Knowing the Territory

Basic Legal Guidelines for Washington City, County and Special Purpose District Officials

Municipal Research and Services Center

October 2013

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Knowing the Territory

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October 2013
$12 (City/County/State/Local Government)/$18 (All Others)

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Preface

This is the twelfth 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 Flannary P. Collins and Paul Sullivan, Legal Consultants, for their contributions to 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*, § 1.21. (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*, § 2.8.

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

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[1] *Lauterbach 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 impliedly 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*, § 12.173.8; *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, resorting 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

[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.

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,

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.

the appointment of such subordinate officers is usually, if not always, the express prerogative of the executive. *See, e.g.*, RCW 35.23.021; 35.27.070; 35A.12.090; and 35A.13.080. And, although the council has general supervision over the city's operations, neither that body nor its committees or individual councilmembers should attempt to exercise powers that are assigned by law to the executive branch. In fact, in cities operating under the council-manager form of government, the law expressly forbids councilmembers from interfering in certain administrative matters, although the council may discuss those matters with the city manager in open session. RCW 35.18.110 and RCW 35A.13.120.

The executive branch of a city, headed by the mayor (or the manager in those cities having a council-manager form of government), is responsible for the day-to-day administration of city affairs. Generally, the responsibility for employing, disciplining, and dismissing department heads and employees is 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; 35.18.010; and 35.18.120. 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.

[3]The 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 personal 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 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:

> (2) 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.
>
> (3) 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

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

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).[4] 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, 1185 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; 36.16.138 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 officials, employees, and volunteers.

[4]The 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.

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. Chapter 42.23 RCW 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 chapter are considered to be minimum ones. RCW 42.23.060.

2. Although the chapter refers to "officers," rather than employees, the word "officers" is broadly defined to include deputies and assistants of such an officer, 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

1. The beneficial interests in contracts prohibited by RCW 42.23.030 are financial interests only. *Barry v. Johns*, 82 Wn. App. 865, 868, 920 P.2d 222 (1996).

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. *See* AGO 53-55 No. 317.

Question: May a city, county or special purpose district official accept a valuable gift from a foreign dignitary in connection with a visit?

Answer: A common policy is to allow the acceptance of such a gift on behalf of the jurisdiction, but not for personal use. Arguably, under the wording of RCW 42.23.070(2), a jurisdiction may adopt a formal policy by local "law" governing such occasions, allowing exceptions in appropriate cases involving essentially personal items, subject to disclosure and other procedures to guard against abuse.

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 insidious 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.

Northport v. Northport Townsite Co., 27 Wash. 543, 549, 68 Pac. 204 (1902).

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 meritorious (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 or 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, 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*,[5] 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 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

[5]From the legal phrase de minimis non curat lex (the law does not concern itself with trifles).

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).[6]

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).[7]

9. Under certain defined circumstances, any employment contract with the spouse of a public hospital district commissioner.[8]

If an exception applies to a particular contract, the municipal officer may not vote for its authorization, approval, or ratification and the 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

[6]The statute allows no exception, based on value or otherwise, for a sale or lease by the city or county to an official under whom the contract would be made or supervised.

[7]See RCW 42.23.030(6)(c)(ii).

[8]RCW 42.23.030(8)-(11).

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*, § 12.59; *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*, § 12.123.[9] 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*, § 12.59. 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.

[9]As an exception to this general rule, however, a councilmember may vote for himself or herself for appointment to a position, such as mayor pro tem, which must be filled from the membership of the council. See *Gayder v. Spiotta*, 206 N. J. Super. 556, 503 A.2d 348, 351-52 (1985).

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*, § 12.112.

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. 90), 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*, § 12.114.

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.

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 313, 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.[10] 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:

   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

[10]However, in *Bunko 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.

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.

4

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.[11] *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 also 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

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

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

[11]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"). *Health Care Facilities v. Ray*, 93 Wn.2d 108, 115-16, 605 P.2d 1260 (1980).

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.[12] 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;[13]
>
> (3) Activities which are a part of the normal and regular conduct of the office or agency.[14]

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 42.17A.575.

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[12]The facilities of a public office may be made available on a non-discriminatory, equal access basis, for political uses. WAC 390-05-271(2)(a).

[13]A 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).

[14]The 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.).

5

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., City Bidding Book – Washington State*, Municipal Research and Services Center, Report No. 52 Revised (May 2013) 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.[15]

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[15]See, also RCW 52.14.110 for fire protection districts; and RCW 57.08.050 for water-sewer districts.

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.)

6

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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[16]See 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,

[17] *Slaughter v. Fire District No. 20*, 50 Wn. App. 733, 738, 750 P.2d 656 (1988), rev. denied, 113 Wn.2d 1014 (1989). The court of appeals, in a later case, also held invalid a labor agreement that had been negotiated at meetings that violated the Act. *Mason County v. PERC*, 54 Wn. App. 36, 40-41, 771 P.2d 1185 (1989). 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.

[18] The 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.

[19] A 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[20]

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; 35.23.221; 35.22.288; 35A.12.160.[21]

Special Meetings[22]

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.[23]
   b. Must be delivered personally, by mail, by fax, or by e-mail 24 hours in advance.
   c. Must be posted on agency's website, if any, so long as agency has at least ten full time employees and has a designated employee or contractor responsible for updating the website.
   d. May be waived by a member.
   e. 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.[24] 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 telephone or e-mail if a quorum of the body discusses a topic of business through an active exchange of information and opinions by telephone or e-mail.[25]

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[20]RCW 42.30.060-.075.

[21]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. *Port of Edmonds v. Fur 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.

[22]RCW 42.30.080.

[23]Other business may be discussed but final action may be taken only on matters specified in the notice of the special meeting.

[24]Note that the restrictions on holding city and town council meetings within the corporate limits were removed by the state legislature in 1994. However, all final actions on resolutions and ordinances must take place within the corporate limits of the city.

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.

[25]See *Battle Ground School District v. Wood*, 107 Wn. App. 550, 27 P.3d 1208 (2001).

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:[26]

   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.[27] 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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[26]The 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.

[27]A 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;

f. 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;

g. 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

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.") RCW 42.32.030.

2. No minutes are required to be recorded for executive sessions. If minutes are kept for an executive session, be aware that there is no categorical exemption for executive session minutes under the Public Records Act. (The Public Records Act is discussed in the next chapter.)

Violations

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

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[28]RCW 42.30.110(1)(i).

[29]There 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.

3. Mandamus or injunctive action may be brought to stop or prevent violations. RCW 42.30.130.

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 attorney 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.[30]

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[30]See *In re Recall of Ward*, 175 Wn.2d 429 (2012); *In re Beasley*, 128 Wn.2d 419 (1996); *In re Roberts*, 115 Wn.2d 556 (1990); *Estey 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).

7

Public Records

The public, through legislation originally adopted by Initiative 276 in 1972, requires that records prepared, owned, used or retained by their government officials and employees 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 protection for certain records that an agency can keep confidential for valid reasons specified in state law. Failure to provide records as required by law can be expensive, both monetarily and in the loss of public trust.

Basics

In addition to a subchapter on public records disclosure which was modeled after the federal "Freedom of Information Act," Initiative 276 also dealt 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 regulations on campaign finance, legislative lobbying and personal finance disclosure are covered in chapter 42.17A RCW. The Public Disclosure Commission has extensive information available to candidates and public officials on campaign finance, legislative lobbying and personal financial disclosure; this publication will not duplicate that information.

The following discussion is intended to supply a basic working knowledge of the "freedom of information" provisions in the Public Records Act (PRA), codified at chapter 42.56.RCW.[31] For a more detailed treatment of the public records disclosure law, see the MRSC publication, *Public Records Act for Washington Cities, Counties and Special Purpose Districts.*

Purpose

The PRA is "a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978).

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[31]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.

> The people of this state do not yield their sovereignty to the agencies that 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 maintain control over the instruments that they have created. RCW 42.56.030.

The PRA is to be "liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030.

Courts frequently cite these principles in deciding public records cases and it is important to recognize that the principles behind the PRA all favor disclosure of records to the public.

Definitions

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(3).

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 42.56.010(4).

Agency Duties

1. Agencies (this term expressly includes all counties, cities, towns, and special purpose districts) shall make all public records available for public inspection and copying unless the record falls within a specific exemption. RCW 42.56.070. Agencies must rely solely on statutory exemptions for withholding public records and may not withhold records based solely upon the identity of the requestor[32]. RCW 42.56.070 and 42.56.080.

2. Agencies are required to establish procedures for access to their records. Indexes should be developed and published, unless to do so would be unduly burdensome. RCW 42.56.040 and .070.

3. 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 website, or included in its publications. RCW 42.56.580.

4. Records must be made available for public inspection and copying during customary office hours. RCW 42.56.090.

Failure to provide records as required by law can be expensive, both monetarily and in the loss of public trust.

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

[32]Except, see RCW 42.56.565, which allows an agency to withhold records from prisoners if the agency secures a court injunction, after proving the prisoner has a bad faith intent, such as an intent to harass agency employees.

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, agencies 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; rather, a few specific exemptions incorporate privacy as one of the elements of the exemptions. 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 qualified exemptions 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 for disclosure or nondisclosure, that desire shall govern.

   f. Test questions, scoring keys, and other examination data used to administer

[33]Whether 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.

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. (Referred to as the "deliberative process" exemption.)

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. If a record contains both exempt and non-exempt information, the agency cannot withhold the entire record. Instead, the agency may redact only that portion of the record that falls within a specific exemption and must release the remainder. *Mechling v. Monroe*, 152 Wn. App 830, 853, 222 P.3d 808 (2009). Furthermore, when the reason for the exemption ceases, the records may lose their exemptions. For example, records which fall under the deliberative process exemption lose their exempt status once the policies or recommendations set forth in the records have been implemented. *West v. Port of Olympia*, 146 Wn. App 108, 192 P.3d 926 (2008). Also, real estate appraisals are no longer exempt when the acquisition or sale is abandoned or the property has been acquired or sold. RCW 42.56.260.

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.

Responding to Records Requests

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) provide a link to the specific page on the agency's website where the records are located (unless the requestor notifies the agency that he or she cannot access records through the internet), (3)

acknowledge the request and give an estimate of when the response will be made,[34] or (4) deny the request. They must give written reasons for denials of access 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.

[34]Reasons 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 is on the agency. RCW 42.56.550(2).

Violations

A person whose request for inspection or copying is wrongly denied can sue on his or her own behalf. The lawsuit must be filed within one year of the agency's claim of exemption or last production of a record. The court may order the record(s) 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.[35] The burden of proof is generally on the agency to justify its decision on the basis of a specific statutory exemption allowing for non-disclosure.[36]

[35]See *Yousoufian v. Office of the King County Executive*, 168 Wn. 2d 444 (2010).

[36]RCW 42.56.550.

8

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 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;[37] other special purpose districts may have in-house attorneys or hire outside legal counsel for assistance.[38]

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[37]RCW 36.27.020(2).

[38]See, 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 councilmembers, and the city council should not hire separate outside council 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.

See also a discussion of this issue in the case of *Tukwila v. Todd*, 17 Wn. App. 401, 406-407, 563 P.2d 223 (1977) and McQuillin, *Municipal Corporations*, § 29.16.

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."[39]

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 Association of Municipal Attorneys (1998), which is available on the MRSC website. 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.

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[39]The 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. 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 and employees 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.