Legal Considerations and Practical Tips Regarding Executive Sessions for Elected City and Town Officials

AWC Elected Officials Webinar

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Call on Joe and the other MRSC consultants with questions related to municipal law and for assistance with sample policies and other research.

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INTRODUCTION

• At MRSC, we are in regular contact with cities, towns, and other local governments across the state regarding issues of concern.

• The rules regarding executive sessions are of particular interest to cities and towns.

• In this presentation, I will focus on information tailored for elected city and town officials related to:
  • The rules under the Open Public Meetings Act (OPMA) that apply to executive sessions; and
  • Practical tips based on my experience addressing these issues as one of MRSC’s attorneys and as a former city attorney.
Overview

1. What is an Executive Session?
2. Why does the OPMA Matter?
3. Penalties under the OPMA
4. Executive Session Procedures
5. Who may Attend an Executive Session?
6. Public Records and Executive Sessions
7. Overview of Reasons for Executive Sessions
8. Confidential Information
9. Executive Sessions vs. Closed Sessions
10. Additional Resources
WHAT IS AN EXECUTIVE SESSION?

- Governed by the Open Public Meetings Act (OPMA)
- An executive session must be part of a regular or special meeting
- Closed to the public

The OPMA is codified in chapter 42.30 RCW

Executive sessions are governed by RCW 42.30.110 of the OPMA
But isn’t the whole point of the OPMA openness?

Yes, but … there are limited circumstances in which the public interest is served by allowing some city/town council discussions to be private, to, for example:

• Prevent sellers of real property from overcharging the city/town
• Prevent contractors from overcharging the city/town
• Facilitate fairness in personnel matters by allowing the city/town council to have frank discussions about the performance of city/town employees while protecting the privacy of those employees
• Help the council to make sound legal decisions and have thorough and frank discussions about legal risks by allowing the council to meet with legal counsel in private
Why does the OPMA matter to you as an elected official?

• Open government promotes better decision-making by city/town councils
• Lack of openness in city/town government leads to distrust
• OPMA violations can lead to fines against you personally
If there’s an OPMA violation, can I as a city/town elected official be subject to a penalty against me personally?
**Answer 1:**

Yes. Elected officials can be subject to a personal fine for OPMA violations.
Penalties under the OPMA

- A city/town councilmember or mayor who knowingly participates in an illegal meeting is subject to a $100 fine.
- Judge may award costs and attorneys fees to a citizen who prevails against a city/town to enforce the OPMA.
- Ordinances, resolutions, regulations, or orders adopted at an illegal meeting are void.

See RCW 42.30.120
See also 42.30.130 (mandamus)

See RCW 42.30.060
EXECUTIVE SESSION PROCEDURES

- Presiding officer (mayor) publicly announces:
  - Purpose of executive session
  - Time it will end
- To extend time, announce to what time
- May not take final action in executive session

See RCW 42.30.110(2)
QUESTION 2:

Can persons other than city/town officials and staff attend an executive session?
**Answer 2:**

Yes, but that person’s presence must be necessary for the council to fulfill the purpose of the executive session.
WHO MAY ATTEND AN EXECUTIVE SESSION?

- City/town councilmembers
- Mayor
- City Manager
- The city’s/town’s legal counsel must attend for discussion regarding litigation or potential litigation/legal risks
- Other persons the city/town council invites
If the council has any doubt about whether it is appropriate to invite a particular person to attend an executive session, ask:

- Is the person’s attendance necessary?
- Does the person have information the council cannot obtain without his/her presence?
- Will the person’s presence result in real or perceived unfairness to someone who was not invited to the executive session?
- Will the person respect the confidentiality of the topic discussed in executive session?
**QUESTION 3:**

Are records that are used or considered in executive session exempt from public disclosure?
**ANSWER 3:**

It depends on the content of the record(s) at issue.
**Practical Tip on Public Records and Executive Sessions**

- Keep in mind that consideration of a record in executive session does not mean the record is exempt from disclosure under the Public Records Act (PRA) – chapter 42.56 RCW
- To be exempt from disclosure, a specific exemption must apply under the PRA for the record or for information in a record
OVERVIEW OF REASONS FOR EXECUTIVE SESSIONS

An executive session can only be held if the topic of discussion is within those set forth in RCW 42.30.110(1).

The following are some of the more common topics:

• Potential litigation
• Real estate – purchase and sale
• Complaints against employees
• Employee performance
• Candidates for appointment to elective office
• Review negotiations on the performance of publicly bid contracts
POTENTIAL LITIGATION

• May meet with the city/town attorney (or legal counsel more generally) in executive session to discuss:
  ➢ Agency enforcement actions
  ➢ Litigation
• Potential litigation
• Legal counsel must be present – may connect by speakerphone
An executive session may be held to discuss with legal counsel:

• Litigation that has been specifically threatened to which the city/town is, or is likely to become, a party

• Litigation the city/town reasonably believes may be commenced

• Litigation or legal risks of a proposed action or current practice the city/town has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the city/town
ACQUISITION OR SALE OF REAL ESTATE

An executive session may be conducted:

• To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge would cause a likelihood of increased price

• To consider the minimum price at which real estate will be offered for sale or lease when public knowledge would cause a likelihood of decreased price

• Note, however, that final action selling or leasing public property shall be taken in a meeting open to the public.
QUESTION 4:

Can the council meet in executive session to consider the price at which city/town real estate will be offered for sale and invite a potential buyer to the executive session?
**Answer 4:**

No. A potential buyer’s presence would not be necessary or helpful regarding the price at which the city/town will offer to sell the real estate.
PRACTICAL TIPS RE: PURCHASE OR SALE OF REAL ESTATE

- Note that RCW 42.30.110(1)(b) and (c) refer to “real estate,” and not to “property” more generally
- Having a potential buyer participate in an executive session would turn the discussion to a negotiation
- Negotiation occurs after the council has arrived at a minimum price, and such negotiation occurs outside of an executive session
- Also, such participation by a potential buyer would raise issues of fairness with respect to other potential buyers
COMPLAINTS OR CHARGES AGAINST OFFICERS OR EMPLOYEES

An executive session may be conducted:

• To receive and evaluate complaints or charges against a public officer or employee

• However, the city/town must first notify the officer or employee and, if requested by the officer/employee, a public hearing open to the public must be held regarding such a complaint or charge
PRACTICAL TIPS RE: COMPLAINTS OR CHARGES AGAINST OFFICERS OR EMPLOYEES

- In cities/towns, a council’s role in personnel and administrative matters is very limited
- This provision for executive sessions does not increase the council’s authority
- To have an executive session on this basis, there must be a complaint or charge
- The complaint or charge need not be formal and it could come from an official of the city/town, a member of the city/town council, an employee, or a citizen
- The council’s consideration of the complaint or charge may also need to be done in open session if the subject of the complaint or charge requests a public hearing on the matter
Can the council meet in executive session to consider the performance of the city manager or city/town administrator?
The council can meet in executive session to review the performance of a public employee under RCW 42.30.110(1)(g). This includes the city manager and the city/town administrator (but see following slides).
EVALUATE QUALIFICATIONS & REVIEW EMPLOYEE PERFORMANCE

An executive session may be conducted:

• To evaluate the qualifications of an applicant for public employment or review the performance of a public employee
  
  ➢ May interview applicants in executive session
    ▪ But may not select an applicant to fill a public employment position in executive session
  
  ➢ May discuss salary/wages of an individual officer/employee, but not overall city/town salary/wages
  
  ➢ Conditions of employment to be generally applied must be discussed in open session
PRACTICAL TIPS RE: EVALUATING QUALIFICATIONS & REVIEWING EMPLOYEE PERFORMANCE

• This provision for executive sessions does not increase the council’s authority

• In a council-manager city, this executive session provision applies primarily in the context of the city manager position – conducting interviews of candidates for that position and reviewing the performance of the city manager

• In a mayor-council form of city/town, given the council’s limited direct authority over employees, this provision would apply in the hiring context to positions the council has made subject to council confirmation, and the provision may have limited practical application regarding employee performance
Candidates for Appointment to Elective Office

An executive session may be conducted:

• To evaluate the qualifications of a candidate for appointment to the city/town council
  ➢ However, any interview of such a candidate must be in open session
  ➢ Final action (i.e., vote) appointing a candidate to fill a vacancy must be done in open session
**Review Negotiations on the Performance of Publicly Bid Contracts**

An executive session may be conducted:

- To review *negotiations* on the performance of publicly bid contracts
- *When public knowledge* regarding such consideration *would cause a likelihood of increased costs*
  - This provision, in practice, is likely limited in scope
  - Could apply to a contract that has already been awarded after a bid process and the performance has become an issue, such as a change order
  - Recognizes that taxpayer money is saved by reducing the potential for costs to increase in publicly bid contracts
  - Also, a contract issue that may result in litigation can be discussed in executive session under the provision regarding discussions concerning litigation or potential litigation *if the attorney is present*
CONFIDENTIAL INFORMATION

• *Robert’s Rules of Order* – provision on executive sessions – includes reference to discipline

• RCW 42.23.070(4) – A municipal officer is prohibited from disclosing confidential information gained by reason of the officer’s position, and from otherwise using such information for his or her personal gain or benefit
  ➢ Should apply to executive sessions

• If RCW 42.23.070(4) applies, the penalties in RCW 42.23.050 would apply
Penalties: Release of Confidential Information

Under RCW 42.23.050:

• Violators of chapter 42.23 RCW are potentially liable for a penalty of $500, in addition to such other civil or criminal liability or penalty as may otherwise be imposed upon the officer by law

• Also subject to possible forfeiture of office

Under RCW 29A.56.110:

• Disclosure of confidential information obtained in executive session could potentially constitute “misfeasance” or “malfeasance” in office or a “violation of the oath of office,” which could provide sufficient grounds for a recall

• I’m not aware of a successful recall occurring on that basis, but perhaps a particularly egregious violation of confidentiality could support a recall effort
The city/town council can adopt a confidentiality policy that:

• Prohibits councilmembers from discussing publicly what took place in executive session without prior council approval

• A bright-line rule is easy to apply and avoids confusion

• If the council is truly discussing in an executive session only what the OPMA allows to be discussed in an executive session, there would in most circumstances be no valid reason to disclose publicly what was discussed privately
Is there a difference between an executive session and a “closed” session?
Yes. The topics of discussion that are appropriate for an executive session are set forth as part of the OPMA, in RCW 42.30.110. A closed session is not subject to the rules of the OPMA.
The OPMA (chapter 42.30 RCW) does not apply to some activities, including:

- Proceedings concerning formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession …
- That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group
- Collective bargaining sessions with employee organizations and labor negotiations, or that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining …
Additional Resources

MRSC Website:
- Open Public Meetings Act

MRSC Publications:
- The Open Public Meetings Act - How it Applies to Washington Cities, Counties, and Special Purpose Districts
- Knowing the Territory - Basic Legal Guidelines for Washington City, County, and Special Purpose District Officials – discusses the purpose of the OPMA and its application to Washington cities, towns, and other local governments
MORE ADDITIONAL RESOURCES

Washington State Attorney General’s website:

- [www.atg.wa.gov](http://www.atg.wa.gov)
- *Open Government Internet Manual*, prepared with the oversight of the Attorney General’s Office (with assistance from Bob Meinig, MRSC Legal Consultant)
  - Provides an excellent overview of the OPMA and executive sessions
QUESTIONS?

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