



## MEMORANDUM

DATE: August 15, 2001

TO: All Cities

FROM: Phil Olbrechts

RE: Applicability of the Washington State Open Public Meetings Act to E-mail Exchanges

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### SUMMARY

E-mail exchanges between city policy makers can constitute a violation of the Washington State Open Public Meetings Act ("OPMA"), Chapter 42.30 RCW. The OPMA requires the meetings of all governing bodies<sup>1</sup> to 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 between 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 members participate in an e-mail discussion of governing body business, the members are conducting a meeting in violation of the OPMA. Page 7 of this memo lists suggestions on how to avoid OPMA problems with e-mail exchanges. The rest of this memo explains the rationale for these suggestions.

### DISCUSSION

An increasingly common practice for city council members and other appointed and elected officials is to discuss city issues by e-mail. In a predictable decision, the Washington State Court of Appeals ruled in Wood that e-mail exchanges between members of a governing body can constitute a meeting. This memo discusses the holding in Wood and its applicability to communications between government officials.

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<sup>1</sup> The issue of what qualifies as a "governing body" has been laboriously analyzed in prior court and attorney general opinions. A "governing body" generally includes any council, committee or board created by a legislative act, such as an ordinance or resolution, that possesses some aspect of policy or rulemaking authority. AGO 1971 No. 33, at 9. City councils, planning commissions, boards of adjustment, boards of appeals and civil service commissions are all considered "governing bodies" that must conduct open meetings.

The Wood holding was predictable in light of the strong purpose clause of the OPMA, which provides:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010.

Washington courts have recognized that this purpose clause "employs some of the strongest language used in any legislation." Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 482 (1980). RCW 42.30.910 adds further punch to this purpose clause, requiring that the purposes of the OPMA shall be liberally construed. Due to the strength of this purpose clause, a court will find that the OPMA applies to a communication if a reasonable interpretation supports such an application. For e-mail exchanges, there is certainly room for disagreement on whether a meeting subject to the OPMA has occurred. In such exchanges, people are not meeting face-to-face; they often aren't even communicating contemporaneously. As shall be discussed, due in part to the strength of the purpose clause, the Wood court held that e-mail exchanges can constitute OPMA meetings despite these distinguishing features.

The driver of the OPMA that implements the purpose clause and governs all city meetings is RCW 42.30.030:

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.

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, via RCW 42.30.020(3), 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).

Given the OPMA’s strong purpose clause, city officials should consider any discussion or deliberation of city 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.<sup>2</sup> The basis of this requirement is that a governing body cannot officially transact business without a majority of its members. See, e.g., RCW 35A.12.120 (requiring a majority of council members to transact official business).

In the e-mail context, the majority requirement means that a majority of the members of the governing body must participate in an e-mail exchange in order to “act.” Members are free to exchange e-mails with other members so long as the total participants on the discussion topic don’t meet or exceed a majority. To qualify as a participant in an e-mail exchange, it may be sufficient to simply receive an e-mail copy. As discussed in the Wood case below, the fact that e-mail participants do not meet face to face should not make a difference from an OPMA meeting perspective. In open meetings, no one would contend that governing body members have to say something in order to count towards the majority requirement – a quorum that has the authority to do business exists regardless of whether any of the members utter a word. The same rationale could apply to a member who receives an e-mail copy but does not respond. Emphasis is upon “could” because the Wood case applied in a situation where a majority of school board members sent e-mails to each other. The Wood case did not identify whether a meeting would have occurred if less than a majority sent e-mails, but all members received copies of the e-mail. Also, note that it may not help to send an e-mail to less than a majority, but then relay the basic content of that exchange to other members through subsequent e-mail exchanges.<sup>3</sup> See Wood, citing Stockton Newspapers, Inc. v. Members of The Redevelopment Agency, 214 Cal. Rptr. 561, 565-55 (1985) (series of telephone calls between individual

<sup>2</sup> 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, except perhaps city council committees with decision making authority.

<sup>3</sup> For example, if one council member sends an e-mail to two other members of a seven member council and some responses occur, no OPMA violation has occurred. However, if one of the recipients then sends an e-mail to a member who hasn’t yet received an email in order to discuss the original exchange, the discussion at that point involves a majority in probable violation of the OPMA.

members and attorney to develop collective commitment or promise on public business violated California version of OPMA).

As identified previously, an OPMA “meeting” is a meeting at which action is taken and e-mail discussions of city business can constitute action. The remaining issue is whether an e-mail exchange constitutes a meeting as used in the OPMA meeting definition, despite the fact that the governing body members participate in the exchange at different times and locations. This is precisely the issue addressed in the Wood case. 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 a prima facie<sup>4</sup> 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.

Although the Wood court did not definitively address the actions of the school board, its reasoning unquestionably establishes that many types of e-mail exchanges by elected and appointed officials constitute meetings prohibited by the OPMA. 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.” It went on to hold as follows:

...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.

The Wood court did not differentiate between the passive and active receipt of e-mail. However, given the “deliberation” and “discussion” components of the OPMA “action” definition, the distinctions are somewhat identifiable. “Active” e-mail use most likely involves an exchange of viewpoints and ideas between governing body members, the type of interaction that fits under the common meanings of discussion and deliberation. Any e-mail communications regarding governing body business that involve an exchange between two or more governing body

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<sup>4</sup> A prima facie case essentially means that the plaintiffs established a rebuttable presumption that they have satisfied the elements of their case.

members may qualify as an OPMA meeting if a majority of the members participate in the exchange. Passive use would be a one-side (no response anticipated) exchange, such as the e-mailing of a report by staff to all governing body members.

When a governing body member sends the one-sided e-mail, the distinction between passive and active use is not as clear. Under at least some circumstances, a one-sided e-mail could be construed as part of an ongoing discussion. For example, a city council member may forward some transit information she acquired at an AWC conference. If the council is currently debating a transit issue, and the council member sends the e-mail in order to support her position, the potential exists for an OPMA meeting. Wood clarifies this issue somewhat by providing that to qualify as an OPMA meeting, the e-mail participants must collectively intend to transact the governing body's official business. Litigants would have a difficult time proving that governing body members have the collective intent to hold a meeting if the members only receive an unsolicited, one-sided e-mail. However, if the members have a history of sending out one-sided e-mails to advocate a point of view in on-going policy discussions, a litigant could argue that the members collectively intend to use the one-sided e-mails to transact business as a matter of practice.

It is difficult at this point to predict how a court would rule on one-sided e-mails sent by governing body members that address on-going business. A court has specifically held that independent and individual examination of documents by governing body members prior to a meeting does not violate the OPMA. Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 482 (1980). In this regard, staff regularly provide information to governing body members prior to a meeting, and no conceivable reason exists why staff could not supply this information by e-mail. If governing body members cannot also provide this type of information prior to meetings, they could arguably circumvent this restriction by asking staff to provide the information for them. Under these types of situations, restrictions on one-sided e-mails can easily degenerate into an absurd exercise in hair-splitting. If Wood's recognition of the need for e-mail for effective government is to have any significance, the courts should accept one-sided e-mails as a legitimate form of governing body communication. If a one-sided e-mail becomes relevant to an open governing body discussion, the governing body should publicly announce the existence of the e-mail. This added disclosure for the limited purpose of one-sided e-mails should satisfy the OPMA policies regarding open deliberation.<sup>5</sup>

In the two-sided e-mail exchange, Wood also leaves a few issues unresolved. An important issue concerns timing -- does the length of time between e-mail exchanges have any significance? In

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<sup>5</sup> Some governing body members have inquired whether a subsequent disclosure of e-mail exchanges would "fix" an e-mail meeting held in violation of the OPMA. RCW 42.30.030 requires meetings to be open to the public, i.e. the public has the right to attend meetings while they occur. The OPMA also has several notice requirements for meetings, so that the public can attend the meetings while they occur. Taping a face to face meeting and making the tape available to the public would not "fix" a closed meeting. Similarly, copies of e-mails would also probably not "fix" an invalid e-mail exchange.

Wood, several hours, and sometimes days, lapsed between e-mail exchanges. The Wood court did not address these delays in response times. It is unclear whether lengthier delays could make any difference under the OPMA.

A final point relevant to the e-mail issue is to clarify what types of discussions and deliberations pertain to the business of the governing body. The Wood opinion touched on this issue by noting that, for e-mail exchanges to constitute an OPMA meeting, the exchanges must address issues “that may or will come before the Board for a vote” (emphasis added). RCW 42.30.070 expressly allows the members of a governing body to gather or travel together for purposes other than a regular or special meeting provided that the members do not engage in any action. When sending an e-mail to all governing body members, therefore, a member should ask him or herself whether the issue at hand could potentially come under the body’s authority at some later date. Scheduling parties, complaining about the weather, and discussing Mariner batting averages, for instance, normally would not constitute OPMA meetings for city councils. Members should refrain from e-mailing a majority of other members on any subject that may someday come to a vote, unless the e-mail is merely passing along information. In considering what may come to a vote, members should remember that they often have the authority to reconsider matters previously voted upon, and that, for cities especially, matters of non-local significance can become the subject of a resolution or proclamation.

### 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, distilled from the analysis of this memo, present a conservative response to the Wood decision:

- When possible, limit e-mail exchanges on issues related to city business to less than a majority of governing body members. This is the safest and easiest way to avoid an OPMA challenge. Note that, if a committee of a governing body has actual or de facto decision making authority, its e-mail exchanges 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 may not suffice if subsequent exchanges relay the content of the original exchange to a majority of members.
- Never decide at an open meeting that a majority of the governing body 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 governing body members are probably consistent with the OPMA. In open meetings, the governing body members should verbally announce that they have sent this type of e-mail if it relates to the discussion at hand. Governing body members 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 governing body 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 governing body, a majority of the governing body should not subject the issue to e-mail discussion.

City officials are encouraged to explore a less restrictive course of action with their city attorneys if the recommended measures prove impractical.