

HEALTH LAW UPDATE

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E-Alert: E-mail Exchanges May Violate the Open Public Meetings Act

SUMMARY

E-mail exchanges among hospital district commissioners can constitute a violation of the Washington State Open Public Meetings Act ("OPMA"), Chapter 42.30 RCW. The OPMA requires that meetings of all governing bodies¹ be open to the public with prior notice. The Washington State Court of Appeals, Division II, ruled on July 27, 2001 that e-mail exchanges among members of a governing body can constitute a meeting. See Wood v. Battle Ground School District, Cause No. 25332-1-II (2001). Generally, if a majority of the commissioners participate in an e-mail discussion of governing body business, the commissioners are conducting a meeting in violation of the OPMA.

DISCUSSION

The implementing provision of the OPMA states that:

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

¹ Public Hospital District boards of Commissioners are considered "governing bodies" that must conduct open meetings.

RCW 42.30.030. In applying RCW 42.30.030 to e-mail exchanges, the central issue is whether an e-mail exchange qualifies as a "meeting" of the governing body. RCW 42.30.020(4) defines a "meeting" as "a meeting at which action is taken." In order for an e-mail exchange to qualify as an OPMA meeting, therefore, the exchange must qualify as both a meeting and contain action.

The OPMA defines "action" as follows:

the transaction of the official business of a public agency by a public body including, but not limited to receipt of public testimony, **deliberations, discussions, considerations, reviews, evaluations and final actions.**

(emphasis added). RCW 42.30.020(3).

Given the OPMA's strong purpose clause, public hospital districts should consider any discussion or deliberation of hospital business as constituting "action." The Wood decision recognizes one important qualification to this rule: a majority of governing body members must participate in the discussion to

constitute action.² The basis of this requirement is that a governing body cannot officially transact business without a majority of its members.

Based on this definition of a “meeting”, e-mail discussions of district business can constitute action. The issue discussed in the Wood case is whether an e-mail exchange constitutes a meeting under the OPMA if the governing body members participate in the exchange at different times and locations. The governing body in the Wood case was a five-member school board. The school board members used e-mails to discuss the termination of the school superintendent. At various dates a board member sent e-mails to all or a majority of the other board members. Two other board members also responded to the e-mails and copied their e-mails to all or a majority of the other board members. A school district employee filed suit against the school board in part because of the e-mails. The trial court ruled that the e-mails constituted a meeting in violation of the OPMA. The Court of Appeals ruled that e-mail exchanges can constitute OPMA meetings and also ruled that the school district employee had established

² Although not recognized in the Wood decision, committees of governing bodies constituting less than a quorum can conduct “action” if the committee acts on behalf of the governing body, conducts hearings or takes testimony or public comment. See RCW 42.30.020(2). A committee acts on behalf of a governing body when it exercises actual or de facto decision making authority. AGO 1986 No. 16, at 12. These situations will rarely occur in the context of e-mail exchanges.

a prima facie³ case that the e-mails constituted an OPMA meeting. The Court of Appeals remanded the meeting issue to the trial court to resolve some outstanding factual issues.

The court explicitly found that “a definition of ‘meeting’ that would require the physical presence of members in the same location would contravene the OPMA’s clear purpose.” The court stated:

...in light of the OPMA’s broad definition of ‘meeting’ and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a meeting. In doing so, we also recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a meeting.

³ A prima facie case essentially means that the plaintiffs established a rebuttable presumption that they have satisfied the elements of their case.

CONCLUSION AND RECOMMENDATIONS

Emails present new issues regarding OPMA compliance. The Wood case provides some clarity on the subject, but officials are cautioned that its facts are very limited. Wood essentially found a prima facie case of an OPMA meeting under the following facts:

1. A majority of school board members sent e-mails to each other on a single topic over a relatively short period of time (six days); and
2. The participating members apparently intended to vote on the subject of the e-mails.

The general guidelines that Wood established and the strong purpose of the OPMA strongly suggest that the courts may find OPMA meetings in a much broader range of e-mail exchanges. However, until the appellate courts provide more guidance, the exact applicability of the OPMA to e-mail exchanges remains speculative. The suggestions below present a conservative response to the Wood decision:

- When possible, limit e-mail exchanges on issues related to district business to less than a majority of the commissioners. This is the safest and easiest way to avoid an OPMA challenge. Note that, if a committee of the Board has actual or de facto decision making authority, e-mail exchanges among the committee

members can violate the OPMA even though the committee membership constitutes less than a majority of the governing body. Sending copies of an e-mail to less than a majority of the commissioners may not suffice if subsequent exchanges relay the content of the original exchange to a majority.

- Never decide at an open meeting that a majority of the commissioners will continue or complete discussion of an agenda item by e-mail.
- One-sided (no response anticipated) informational e-mails to a majority or more of commissioners are probably consistent with the OPMA. In open meetings, the commissioners should verbally announce that they have sent this type of e-mail if it relates to the discussion at hand. Commissioners are free to engage in e-mail exchanges with staff on one-sided e-mails, but not with each other.
- E-mail exchanges on issues that the commissioners will not address are consistent with the OPMA. However, if any reasonable chance exists that an issue relates to a vote that may or will come before the commissioners, a majority of the commissioners should not discuss the subject by e-mail.

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