*, 110 Wn. App. at 222-23. This view can trace its roots not directly to the statute itself but to the aforementioned DESKBOOK and to the Supreme Court’s interpretation of RCW 42.30.070 to be that a “majority of the members of a governing body are not prohibited from gathering together for purposes other than a regular or special meeting, so long as they take no ‘action.’” *In re Recall of Roberts*, 115 Wn.2d 551, 554, 799 P.2d 734 (1990).

The OPMA does not require that meetings be conducted in person. Exchanging email can constitute a meeting. *Wood*, 107 Wn. App. at 564. The *Wood* court noted, however, that “mere use or passive receipt of e-mail”—as opposed to the “active exchange of information and opinions” via email—“does not automatically constitute a ‘meeting.’” *Id.* at 564, 566. Other exchanges of information also have been found to constitute a “meeting.” In 1996, the state auditor held that two members of a three-member board violated the OPMA when one board member called another to discuss agency business. The calls lasted from one minute to up to one hour. The Attorney General’s Office in a 1991 letter opinion advised that if one member of a three-member commission called another member to discuss an issue of importance to the commission, this call would constitute a meeting and would violate the OPMA. Letter to Mike Heavey, State Representative, January 17, 1991. One Court of Appeals found that a meeting might have taken place when a city council member spoke with individual council members in an attempt to reach a consensus. *Eugster*, 110 Wn. App. at 224. In 1996, the state auditor found that the board that operates a public ambulance service in Skamania County violated the OPMA when two members of the three-member board used a third party to exchange information between the members that ultimately became part of an agreement signed by the board. If members performed action by way of email exchanges or other written exchanges, one could arguably classify the activity as a meeting.

² Where no meeting subject to the OPMA took place, no attorney fees are available under the OPMA. *See* *Loefelhoz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 1199 (2004).

Presumably, such meetings are not prohibited so long as there has been proper notice and there is a speakerphone, video display terminal or other method of observation for the public and press to observe or otherwise follow the proceedings. With the proper scheduling of meeting and agenda, such procedures should meet the requirements of the OPMA.

IV. WHO MAY ATTEND PUBLIC MEETINGS

“[A]ll persons” may attend the meeting of the governing body of a public agency. RCW 42.30.030. The governing body cannot place conditions on attendance such as asking people to sign in or complete a questionnaire in order to attend. RCW 42.30.040. A governing body may set reasonable rules of conduct so meetings can be conducted in an orderly fashion, but access cannot be limited and cameras and tape recorders cannot be prohibited unless they are actually disruptive. RCW 42.30.050; *see also In re Recall of Kast*, 144 Wn.2d 807, 817-18, 31 P.3d 677 (2001) (body has discretion to remove disruptive party but must exercise discretion in a reasonable manner); Op. Atty. Gen. 1998, No. 15. If there is a disturbance and individuals are removed for disrupting the meeting, “[r]epresentatives of the press or other news media, except those participating in the disturbance,” must be allowed to remain in attendance. RCW 42.30.050. Members of the public not involved in the disturbance may also be allowed to stay. *Id.*

V. REQUIREMENTS FOR MEETINGS SUBJECT TO THE OPMA

The OPMA has separate requirements for “regular meetings,” for “special” or “emergency” meetings and for closed executive sessions.

A. Regular Meetings

Regular meetings are “recurring meetings held in accordance with a periodic schedule declared by statute or rule.” RCW 42.30.075; *see also* MRSC Report at 9. State and public agencies are required to give notice in accordance with statutes or rules pertaining to that agency under either RCW 42.30.070 (for public agencies) or .075 (for state agencies). The OPMA requires that public agencies establish a time for holding regular meetings “by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.” RCW 42.30.070; *see also* DESKBOOK, §21.4(1), at 21-9 (discussing regular meetings) (citation omitted); 1971 Att’y Gen. Op. No. 33 at 25-27 (“[I]f a particular governing body does hold regular meetings on a date fixed by law or rule, it must identify a time for such meetings by ordinance, resolution, etc.—and not, for example, by word of mouth or informal memo among the members or the like.”). State agencies must file a schedule of the time and place of regular meetings for publication with the Washington State Register on or before January of each year. Notice of any change from such schedule must be published in the State Register for distribution at least 20 days prior to the rescheduled meeting date. RCW 42.30.075.

If a governing body holds regularly recurring “study sessions,” “retreats,” or any other form of informal gathering where action takes place, those meetings should be included in the regular meeting schedule. “The primary requirement for regularly scheduled meetings is that they be ‘open to the public.’” *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 789, 650

P.2d 220 (1982). *See also Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 435, 128 P.3d 588 (2006) (Johnson, J., dissenting) (“Public notice that insufficiently apprises those who may be affected undermines the public confidence and trust that is placed into those legislative bodies and their decision-making abilities.”) (citing RCW 42.30.060(1)). The Attorney General’s Open Government Manual is instructive on this issue, stating:

The OPMA does not allow for “*study sessions*”, “*retreats*”, or similar efforts to discuss agency issues without the required notice. *Notice must be given just as if a formally scheduled meeting was to be held.*

Att’y Gen. Open Gov’t Manual, §3.4(B) (emphasis added)

An agenda is not required for regular meetings, though one will often be created. In the event of a disruption of a regular meeting in which members of the public are excluded but the media is allowed to remain, final action may only be taken on matters appearing on a written agenda. RCW 42.30.050. Regular meetings with no formal agenda cannot result in final action in such a situation. *Id.* There is no sanction against an agency for failing to hold regular meetings; however, if they do, they must comply with the notice provisions in the OPMA for regular meetings. *See* 1971 Att’y Gen. Op. No. 33 at 16. Moreover, if an agency has meetings without a regular meeting schedule, those meetings will by default be treated as special meetings—and, again, must comply with the relevant provisions of the OPMA (see below). *Id.*

B. Special or Emergency Meetings

A special meeting is “a meeting other than a scheduled regular meeting[.]” DESKBOOK, § 21.4(2), at 21-9; *see also* RCW 42.30.080; Att’y Gen. Open Gov’t Manual, Chapter 3, §3.5(B). Special or emergency meetings may be called at any time by the presiding officer of the governing body or a majority or its members so long as 24 hours advance written notice is given to each member of the governing body and to each media organization that has on file with the governing body a written request to be notified of special meetings. *See* RCW 42.30.080³; *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 630 P.2d 930 (1981); *see also* Att’y Gen. Open Gov’t Manual, § 3.5(B) (special meetings must be called by

³A special meeting may be called at any time by the presiding officer of the governing body of a public agency or by a majority of the members of the governing body by delivering written notice personally, by mail, by fax, or by electronic mail to each member of the governing body; and to each local newspaper of general circulation and to each local radio or television station which has on file with the governing body a written request to be notified of such special meeting or of all special meetings. Such notice must be delivered personally, by mail, by fax, or by electronic mail at least twenty-four hours before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the governing body a written waiver of notice. Such waiver may be given by telegram, by fax, or electronic mail. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. The notices provided in this section may be dispensed with in the event 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 time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage.

presiding officer or majority of body). The notice must include an agenda specifying the business to be transacted at the meeting, and agency action at the meeting is limited to those items on the agenda. RCW 42.30.080.⁴ With only vague and generalized descriptions for what exactly is going to be discussed, reviewed, considered, or ultimately acted upon at the special meeting, a member of the public, media, or even a Board member, would have no idea whether the body was authorized to take any final action. *See* RCW 42.30.080; *see also* Att’y Gen. Open Gov’t Manual, § 3.5(B). Agencies can call special meetings without notice only in emergencies involving or threatening sudden, unexpected and severe physical damage to persons or property and requiring immediate action. RCW 42.30.080; *Mead Sch. Dist. v. Mead Educ. Ass’n*, 85 Wn.2d 140, 530 P.2d 302 (1975). An impending teacher’s strike, for example, is not such an emergency. *Mead*, 85 Wn.2d at 145. Only those to whom notice was required to be given have standing to bring a claim under the OPMA for failing to give adequate notice for a special meeting. *See Kirk*, 95 Wn.2d at 772-73.

C. Closed Meetings and Executive Sessions

Closed meetings or executive sessions are allowed under specific circumstances, discussed below. *See* DESKBOOK, § 21.5(1) (discussing general requirements for a valid executive session); *see also* Att’y Gen. Open Gov’t Manual, §§ 4.2-4.3 (same). Although not explicitly defined under the OPMA, executive sessions are “understood to mean that part of a regular or special meeting of the governing body that is closed to the public.” DESKBOOK, § 21.5, at 21-11. Governing bodies are allowed during a regular or special meeting to go into an executive session if the matter to be discussed falls within one of the exceptions to the OPMA. Because the public can be excluded, executive sessions are allowed only under these limited circumstances and for a narrow set of specifically-authorized purposes. *See id.*, § 21.5, at 21-11–21-12 (describing executive sessions); *see also Port Townsend Pub. Co., Inc. v. Brown*, 18 Wn. App. 80, 82 n.3, 567 P.2d 664 (1977) (same); *see also* Att’y Gen. Open Gov’t Manual, Chapter 4, § 4.1. To meet in executive session, the topic of the governing body’s meeting must fit within one of 13 specific grounds. *See* RCW 42.30.110(1)(a)–(m). *See also Miller*, 138 Wn.2d at 327 (action not specifically enumerated in executive session exception “must take place in public”).

Before going into executive session, the presiding officer of the governing body must publicly announce to those in attendance that it is going into executive session and the purpose for excluding the public from the meeting place. RCW 42.30.110(2). It is clearly contemplated that the governing body will meet first in public before closing a meeting. *Id.*; *see also* DESKBOOK, § 21.5(1), at 21-11–21-12; Att’y Gen. Open Gov’t Manual, § 4.2; MRSC Report at 15 (“A governing body may hold an executive session only for specified purposes... and only during a regular or special meeting.”). The public announcement should specifically identify the exemption of the Act that is involved and the general subject matter of the closed session. *See id.* Further, the announced purpose of the executive session “must contain enough detail to identify the purpose as falling within one of those identified in RCW 42.30.110(1).” *See* DESKBOOK, §21.5(1), at 21-11; *see also* Att’y Gen. Open Gov’t Manual, §4.2. Therefore, “it

⁴ The state auditor held that the Bothell City Council violated the OPMA in 1999 when it discussed a topic not on the published agenda for a special meeting. Washington State Auditor Schedule of Audit Findings for 1/1/99-12/31/99.

would not be sufficient for a presiding officer to declare simply that the governing body will now meet in executive session to discuss ‘personnel matters.’” *Miller*, 138 Wn.2d at 327; *see also* Att’y Gen. Open Gov’t Manual, §4.2 (“Discussion of personnel matters, in general, is not an authorized purpose for holding an executive session; only specific issues [authorized by RCW 42.30.120(1)] relating to personnel may be addressed in executive session.”); MRSC Report at 23 (“[P]ersonnel matters’ is too broad a purpose and could include purposes not authorized by statute.”). *See also Feature Realty v. City of Spokane*, 331 F.3d 1082, 1089 (9th Cir. 2003) (“Unless the action is “explicitly specified,” it is “beyond the scope of the exception” and violates the Act.”) (citation omitted).

At the time a meeting is closed, the presiding officer must announce when the executive session will be concluded and, if it is not concluded at that time, the presiding officer must make a subsequent announcement on the extension of the time. RCW 42.30.110(2). *See* DESKBOOK, §21.5, at 21-11; *see also* Att’y Gen. Open Gov’t Manual, § 4.2 (same); MRSC Report at 16 (same). The purpose of this requirement is articulated in the Attorney General’s Open Government Manual:

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 when the presiding officer announced the executive session would conclude.

Id. at § 4.2 (emphasis in original); *see also* DESKBOOK, §21.5(1), at 21-11–21-12.

D. Adjournments and Continuances

If a regular meeting or special meeting is adjourned to another date and time or a hearing at a meeting is continued, a notice shall be conspicuously placed on or near the door of the place where the meeting was held immediately after the adjournment or continuance. RCW 42.30.090-.100. The notice should state the location, date and time at which the meeting or hearing will resume. Notice must also be given to all members of the governing body and to all media entities that have filed requests for notice of special meetings in the same manner as required for notice of special meetings. *Id.*

E. Minutes

Though the OPMA does not have a provision regarding minutes, there is a separate state law that requires minutes of regular and special meetings to be promptly recorded and open to public inspection. *See* RCW 42.32.030 (“The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.”).⁵ Written or taped

⁵ The state auditor held that the King County Water District failed to comply with state law in 1998 when it failed to prepare minutes for one special meeting, failed to approve regular meeting minutes, made corrections to minutes without commissioners’ approval, made changes to prior minutes outside of a meeting without any indication in subsequent minutes or sufficiently describing or identifying changes, and added disbursement payment vouchers to minutes after minutes approval. Washington State Auditor Audit Report No. 61149 at 6, 9 (Mar. 17, 2000).

minutes, whether from an open meeting or a closed meeting or executive session, are public records and are available under the Public Records Act unless they fall within an exemption to that Act. *See generally* RCW 42.56.

F. Final Decisions and Votes

Secret ballots are forbidden at any meeting required to be open under the OPMA. RCW 42.30.060. Members must cast their votes and make their recommendations openly so that observers know each member's position. Final action taken by secret ballot vote is null and void. *Id.*

VI. PENALTIES FOR FAILURE TO COMPLY WITH THE OPMA

The OPMA provides:

No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection *shall be null and void.*

RCW 42.30.060(1) (emphasis added). The Legislature chose the word “shall,” meaning the nullification remedy is mandatory once a court finds that a meeting violated the OPMA in some manner. *See Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366, 371, 203 P.3d 1069 (2009) (“Unless clear contrary legislative intent exists, the word ‘shall’ in a statute is a mandatory directive.”) (citation omitted). Moreover, if an action made subsequent to the unlawful action merely ratifies the unlawful action, the ratification is also null and void. *See Clark v. City of Lakewood*, 259 F.3d 996, 1014 n.10 (9th Cir 2001) (citation omitted); *see also Miller*, 138 Wn.2d at 329-31. Final action taken at a meeting failing to comply with the requirements of the OPMA is null and void. RCW 42.30.060; *see, e.g., Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994); *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992); *Mason County v. Public Employment Relations Comm'n*, 54 Wn. App. 36, 771 P.2d 1185 (1989); *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656 (1988). Also each member of the governing body who attends the meeting with knowledge that the meeting is in violation of the OPMA is personally liable for a mandatory civil penalty of \$100. RCW 42.30.120(1).

In some cases, preliminary actions taken at a meeting held in violation of the OPMA could affect the validity of final action taken in a meeting that complied with the law. In *Clark v. City of Lakewood*, the Lakewood City Council developed and passed an ordinance in an open meeting but based its actions on the factual findings of a task force that met privately in violation of the OPMA. *Clark*, 259 F.3d at 1013-14. Because the task force developed those factual findings in violation of the OPMA, they were null and void and could provide no support to show the ordinance furthered a significant governmental interest. *Id.* at 1015.

Consequently, the ordinance based on those findings might not survive a constitutional challenge. *Id.*

Any person or entity, including media organizations, may commence a court action for an injunction or mandamus to stop or prevent violations under the OPMA. RCW 42.30.130.⁶ *See also* 1971 Atty Gen. Op. No. 33 at 38 n.19 (discussing legislative history of standing requirement). *See, e.g., Wood*, 107 Wn. App. at 556 (suit by school employee to remedy closed meetings held by email); *Protect the Peninsula's Future*, 66 Wn. App. at 672 (suit by non-profit citizens group to remedy illegal executive sessions). To support a claim under the OPMA, and subject governing board members to personal liability, a plaintiff must show (1) members of a “governing body,” (2) held a “meeting” of that body, (3) where that body took “action” in violation of the OPMA, and (4) members of that body knew that the meeting violated the statute. *See Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902, 86 P.3d 835 (2004) (citations omitted); *see also Eugster*, 118 Wn. App. at 424 (citation omitted); *see also Wood*, 107 Wn. App. at 558. If a person prevails against an agency for a violation of the OPMA, he or she will recover his or her reasonable expenses and attorneys’ fees in bringing the action. RCW 42.30.120(2). Again, to prevail, a party need only establish that an OPMA violation has occurred, not that the participants knowingly violated the law. *See, e.g., Miller*, 138 Wn.2d at 331-32 (awarding attorneys’ fees and costs despite finding that participants believed they were acting appropriately under the law).

A knowing violation of the OPMA can also result in recall from office. *See, e.g., In re Recall of Davis*, 164 Wn.2d 361, 193 P.3d 98 (2008); *In re Anderson*, 131 Wn.2d 92, 929 P.2d 410 (1997); *In re Recall of Roberts*, 115 Wn.2d 551, 799 P.2d 734 (1990); *Pederson v. Moser*, 99 Wn.2d 456, 662 P.2d 866 (1983); *Cole v. Webster*, 103 Wn.2d 280, 692 P.2d 799 (1984). The governor may also remove an appointee confirmed by the Senate if the governor believes the appointee has violated the OPMA. RCW 43.06.080; *see also Price v. City of Seattle*, 39 Wash. 376, 81 P. 847 (1905); *State v. Johns*, 139 Wash. 525, 248 P. 423 (1926) (confirming governor’s plenary power to remove appointees believed to have committed misconduct or malfeasance).

VII. CLOSED MEETINGS THAT ARE ALLOWED UNDER THE OPMA

The OPMA is a remedial legislation, and its provisions are to be liberally construed. RCW 42.30.910. Accordingly, any exception to the Act must be narrowly confined. *Miller*, 138 Wn.2d at 324. The OPMA allows for closed meetings in only two circumstances.⁷ First, certain meetings may be closed because the OPMA is deemed not to apply to such meetings.

⁶ The OPMA does not contain a specific statute of limitations for enforcement actions. The Washington State Supreme Court has stated that in situations where there is no statute of limitations provided for a particular cause of action, the court is to adopt the “catch-all” statute of limitations, RCW 4.16.130 (“An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.”). *See Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 721, 709 P.2d 793 (1985) (“[RCW 4.16.130] serves as a limitation for any cases not fitting into the other limitation provisions. This [catch-all provision] serves the State's purpose to compel prompt litigation and not leave persons fearful of litigation unlimited by time.”).

⁷ Though in the event of a disturbance at a meeting, the governing body may order the room clear of the public, such a situation does not allow the meeting to be closed as members of the media who were not involved in the disturbance must be allowed to remain. RCW 42.30.050.

RCW 42.30.140. Second, agencies are permitted, under certain circumstances, to have a closed executive session. RCW 42.30.110(1) (a)-(m). The areas not covered by the Act and the executive session exception are discretionary. In other words, there is no requirement that the meetings be closed or that the public be excluded.

VIII. MEETINGS TO WHICH THE OPMA DOES NOT APPLY

Meetings may be closed in five situations where the OPMA has been deemed not to apply:

- (1) The formal granting or denying of a license, permit or certificate to engage in a business, occupation or profession, or disciplinary proceedings involving a member of such business, occupation or profession, or to issue a license for sports activity or to operate a motor vehicle or mechanical device, RCW 42.30.140(1).
- (2) Proceedings of a quasi-judicial nature relating to named parties, as opposed to a matter having a general effect on the public or on a class or group, RCW 42.30.140(2). A four-part test is used to determine if a proceeding is “quasi-judicial”:
 - (1) [w]hether a court could have been charged with making the agency’s decision;
 - (2) whether the action is one which historically has been performed by courts;
 - (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and
 - (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.

Protect the Peninsula’s Future, 66 Wn. App. at 676. Applying the test, a county commission’s consideration of whether to grant a permit allowing the city to extend its sewer outfall, as a matter of significant public interest, was not a “quasi-judicial matter between named parties.” *Id.*

- (3) Matters covered by the state Administrative Procedures Act (“APA”).⁸ RCW 42.30.140(3). This typically involves adjudications by state administrative bodies. As a general rule, fact-finding by these bodies is open, but the deliberations are closed. This exemption has no impact on local government since the APA does not apply to local agencies. *See Victoria Tower P’ship v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987).
- (4) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings and discussions relating to the interpretation or application of a labor agreement, RCW 42.30.140(4).
- (5) Meetings or portions of meetings concerning the strategy or position to be taken by the governing body during the course of collective bargaining, professional negotiations or grievance or mediation proceedings, or involving reviewing proposals made in such negotiations. *Id.* In *The American Civil Liberties Union of Washington v. City of*

⁸ Ch. 34.05 RCW.

Seattle, 121 Wn. App. 544, 89 P.3d 295 (2004), the court held that the OPMA does not expressly exempt from disclosure written materials for labor negotiation agreements and the court may not imply such an exemption. In anticipation of new contract negotiations, the Seattle Police Officers Guild and the City of Seattle exchanged lists of issues that each planned to address during the upcoming negotiations. The ACLU requested copies of the lists and when that request was refused, subsequently filed suit. Without conducting an in camera review of the documents sought, the trial court concluded in part that the lists were exempt from the OPMA. The Court of Appeals overruled that part of the trial court opinion, noting that although collective bargaining sessions relating to labor negotiations themselves were exempted under the OPMA, that protection does not explicitly include any documents.

IX. EXECUTIVE SESSION JUSTIFICATIONS

As stated above, executive sessions may be called for 13 specific purposes. Since all “action” (not simply “final action”) must ordinarily be performed in an open meeting, any action performed in an executive session violates the OPMA unless it falls within the specific parameters of an executive session exception. *Miller*, 138 Wn.2d at 326-27. It is illegal to engage in any action in an executive session, including initial discussions, on a subject or for a purpose beyond that specifically identified by an executive session exception. *Id.* Thus, if an exception allows a governing body to “evaluate” or “consider” a subject, the governing body may not attempt to reach a collective decision on the subject in executive session. *Id.* at 326. For example, in *Feature Realty v. City of Spokane*, , the Ninth Circuit held that although an exception to the OPMA applied to the distribution of a confidential memorandum detailing settlement provisions by the city council’s attorney during a closed-door city council executive session under RCW 42.30.110(1)(i) (discussed below), the council’s approval of that settlement by way of a “collective positive decision” done by informal consensus during the closed session violated the OPMA because that action was beyond the scope of the exception. 331 F.3d at 1090-91. The court in *Feature Realty* further emphasized that, “[t]he statutory procedures at issue here are essential to protect the interests of the public.” *Id.* at 1091.

The 13 executive session exceptions are:

1. To consider matters affecting national security, RCW 42.30.110(1)(a);
2. To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would likely increase the price, RCW 42.30.110(1)(b);
3. To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding the consideration would likely lower the price, though final action selling or leasing public property must be conducted during an open meeting, RCW 42.30.110(1)(c);⁹

⁹ The state auditor held that the Benton County Board of Commissioners and Franklin County Board of Commissioners violated the OPMA in 1998 when they held a joint executive session to discuss turning over the management of the Benton-Franklin County fairgrounds to a private firm. The auditor held that the discussion did

4. To review negotiations on the performance of publicly held contracts when public knowledge would likely increase costs, RCW 42.30.110(1)(d);
5. In the case of a commercial export trading company, to consider financial and commercial information supplied by private persons to the export trading company, RCW 42.30.110(1)(e);
6. To receive and evaluate complaints or charges brought against a public officer or employee, unless the officer or employee requests that the meeting be open, RCW 42.30.110(1)(f), though the discharging or disciplining of any employee or officer must occur in a public meeting, RCW 42.30.110(f)-(g);
7. To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee, though discussions of salaries, wages and other conditions of employment to be generally applied within an agency as well as final actions, including hiring, setting salaries of an individual or class of employees, or discharging or disciplining an employee must occur in public meeting, RCW 42.30.110(1)(g);^{10 11 12}
8. To evaluate the qualifications of a candidate for appointment to elective office, though interview of the candidate and final action appointing a candidate must be performed in an open meeting, RCW 42.30.110(1)(h);
9. To discuss with a lawyer or lawyers representing the agency in matters relating to agency enforcement actions or litigation or potential litigation to which the agency, the governing body or a member is, or is likely to become, a party, when public knowledge of the discussion is likely to result in adverse legal or financial consequences to the agency. RCW 42.30.110(1)(i); *see Washington Public Trust Advocates*, 120 Wn. App. at 902-03 (concluding that a meeting of a mayor and special counsel falls within this exception). The mere presence of the agency's attorney does not trigger this

not fall within .110(1)(c) as argued by the Franklin County Board and did not meet the criteria of any other executive session exception. Washington State Auditor Audit Report Nos. 60805 (Dec. 3, 1999), 60585 at 5 (Sept. 30, 1999).

¹⁰ In *Miller v. City of Tacoma*, the Washington Supreme Court held that informal balloting during an executive session regarding city council members' preferences among candidates for an unpaid position was beyond the evaluation of the candidates' qualifications and thus action performed in an executive session was in violation of the OPMA. 138 Wn.2d at 326-28. In her concurrence, Justice Madsen also found the action outside of the exemption because the candidate was unpaid and thus not a candidate for "public employment." *Id.* at 332 (Madsen, J. concurring/dissenting).

¹¹ *See also*, Op. Atty. Gen. 1992, No. 21 (purchase of life insurance for public utility district's commissioners and managers is compensation and so must be discussed in open meeting and voted on in open meeting. "Reviewing an employees' performance does not include fixing his or her compensation; however, that must be done in public.")

¹² The state auditor held that the City of Monroe violated the OPMA in 1999 when it entered into a contract for legal services with one of its council members outside of an open meeting. The decision, in addition to violating the OPMA, led to the council member holding incompatible offices. Washington State Audit Report No. 61046 at 4 (Feb. 4, 2000).

exception. "Potential litigation" involves litigation that has been specifically threatened to which the agency, governing body or member is, or is likely to become, a party; litigation that the agency reasonably believes may be commenced by or against the agency, governing body or member; or litigation or legal risks of a proposed or current action when public discussion of the litigation or legal risks is likely to result in adverse legal or financial consequences to the agency. RCW 42.30.110(1)(i). Officials are not required to determine before meeting with counsel whether the discussion fits within this exception. Rather, the exception is unavailable only when an agency objectively should have known beforehand that an open discussion would be unlikely to have adverse consequences. *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586-87, 30 P.3d 474 (2001);

10. In the case of the state library commission or advisory bodies, to consider western library network prices, products, equipment and services, when public discussion would reduce the network's competitiveness, though final action must be taken in public, RCW 42.30.110(1)(j);

11. In the case of the State Investment Board, to consider financial and commercial information when the information relates to the investment of public trust or retirement funds and when public knowledge regarding the discussion would result in loss to the funds or in private loss to the providers of this information, RCW 42.30.110(1)(k);

12. In considering proprietary or confidential nonpublished information related to the development, acquisition, or implementation of state purchased health care services as provided in RCW 41.05.026, RCW 42.30.110(1)(l); and

13. In the case of the life sciences discovery fund authority, to consider the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information, RCW 42.30.110(1)(m).