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info@washingtoncog.org

6351 Seaview Ave NW

Seattle, WA 98107-2664

Phone: 206.782.0393 FAX: 206.623.4474

Washington *Coalition for* Open Government

washingtoncog.org

September 27, 2011

Jeff Even, Deputy Solicitor General
Office of the Attorney General
Solicitor General Division
P.O. Box 40100
Olympia, Washington 98504-0100

Re: Attorney General Opinion Request No. 11-08-04

Dear Mr. Even:

This letter is submitted as public comment in response to the request for an Attorney General Opinion from Representative Jeff Morris, who asked the following:

In light of recent decisions, does the Open Public Meetings Act apply to the Washington State Health Insurance Pools, contrary to a conclusion in an informal opinion dated December 2, 2000, that it does not?

It is our opinion that WSHIP is subject to the OPMA.

Generally speaking, the OPMA requires that all meetings of a governing body of a public agency shall be open and public. RCW 42.30.030.

RCW 42.30.020(1) defines "public agency" to include:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) 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;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

RCW 42.30.020(2) defines “governing body”:

(2) “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 most relevant case in analyzing whether WSHIP is a public agency is *West v. State, Washington Ass’n of County Officials*, 162 Wn.App. 120 (2011). In that case, the Court of Appeals (Div. 2) held that the Washington Association of County Officials (WACO) was a public agency under the OPMA. More importantly, the court clarified the appropriate test for evaluating when an entity falls within the OPMA’s definition of “public agency.”

The appellant in *West v. State* had argued that the court, in determining whether WACO was a public agency, should rely on the functional equivalent test provided in *Telford v. Thurston County Board of Commissioners*, 95 Wn.App. 149, *review denied*, 138 Wn.2d 1015 (1999). The *Telford* test uses four factors to evaluate an entity’s status under the PRA: (1) the entity’s governmental function, (2) the entity’s government funding, (3) government control over the entity, and (4) the entity’s origin. *Telford*, 95 Wn.App. at 162–63. The *Telford* court did not discuss the OPMA.

The *West v. State* court declined to rely upon the *Telford* functional equivalent test in evaluating the OPMA’s applicability to WACO. *Telford*, the court said, “informs but does not control our decision here.” *West*, 162 Wn.App. at 133.

Nevertheless, the court noted that the OPMA calls for liberal construction. Looking to the OPMA’s definition of a state agency, the court noted that WACO was not a state board, commission, committee, department, or educational institution. Thus, to be a public agency, WACO would have to qualify as an “other state agency which is created by or pursuant to statute.” RCW 42.30.020(1)(a). The court held that for purposes of the OPMA, a state agency “may be an association or organization **created by or pursuant to statute** which **serves a statewide public function.**” *West*, 162 Wn.App. at 132 (emphasis added). Using this analysis, the Court of Appeals held that WACO was a public agency for purposes of the OPMA.

Turning to the origin and functions of WSHIP, it appears that this entity falls under the OPMA’s definition of a public agency as it was created by statute and serves a statewide public function. The Washington Legislature created WSHIP by RCW 48.41.040 (“There is created a nonprofit entity to be known as the Washington state health insurance pool.”) As for the public function factor, RCW 48.41.020 states:

It is the purpose and intent of the legislature to provide access to health insurance coverage to all residents of Washington who are denied health insurance. It is the intent of the Washington state health insurance coverage access act to provide a mechanism to ensure the availability of comprehensive health insurance to persons unable to obtain such insurance coverage on either an individual or group basis directly under any health plan.

We note that the term “statewide public function” is first used in *West v. State*, which does not define the term. However, the intent of the legislature in creating WSHIP was a “comprehensive” plan to provide health insurance coverage to “all residents” who had been denied health insurance coverage. RCW 48.41.020. The program is statewide in its impact and coverage, and appears motivated by a public interest in providing health care coverage to residents.

Thus, WSHIP falls under the OPMA’s definition of a public agency.

The OPMA applies only to meetings of the governing body of a public agency. WSHIP has such a governing body. As noted on WSHIP’s web site (<https://www.wship.org/structure.asp>):

Board of Directors

Pool oversight is the responsibility of an eleven-member Board of Directors, ten of whom serve three-year terms. Six directors are appointed by the Governor; they represent consumers (two positions); small employers (one); large employers (one); health care providers (one), and agents (one). Four directors are elected by Member Plans. The Insurance Commissioner or his designee is an ex-officio, non-voting director.

The WSHIP Board's powers and duties are set forth at RCW 48.41.060.

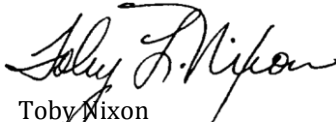
We note that the Office of the Attorney General issued an informal opinion dated December 21, 2000, in which it discussed whether WSHIP was subject to the OPMA. This opinion relied on a four-part test borrowed from a Connecticut case for determining whether an entity is a public agency under the OPMA. The informal AGO concluded that the OPMA did not apply to meetings of the board of directors of the WSHIP but admitted the question was "close." Given the discussion above, this informal opinion does not employ the correct analysis and should be disregarded in light of *West v. State*.

In conclusion, WSHIP is a public agency, created by statute for a statewide public function, and the meetings of its governing body are subject to the OPMA.

We hope this information will be helpful.

Sincerely,

WASHINGTON COALITION FOR OPEN GOVERNMENT

A handwritten signature in black ink, appearing to read "Toby Nixon", written in a cursive style.

Toby Nixon
President