PLEDGE OF ALLEGIANCE

CONSENT AGENDA
   1. Approval of Agenda 08/22/17
   2. Approval of Minutes 08/08/17
   3. Ratification of Vouchers 08/15/17
   4. Approval of Vouchers 08/22/17

TREASURER’S REPORT – July 2017

AUDIENCE COMMENTS

OLD BUSINESS
   5. Manager’s Report

NEW BUSINESS

MISCELLANEOUS
   7. Attorney General’s Opinion 2017 – No. 5

COMMISSIONER COMMENTS

ADJOURNMENT

JUDY RESERVOIR ELEVATION
The regular meeting of the Commission of Public Utility District No. 1 was held in the Aqua Room of the utility located at 1415 Freeway Drive, Mount Vernon, Washington, on August 8, 2017.

The meeting was called to order at 4:30 PM. Those Commissioners in attendance were: Robbie Robertson, President; Eron Berg, Vice President; and Al Littlefield Secretary. Also in attendance were: George Sidhu, General Manager; Mark Handzlik, Engineering Manager; Sally Saxton, Finance Manager/Treasurer; Peter Gilbert, Attorney; and Kim Carpenter, Clerk of the Board; Audience: Judy Littlefield, Diane Robertson, Les Walker, and Dale Ragan, Mount Vernon City Councilman; District Employees: Mike Fox, Gary Chrysler, Kathy White, Kevin Tate, Luis Gonzalez, and Mark Semrau.

Commissioner Littlefield led the Pledge of Allegiance.

Commissioner Littlefield moved to approve the Consent Agenda for August 8, 2017:

1. Approval of Agenda 08/08/17
2. Approval of Minutes 07/25/17
3. Ratification of Vouchers
   - No. 2743 Voucher Nos. 01945 to 10001 ($1,060,632.94) 07/25/17
   - No. 2744 Voucher Nos. 10002 to 10038; Payroll Check Nos. 19241-19324 ($301,877.34) 08/01/17
4. Approval of Vouchers
   - No. 2745 Voucher Nos. 10040 to 10111; Payroll Check Nos. 19325-19408 ($591,542.46) 08/08/17
5. Aronson Security Group (ASG) - Install Access Control, Intrusion Detection and Video Surveillance Systems for Tank and Booster Pump Station

The motion passed.

Treasurer Saxton presented the Status of Budget/Financial Summary

Audience Comments: None

Under Old Business:

6. Manager’s Report - Manager Sidhu reported on the following items:
   - Upon the retirement of Larry Saunders, Engineering Supervisor, the District conducted an internal search and Bill Trueman, Environmental Services Coordinator was selected for the position.
   - Met with representatives from the Samish Water District to discuss if they can confirm that the District is amenable to wheeling wholesale water. They have asked the residents to circulate a petition of interest.
• The State audit will begin August 21; however, they have not yet scheduled an entrance conference. They expect to be onsite for approximately two weeks.

• Bill outsourcing begins this week and information is posted on the District’s website.

• The District advertised a Request for Qualifications for an architectural needs assessment of the building facility. Ten submittals and were narrowed to three for interviews, which have been conducted. The interview team will meet on Friday to determine the selection.

• Grant funding from Skagit County to connect fiber to the Port has been revised based on the scope of work changes and the District received a schedule extension.

• A tour of the WTP for elected officials is scheduled for August 24 for the Cities of Mount Vernon, Sedro-Woolley and Burlington. Skagit County officials will tour the facility on August 31. Details regarding time are being worked out, but participants will meet at the park and ride on the south side of the bridge on SR9. Commissioner Robertson plans to attend the and suggested inviting service organizations such as Kiwanis, Rotary and the Chambers to the tour on August 31.

7. Commission Priorities and Goals for 2018 Budget Summary
Manager Sidhu reviewed the summary and stated it helps with the budget process. The Commission and staff are in general agreement regarding the major capital items.

8. Quarterly Report- Information Technology (IT) Department – IT Manager Chrysler presented the quarterly report for his department. Discussion ensued regarding various aspects of the information presented.

New Business

9. Draft Credit Card Administrative Practice & Procedures (AP&P) Revisions – Discussion
Manager Sidhu stated that IT Manager Chrysler and Treasurer Saxton are working on policy revisions. Manager Sidhu stated there is no action required for the AP&P, but wanted to address any questions or comments from the Commission.

10. Safety Policy – Drug Free Workplace Policy and Associated AP&P’s – Discussion/Action
Manager Sidhu stated that the first draft was presented to the Commission on 06/27 and comments were reviewed and revisions were made with the associated policies. The related AP&P’s were presented to the Commission for any questions or comments. Commissioner Berg moved to approve Policy #1026 as presented. The motion passed. Commissioner Berg moved to approve Policy #1013 as presented. The motion passed.
Under Commissioner Comments, Commissioner Littlefield reported that there are no WA PUD Association (WPUDA) meetings this month.

Commissioner Robertson commented briefly regarding the WPUDA strategic plans for major committees discussed at the meetings last month.

Having no further business to come before the Board, Commissioner Littlefield moved for adjournment. The motion passed and the meeting of August 8, 2017 was adjourned at 5:27 PM.

Respectfully submitted:

______________________________
Kim Carpenter
Clerk of the Board
**Balance of District Funds**

<table>
<thead>
<tr>
<th>Fund</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Revenue Fund</td>
<td>$5,139,866</td>
</tr>
<tr>
<td>Capital Project Fund</td>
<td>313,836</td>
</tr>
<tr>
<td>Construction Fund</td>
<td>6,056,887</td>
</tr>
<tr>
<td>System Development Fund</td>
<td>2,082,827</td>
</tr>
<tr>
<td>Debt Service Fund</td>
<td>506,032</td>
</tr>
<tr>
<td>Bond Funds</td>
<td>413,052</td>
</tr>
<tr>
<td>Rate Stabilization Funds</td>
<td>37,159</td>
</tr>
<tr>
<td><strong>Total Funds</strong></td>
<td><strong>$14,549,640</strong></td>
</tr>
</tbody>
</table>

**Investment of District Funds**

<table>
<thead>
<tr>
<th>Fund</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local Gov Investment Pool</td>
<td>$8,334,321</td>
</tr>
<tr>
<td>Cash</td>
<td>2,215,319</td>
</tr>
<tr>
<td>Money Market Deposit Accts</td>
<td>0</td>
</tr>
<tr>
<td>Govt Agencies/Securities</td>
<td>4,000,000</td>
</tr>
<tr>
<td><strong>Total Funds</strong></td>
<td><strong>$14,549,640</strong></td>
</tr>
</tbody>
</table>

---

**District Fund Segments**

- General Revenue Fund
- Capital Project Fund
- Construction Fund
- System Development Fund
- Debt Service Fund
- Bond Funds
- Rate Stabilization Funds

**Investment of District Funds**

- Govt Agencies/Securities
- Cash
- Local Gov Investment Pool

---

**Rates of Investment Interest Received**

Interest Rate vs. Month

- FCB
- FNMA
- LGIP
- FHLMC
- RFC
- SB MMA

**Market Value vs. Face Value of Government Securities**

Market Value vs. Face Value

- Fed Farm Credit Bank (mat 2/18)
- Fed Home Loan Mtg Corp (mat 7/18)
- Fed Natl Mtg Asn (mat 10/19)
- Resolution Funding Corp (mat 7/20)
- Face Value
# PUBLIC UTILITY DISTRICT NO. 1 OF SKAGIT COUNTY  
**TREASURER REPORT**

For the month ending July 31, 2017

<table>
<thead>
<tr>
<th>Resources:</th>
<th>July 2016</th>
<th>July 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>REVENUE FUND</strong></td>
<td><strong>CAPITAL PROJECT FUND</strong></td>
<td><strong>SYSTEM DEVELOPMENT FUND</strong></td>
</tr>
<tr>
<td>REVENUE FUND</td>
<td>DEBT RESERVE</td>
<td>BOND SINKING</td>
</tr>
<tr>
<td>Capital Projects</td>
<td>Restricted</td>
<td>Debt Reserve</td>
</tr>
<tr>
<td>Water Customer Receipts</td>
<td>1,801,104</td>
<td>1,748,626</td>
</tr>
<tr>
<td>System Development Fees</td>
<td>167,065</td>
<td>103,290</td>
</tr>
<tr>
<td>Capital Contributions</td>
<td>196,325</td>
<td>105,012</td>
</tr>
<tr>
<td>Grants</td>
<td>6,631</td>
<td>3,737</td>
</tr>
<tr>
<td>LUC Assessments, Interest, Penalties</td>
<td>8,082</td>
<td>5,014</td>
</tr>
<tr>
<td>Investment Income</td>
<td>5,085</td>
<td>289</td>
</tr>
<tr>
<td>Non-Operating Revenues</td>
<td>19,560</td>
<td>14,156</td>
</tr>
<tr>
<td>Total External Revenue</td>
<td>1,805,905</td>
<td>289</td>
</tr>
<tr>
<td><strong>Debt Proceeds:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debt Proceeds - DWRSIF Loan Draws</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td><strong>Transfers from Other Funds:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debt Reserve = Revenue Fund</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Debt Reserve = System Development Fund</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Revenue Fund = Debt Reserve</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Debt Reserve = Bond Sinking Fund</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Bond Reserve = Construction Fund</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Capital Projects = Revenue Fund</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Capital Projects = System Development Fund</td>
<td>690,229</td>
<td>0</td>
</tr>
<tr>
<td>Total Transfers to Other Funds</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total Revenue:</strong></td>
<td>2,779,136</td>
<td>289</td>
</tr>
<tr>
<td><strong>Uses:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Operating Expenditures:</td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
<tr>
<td>Operations and Maintenance</td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
<tr>
<td>Utility and Service Taxes</td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
<tr>
<td><strong>Total Operating Expenditures</strong></td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
<tr>
<td>Total Capital Expenditures</td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
<tr>
<td><strong>Capital Projects:</strong></td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
<tr>
<td><strong>Total Capital Expenditures</strong></td>
<td>1,109,412</td>
<td>94,326</td>
</tr>
</tbody>
</table>

| **Total Expenditures:** | 2,559,677 | 2,935 | 4,013 | 80,619 | 268,731 | 5,566 | 83 | 3,074,839 | 2,435,788 |
| **Increase (Decrease) in Fund Balance:** | 123,457 | (2,650) | (2,480) | 80,619 | 268,731 | 5,896 | 83 | 401,046 | (10,401) | 8,723 |
For the seven months ending July 31, 2017

<table>
<thead>
<tr>
<th>Resources:</th>
<th>REVENUE FUND</th>
<th>CAPITAL PROJECT FUND</th>
<th>SYSTEM DEVELOPMENT FUND</th>
<th>DEBT SERVICE FUND</th>
<th>RATE STABILIZATION FUND</th>
<th>COMBINED</th>
<th>ANNUAL BUDGET</th>
<th>PERCENTAGE OF BUDGET REALIZED</th>
</tr>
</thead>
<tbody>
<tr>
<td>External Revenue:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Water Customer Receipts</td>
<td>11,267,617</td>
<td></td>
<td>900,577</td>
<td></td>
<td></td>
<td>11,267,617</td>
<td>20,000,000</td>
<td>54.40%</td>
</tr>
<tr>
<td>System Development Fees</td>
<td></td>
<td>900,577</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital Contributions</td>
<td>930,339</td>
<td></td>
<td>1,224,940</td>
<td></td>
<td></td>
<td>930,339</td>
<td>1,224,940</td>
<td>76.91%</td>
</tr>
<tr>
<td>Grants</td>
<td></td>
<td></td>
<td>3,197,500</td>
<td></td>
<td></td>
<td>3,197,500</td>
<td>3,197,500</td>
<td>100.00%</td>
</tr>
<tr>
<td>LUD Assessments, Interest, Penalties</td>
<td>0</td>
<td></td>
<td>0</td>
<td></td>
<td></td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment Income</td>
<td>148,299</td>
<td></td>
<td>157,404</td>
<td></td>
<td></td>
<td>157,404</td>
<td>157,404</td>
<td>100.00%</td>
</tr>
<tr>
<td>Non-Operating Revenues</td>
<td>22,559</td>
<td>1,257</td>
<td>28,591</td>
<td></td>
<td></td>
<td>28,591</td>
<td>28,591</td>
<td>100.00%</td>
</tr>
<tr>
<td>Total External Revenue</td>
<td>12,795,294</td>
<td>1,257</td>
<td>28,591</td>
<td>8,964</td>
<td></td>
<td>8,964</td>
<td>8,964</td>
<td>100.00%</td>
</tr>
<tr>
<td>Debit Proceeds:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debit Proceeds - DWSRF Loan Draws</td>
<td>3,964,027</td>
<td></td>
<td>876,713</td>
<td></td>
<td></td>
<td>3,964,027</td>
<td>876,713</td>
<td>454.43%</td>
</tr>
<tr>
<td>Debit Proceeds - Dept. of Ecology Loan</td>
<td>0</td>
<td></td>
<td>1,192,000</td>
<td></td>
<td></td>
<td>0</td>
<td>1,192,000</td>
<td>0.00%</td>
</tr>
<tr>
<td>Debit Proceeds - Bonds</td>
<td>0</td>
<td></td>
<td>4,200,000</td>
<td></td>
<td></td>
<td>0</td>
<td>4,200,000</td>
<td>0.00%</td>
</tr>
<tr>
<td>Total Debit Proceeds</td>
<td>3,964,027</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
<td>3,964,027</td>
<td>0</td>
<td>63.55%</td>
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<tr>
<td>Transfers from Other Funds:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Debt Reserve = Revenue Fund</td>
<td>2,381,183</td>
<td></td>
<td>2,931,183</td>
<td></td>
<td></td>
<td>2,931,183</td>
<td>2,931,183</td>
<td>100.00%</td>
</tr>
<tr>
<td>Debt Reserve = System Development Fund</td>
<td></td>
<td></td>
<td>981,800</td>
<td></td>
<td></td>
<td>981,800</td>
<td>981,800</td>
<td>100.00%</td>
</tr>
<tr>
<td>Revenue Fund = Debt Reserve</td>
<td></td>
<td>3,239</td>
<td></td>
<td></td>
<td></td>
<td>3,239</td>
<td>3,239</td>
<td>100.00%</td>
</tr>
<tr>
<td>Bond Reserve = Bond Sinking Fund</td>
<td></td>
<td>90,361</td>
<td></td>
<td></td>
<td></td>
<td>90,361</td>
<td>90,361</td>
<td>100.00%</td>
</tr>
<tr>
<td>Capital Projects = Revenue Fund</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Transfers to Other Funds</td>
<td>2,381,183</td>
<td>3,239</td>
<td>981,800</td>
<td></td>
<td></td>
<td>3,382,183</td>
<td>3,382,183</td>
<td>143.54%</td>
</tr>
<tr>
<td>Total Revenue</td>
<td>19,394,496</td>
<td>311,257</td>
<td>28,591</td>
<td>9,095</td>
<td></td>
<td>22,734,606</td>
<td>33,034,544</td>
<td>67.58%</td>
</tr>
</tbody>
</table>

Uses:

| Operating Expenditures:                         | 8,468,576    |                      |                         |                   |                         | 8,468,576 | 8,468,576     | 100.00%                       |
| Utility and Exclus Taxes                        | 582,629      |                      | 1,029,000               |                   |                         | 582,629  | 582,629       | 57.59%                        |
| Total Operating Expenditures                    | 7,951,204    | 0                    | 0                       | 0                  |                         | 7,951,204 | 7,951,204     | 100.00%                       |
| Capital Expenditures:                           | 7,935,509    | 129,171              | 35,978                  |                   |                         | 8,103,689 | 20,377,038   | 39.77%                        |
| Total Capital Expenditures                      | 8,596,639    | 129,171              | 35,978                  |                   |                         | 8,596,639 | 20,377,038   | 39.77%                        |
| Debt Service Payments:                          | 368,436      |                      | 368,436                 |                   |                         | 368,436  | 368,436       | 100.00%                       |
| Federal Tax Credit for 2005 Bonds               | (33,080)     |                      | (33,080)                |                   |                         | (33,080) | (33,080)      | 0.00%                         |
| Principal Payments                              | 2,668,284    |                      | 2,668,284               |                   |                         | 2,668,284 | 2,668,284     | 100.00%                       |
| Total Debt Service Payments                     | 3,024,626    | 0                    | 0                       | 0                  |                         | 3,024,626 | 3,024,626     | 100.00%                       |
| Transfers to Other Funds:                       | 1,388,839    |                      | 1,388,839               |                   |                         | 1,388,839 | 1,388,839     | 100.00%                       |
| Revenue Fund = Debt Reserve                     |              | 595,216              | 2,931,183               |                   |                         | 2,931,183 | 2,931,183     | 100.00%                       |
| Bond Sinking Fund = Debt Reserve                |              | 90,361               |                         |                   |                         | 90,361   | 90,361        | 100.00%                       |
| Total Transfers to Other Funds                  | 1,388,839    | 90,361               | 2,931,183               | 3,239              |                         | 3,382,183 | 3,382,183     | 143.54%                       |
| Total Expenditures                              | 19,409,614   | 102,171              | 156,340                 | 9,095              |                         | 23,507,764 | 40,668,792   | 57.80%                        |

Increase (Decrease) in Fund Balance: (15,120)
### SKAGIT PUD DEBT REPAYMENT AMOUNTS
#### AS OF JULY 31, 2017

<table>
<thead>
<tr>
<th>Year</th>
<th>Senior Lien Bond Debt</th>
<th>Public Works Trust Fund Loan Debt</th>
<th>Drinking Water State Revolving Fund Loan Debt</th>
<th>Total Principal and Interest Outlay</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coupon Rates</td>
<td>Mature Date</td>
<td>Beg Bal</td>
<td>Interest Rates</td>
</tr>
<tr>
<td>2008 Refunding</td>
<td>3.5% - 4.25%</td>
<td>Jul 2018</td>
<td>8,836,531</td>
<td>0.50%</td>
</tr>
<tr>
<td>2009B BAB</td>
<td>2.7% - 3.79%</td>
<td>Jul 2029</td>
<td>3,640,000</td>
<td>0.50%</td>
</tr>
<tr>
<td>2016 Revenue</td>
<td>2.65% - 10.00%</td>
<td>Jul 2036</td>
<td>6,300,000</td>
<td>0.25%</td>
</tr>
<tr>
<td>2017</td>
<td>0</td>
<td>0</td>
<td>2.65%</td>
<td>4.25%</td>
</tr>
<tr>
<td>2018</td>
<td>1,163,588</td>
<td>317,332</td>
<td>2.65%</td>
<td>4.25%</td>
</tr>
<tr>
<td>2019</td>
<td>495,257</td>
<td>275,032</td>
<td>2.65%</td>
<td>3.72%</td>
</tr>
<tr>
<td>2020</td>
<td>511,717</td>
<td>261,500</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2021</td>
<td>529,157</td>
<td>244,595</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2022</td>
<td>541,369</td>
<td>227,521</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2023</td>
<td>563,816</td>
<td>210,083</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2024</td>
<td>581,112</td>
<td>192,166</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2025</td>
<td>599,262</td>
<td>173,038</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2026</td>
<td>617,303</td>
<td>153,641</td>
<td>2.65%</td>
<td>3.79%</td>
</tr>
<tr>
<td>2027</td>
<td>542,412</td>
<td>399,339</td>
<td>3.79%</td>
<td>10.00%</td>
</tr>
<tr>
<td>2028</td>
<td>579,033</td>
<td>365,603</td>
<td>3.79%</td>
<td>10.00%</td>
</tr>
<tr>
<td>2029</td>
<td>614,704</td>
<td>327,250</td>
<td>3.79%</td>
<td>10.00%</td>
</tr>
<tr>
<td>2030</td>
<td>297,049</td>
<td>285,846</td>
<td>10.00%</td>
<td>0.25%</td>
</tr>
<tr>
<td>2031</td>
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$ Change from previous month: $2,665,590 paid July 1

Total Principal Outstanding: $19,138,356
Total Interest Outstanding: $4,591,791
Total Debt Repayment: $23,730,647

2017 Weighted Interest Rate: 2.08%
April 4, 2016

The Honorable Bob Ferguson
Washington State Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

RE: Request for Opinion – Disclosure of Executive Session Deliberations under the Open Public Meetings Act

Dear Attorney General Ferguson:

Pursuant to RCW 43.10.030(5), I write to request an opinion as to whether public officials who participate in meetings convened in executive session under the Washington Open Public Meetings Act may lawfully later disclose information shared during such sessions (assuming the disclosure would not violate separate privacy laws, or local laws or policies).

Some government jurisdictions have advised public officials that Washington law categorically prohibits public officials from later disclosing information obtained during executive sessions. Some cities have advised that all information in an executive session is confidential and that disclosure could lead to criminal sanctions.

The Municipal Research and Services Center provides similar guidance, which is broadly circulated among government jurisdictions in Washington. For example, in its 2011 report, “Knowing the Territory: Basic Legal Guidelines for Washington City, County and Special Purpose District Officials,” MRSC advises under the heading, “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.”


The theory that disclosure is prohibited apparently reads RCW 42.23.070(4) (a statute related to ethics) as a restriction to the OPMA’s presumption of openness. RCW 42.23.070 (4) states: “No municipal officer may disclose confidential information gained by reason of the officer’s position, nor may the officer otherwise use such information for his or her personal gain or benefit.” The statute does not define “confidential.” The theory apparently presumes that information that qualifies for the executive session exemption in the OPMA categorically constitutes “confidential” information.

However, Timothy Ford, former Open Government Ombudsman for the Washington Office of Attorney General, apparently rejected that theory in 2009. He wrote in an informal opinion to a member of the Puyallup City Council, in part:

“It is true that confidential information must be protected pursuant to RCW 42.23.070(4). However, not all information shared in executive session may be confidential. The mere fact that records and information are shared in executive session is not sufficient to create confidentiality. The executive session is not a valid exemption from disclosure of non-exempt materials. _ACLU V. City of Seattle_, 121 Wn. App. 544, 554-555 (2004).

Moreover, while the executive session allows closed meetings on specific topics, it does not limit your first amendment right to speak about non-confidential information that concerns the public. Any rule that seeks to limit all information discussed in executive session may be overly broad, and likely restricts your constitutional rights. Taken to its absurd limit, an overly broad rule might prohibit the city council from taking required actions in public where it is necessary to explain to the public much of its rational that was formerly discussed in executive session.”

I have enclosed a copy of the letter.

Additionally, some local jurisdictions have adopted policies allowing for limited disclosure of information discussed during executive sessions. For example, the Spokane Municipal Code’s chapter on ethics says: “Confidential information does not include information authorized by the mayor or a majority vote of the council to be disclosed.” SMC 01.04A.020(I)(4).

I request your guidance to resolve this question, which implicates a broad range of potential issues, from whether members of a public agency may choose to disclose details of real estate negotiations after the negotiations conclude, to whether a public agency may collectively disclose matters of public concern.

Specifically:
1. Does RCW 42.23.070(4) restrict public officials from disclosing information shared during meetings conducted as executive sessions under the Open Public Meetings Act? If so, does the statute categorically prohibit disclosure, or is its reach limited to “confidential information”? If limited, how should public officials define “confidential information”?

2. If RCW 42.23.070(4) does prohibit public officials from disclosing information exchanged during executive sessions, would a violation of that prohibition constitute a misdemeanor under RCW 42.20.100 (“Failure of duty by a public wrongful conduct”) and/or “official misconduct” under RCW 9A.80.010?

Sincerely,

Representative Marcus Riccelli

cc: Sarah Reyneveld, Mike Webb
October 26, 2015

The Honorable Bob Ferguson
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504-0100

Dear Attorney General Ferguson:

As Chair of the House committee with jurisdiction over ethics issues, I am writing pursuant to RCW 43.10.030(5) to request guidance from your office on constitutional and statutory provisions relating to incompatibility of office, conflict of interest, appearance of fairness, and disclosure of confidential information.

To provide context for this request, I submit the following scenario:

Jane Doe is an elected member of a school district board of directors and also serves as a member of the local city planning commission. The powers and duties of school boards are set forth in RCW 28A.320.015. The general powers of planning commissions are set forth in RCW 35.63.060. The city defines the duties of its planning commission also to include making recommendations to the city council on a broad range of issues relating to land use, zoning, property redevelopment, and infrastructure. The school board and the city are in communication regarding the use and potential redevelopment of school district property. Pursuant to RCW 42.30.110, the school district board of directors meets in executive session to discuss the use and disposition of school district property.

My questions are as follows:

1) Are the positions of school board director and planning commission member incompatible under Washington law? How is that determination made and, if the positions are incompatible, what remedies are available to address the incompatibility?

2) Is there a conflict of interest between such dual positions under Washington law? How is that determination made, and if a conflict or potential conflict exists, what remedies are available to address it?
3) Does holding such dual positions violate the appearance of fairness provisions of RCW 42.36? How is that determination made, and what remedies are available to address it?

4) In the scenario presented, what obligations does Washington law impose on the person holding dual positions in regard to confidential information?

5) Under what circumstances, if any, may a school board exclude an elected member from executive session because of concerns about incompatibility of office, conflict of interest, appearance of fairness or confidential information?

Please let me know if you have questions or need additional information. I appreciate your assistance.

Sincerely,

Representative Sam Hunt
Chair, State Government Committee
OPEN PUBLIC MEETINGS ACT—PUBLIC MEETINGS—CONFIDENTIALITY—
ETHICS—MUNICIPALITIES—CRIMES—Whether Information Learned In An
Executive Session Is Confidential

1. Information learned in a properly-convened executive session of a
governing body of a public agency is generally confidential.
2. The disclosure by a municipal officer of information learned in an
executive session that is made confidential by the Open Public Meetings Act is a
violation of the Code of Ethics for Municipal Officers.
3. The disclosure by a municipal officer of information learned in an
executive session that is made confidential by the Open Public Meetings Act
could be a misdemeanor.
4. A governing body may seek a court order enforcing the obligation of its
members to honor the confidentiality of executive sessions, but we have
identified no specific authority authorizing the exclusion of members from
executive sessions without court order.
August 3, 2017

The Honorable Sam Hunt
State Senator, District 22
PO Box 40422
Olympia, WA 98504-0422
The Honorable Marcus Riccelli
State Representative, District 3
PO Box 40600
Olympia, WA 98504-0600

Cite As:
AGO 2017 No. 5

Dear Senator Hunt and Representative Riccelli:

By letters previously acknowledged, you have each requested our opinion on a
series of questions regarding the Open Public Meetings Act (OPMA). Senator Hunt
posed a total of five questions, the first three of which related to different legal issues
and to which we previously responded by separate opinion. AGO 2016 No. 7. We
consolidate our response to Senator Hunt’s fourth and fifth questions and
Representative Riccelli’s questions, which we have divided and paraphrased as follows:

1. Are the members of the governing body of a public agency prohibited by
the Open Public Meetings Act from disclosing information shared during
executive sessions that are properly called under the Open Public Meetings Act?
Brief Answer: Yes. Participants in an executive session have a duty under the OPMA to hold in confidence information that they obtain in the course of a properly convened executive session, but only if the information at issue is within the scope of the statutorily authorized purpose for which the executive session was called.

2. Are the members of the governing body of a public agency prohibited by the Code of Ethics for Municipal Officers from disclosing information shared during executive sessions that are properly called under the Open Public Meetings Act?

   Brief Answer: Yes. RCW 42.23.070(4) prohibits a municipal officer from disclosing confidential information learned in an executive session or otherwise using such information for personal gain.

3. If the law prohibits public officials from disclosing information exchanged during executive sessions, would a violation of that prohibition constitute a misdemeanor under RCW 42.20.100 and/or “official misconduct” under RCW 9A.80.010?

   Brief Answer: It is conceivable that facts could arise under which the disclosure of information learned in an executive session under the OPMA might constitute a misdemeanor under one or the other of the cited statutes. But such cases would be difficult to prove and should rarely arise.

4. Under what circumstances, if any, may the governing body of a public agency exclude an elected member from executive session because of concerns about confidential information?

   Brief Answer: A governing body may ask a court to enforce the confidentiality of an executive session through a writ of mandamus or injunction, pursuant to RCW 42.30.130. It is unlikely that a governing body would ordinarily have the authority to exclude one of its members from attending an executive session without such an injunction, but we do not rule out the possibility that some governing bodies may be authorized to do so pursuant to the statutes or local charters under which specific governing boards may operate.

FACTUAL BACKGROUND

The questions posed by each of you arise in differing factual contexts. We answer them together because they have in common the legal question of whether members of a governing body have a duty to hold in confidence information that they learn in an executive session of the body.

Senator Hunt’s questions relate to an elected school director. The scenario at issue involves a member of a school board who also serves as an appointed member of the local city planning commission. The planning commission makes recommendations to the city council regarding a range of land use, zoning, property redevelopment, and infrastructure issues. The school board is vested with authority regarding the use and disposition of the school district’s real property. Senator Hunt’s questions arise in the context of communications between the school district and the city regarding the use and potential redevelopment of school district property, and relate to information that the school director learns in school board meetings held in executive session.
Representative Riccelli’s letter requesting our opinion frames his questions generally in terms of whether Washington law categorically prohibits the disclosure of information learned in an executive session. The letter notes that different jurisdictions within Washington have given different advice on the subject. Representative Riccelli frames his questions broadly in terms of any governing body of a public agency holding executive sessions, but we understand that these questions arise from facts involving a city council.

You have both appropriately limited your questions to requests for our legal analysis. Our opinion does not imply any comment on our part regarding the factual scenarios underlying the questions.

**ANALYSIS**

1. **Are the members of the governing body of a public agency prohibited by the Open Public Meetings Act from disclosing information shared during executive sessions that are properly called under the Open Public Meetings Act?**

   This first question addresses information that a member of a governing board may learn in an executive session. We conclude that the Open Public Meetings Act (OPMA) creates a duty for members of a governing board not to disclose information learned in a properly-convened executive session, if the information was within the scope of the statute’s authorized purpose for convening the executive session.

   The OPMA applies to all meetings of the governing body of a public agency. RCW 42.30.030. The terms “public agency,” “governing body,” and “meeting” are all statutorily-defined. “Public agency” is defined broadly to include “[a]ny state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute,”

**[original page 4]**

other than courts and the legislature.” RCW 42.30.020(1)(a). It also includes local governments, including counties, cities, school districts, and other municipal corporations and political subdivisions. RCW 42.30.020(1)(b). And it includes certain subagencies of these agencies. RCW 42.30.020(1)(c). A “governing body” means “the multimember board, commission, committee, council, or other policy or rule-making body of a public agency[.]” RCW 42.30.020(2). The OPMA defines a “meeting” as “meetings at which action is taken.” RCW 42.30.020(4). “Action’ means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3).

The OPMA thus applies to meetings of multimember boards that govern a wide variety of state and local agencies. Your questions arise in the context of locally-elected multimember boards, such as city councils and school boards. The act applies to numerous appointed bodies as well, at both the state and local levels.
The general rule underlying the OPMA is that “[a]ll 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 [the OPMA].” RCW 42.30.030; see also Columbia Riverkeeper v. Port of Vancouver USA, No. 92455-4, 2017 WL 2483271 (Wash. June 8, 2017), at *6 (“The OPMA is Washington’s comprehensive transparency statute.”). A notable exception to that general rule of openness is that the OPMA allows a governing body to convene privately, in executive session, during a meeting to consider certain limited matters specified in statute, such as to discuss litigation with counsel or certain aspects of real estate transactions. RCW 42.30.110(1).[1]

The executive session must be limited to the purposes set forth in statute. RCW 42.30.110(1). For example, in the factual scenario that Senator Hunt described, the school board might meet in executive session in order 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[.]” RCW 43.30.110(1)(b). If one of the board members also sat on the local planning commission, as Senator Hunt postulated, then a concern could emerge that a planning commissioner might share inside information from the executive session with planning commission colleagues or others. Alternatively, Representative Riccelli asks about a member of a city council who might discuss in executive session the performance evaluation of a city employee and acquire information that neither the city nor the employee would anticipate making public. RCW 42.30.110(1)(g). Both situations could additionally involve consultation with legal counsel to which the attorney-client privilege could apply. RCW 42.30.110(1)(i). All of these topics are permissible for executive session, and might create at a minimum an expectation that the discussion would not be divulged outside the executive session without the approval of the governing body as a whole. Your question, of course, is whether that expectation is a legal obligation.[2]

We consider your question primarily in light of Washington authorities, especially the text of the OPMA itself. See Dept of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (the plain meaning of a statute “is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question”). In addition, the OPMA was modeled on California’s and Florida’s open meeting laws. AGO 1971 No. 33, at 2. “Thus, decisions from those jurisdictions provide guidance in interpreting Washington law.” Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 560, 27 P.3d 1208 (2001). Our conclusion in response to this question is consistent with conclusions reached in those states, and we cite authorities from them where relevant.
The exclusion of the public is an intrinsic feature of an executive session. By statute, convening in executive session is only allowed after publicly announcing "the purpose for excluding the public from the meeting place[]." RCW 42.30.110(2). The OPMA does not define the term "executive session." The statute's description of an executive session as a portion of a meeting from which the public is excluded harmonizes with the general meaning of the term. See Black's Law Dictionary 1579 (10th ed. 2014) (defining an executive session as, "[a] meeting, usu. held in secret, that only the members and invited nonmembers may attend"). Similarly, while providing only persuasive support, Robert's Rules of Order indicates that an "executive session" in general parliamentary usage is "a meeting or a part of a meeting at which the proceedings are secret." Robert's Rules of Order 92-93 (10th ed. 2000). In other words, if the public is not excluded, then the proceeding is not an executive session but simply a public meeting. Confidentiality is therefore inherent in the very concept of an executive session.

In choosing to allow executive sessions on the topics listed in statute, the Legislature presumably made a policy decision that the public interest could be better served by discussion of these limited topics in private, rather than public. RCW 42.30.110(2). This reflects a legislative effort to balance the public interest in openness against the public interest in conducting a limited set of governmental affairs outside public view. In re Recall of Lakewood City Council Members, 144 Wn.2d 583, 586, 30 P.3d 474 (2001). The topics that the Legislature has chosen to include as permissible subjects for executive sessions have in common a public interest in confidentiality. See, e.g., RCW 42.30.110(1)(a)(i) (allowing national security as an executive session topic); RCW 42.30.110(1)(b), (c) (allowing discussions of certain real estate transactions when public knowledge regarding such consideration would cause a likelihood of increased or decreased price); RCW 42.30.110(1)(d) (reviewing contract performance negotiations when public knowledge would likely lead to increased costs). Indeed, the legislative description of each permissible subject of an executive session carries its own statutory articulation of the public policy reason for excluding the public. See, e.g., RCW 42.30.100(1)(e) (to consider certain private financial information); RCW 42.30.110(1)(f) (to receive complaints or charges against public employees); RCW 42.30.110(1)(g) (to evaluate the qualifications of applicants for public employment or the performance of employees). These examples make the point: the Legislature has allowed executive sessions on specified topics for the very reason that the Legislature has determined that public interest would not be served by making public the information exchanged on these topics, or at least not prematurely.
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The duty on the part of participants in an executive session not to disclose the information discussed there is part and parcel of the concept of an executive session. The OPMA doesn’t state this directly, but to conclude that participants may freely divulge information shared at executive session without the approval of the governing body as a whole would frustrate the purpose of allowing executive sessions in the first place. See State v. McDougal, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) ("Departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question." (quoting 2A N. Singer, Statutory Construction § 45.12 (4th ed. 1984))). As we have previously observed: "The discussions at executive sessions are intended to be private." AGO 1998 No. 15, at 8 (concluding that governing bodies have the discretion whether to prohibit or allow the recording of executive sessions).

A California court reached a similar conclusion. In Kleitman v. Superior Court, 74 Cal. App. 4th 324, 333-34, 87 Cal. Rptr. 2d 813 (1999), the court followed the reasoning of a series of opinions of the California Attorney General, which had found a duty of confidentiality implicit in the authorization of executive sessions because a contrary conclusion would render executive sessions meaningless. Id. at 334 (citing 76 Op. Att'y Gen. 289, 291 (Cal. 1993); 80 Op. Att'y Gen. 231, 239 (Cal. 1997)). As the California Attorney General observed, "Board members cannot feel free to discuss the issues candidly [in executive session] if they believe that their disaffected colleagues will be unconstrained in talking publicly about the closed session deliberations and thereby prejudice the course of action to be taken." 80 Op. Att'y Gen. 231 (Cal. 1997), 1997 WL 468122, at *6. The Florida Attorney General concluded likewise, noting that although that state’s law "does not directly address the dissemination of information that may be obtained at a closed meeting . . . the nature of such proceedings shows a clear intent that matters discussed . . . are not to be open to public disclosure." Op. Att’y Gen. 2003-09, at 1 (Fla. 2003).

A comprehensive treatise on open meetings law reaches the same conclusion. "The obvious purpose of any executive session is to prevent disclosure of the matters discussed to part or all of the general public at least for a period of time." 2 Ann Taylor Schwing, Open Meeting Laws § 7.10(E) (3d ed. 2011). "The members of the public body and any staff or others present are at least morally obligated to maintain their silence as to the content of closed sessions." Id.
Our conclusion that this is a legal obligation, and not solely a moral one, finds support in the Legislature’s decision when it enacted the OPMA to retain one section of the earlier act that the OPMA replaced. The Legislature first enacted the OPMA in 1971. Laws of 1971, 1st Ex. Sess., ch. 250. Before then, the requirement for open meetings was governed by a sparse, three-section act adopted in 1953 and codified in RCW 42.32. Laws of 1953, ch. 216. The 1971 act repealed two of the three sections that comprised the prior law, but left one section in place. Laws of 1971, 1st Ex. Sess., ch. 250, § 15. The sole remnant of the prior act remains in the law today, and reads in full: “The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.” RCW 42.32.030, recodified, Laws of 2017, 3d Sp. Sess., ch. 25, § 30. Thus, in the same act in which the Legislature authorized executive sessions, it retained a statute that does not require recording the minutes of executive sessions and only requires public minutes for the open and public portions of meetings. Laws of 1971, 1st Ex. Sess., ch. 250, § 11 (authorizing executive sessions, codified as amended at RCW 42.30.110); Laws of 1971, 1st Ex. Sess., ch. 250, § 15 (omitting RCW 42.32.030 when otherwise repealing the prior act); see also AGO 1998 No. 15, at 8-9 (concluding that governing bodies may prohibit the recording of executive sessions). “If the recording of a closed session discussion must be kept in confidence, it follows that oral communications of such information may not be made to the public.” 80 Op. Att’y Gen. 231 (Cal. 1997), 1997 WL 468122, at *3. This statutory recognition of the confidential nature of executive sessions supports our conclusion that information shared in executive session may not be freely divulged—and is strikingly inconsistent with a contrary argument that such information is public.

This does not mean that the OPMA imposes a blanket prohibition against disclosing any and all information that may have been shared during an executive session. For one thing, information that had already been disclosed publicly would not be rendered confidential by discussing it in executive session. Rather, RCW 42.30.110 only creates a duty of confidentiality with regard to information about the statutorily authorized purpose (or purposes) for convening an executive session. The duty of confidentiality arises in the first instance only because the Legislature has enumerated a limited number of specific topics that, in the public interest, may be discussed outside the presence of the public. In re Recall of Lakewood City Council Members, 144 Wn.2d at 586. In order for information to be properly shared within the scope of an executive session, several requirements must be satisfied. An executive session, first, can only be held

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“during a regular or special meeting.” RCW 42.30.110(1). The governing body must satisfy the applicable notice requirements for holding the regular or special meeting in the first place. RCW 42.30.075 (schedule of regular meetings); RCW 42.30.080 (special meetings). The purpose and duration of the executive session must be publicly announced. RCW 42.30.110(2). Finally, the purpose of the executive session must be one of the purposes for which an executive session is allowed. RCW 42.30.110(1).
Agenda Item #7

Any duty of confidentiality cannot logically extend beyond the purpose of a properly-convened executive session. We agree with the California Attorney General that a member of a governing board who discloses only discussions that improperly took place during an executive session has not violated the duty to honor the confidentiality of proper executive session discussions. 80 Op. Att’y Gen. 231 (Cal. 1997), 1997 WL 468122, at *7 n.2. A participant who discloses conversations not legally within the scope of an executive session would not transgress the public purpose for which executive sessions are authorized in the first place. Cf. In re Recall of Lakewood City Council Members, 144 Wn.2d at 586 (RCW 42.30.110 reflects a legislative determination as to the limited circumstances in which executive sessions are in the public interest). As exceptions to the general rule that governing bodies must conduct their business in open meetings, the permissible scope of executive sessions are construed narrowly. Columbia Riverkeeper, 2017 WL 2483271, at *7.

We must reject a potential counterargument based on the intent and structure of the OPMA. The OPMA’s intent section explains that the actions of governing bodies should “be taken openly and . . . their deliberations be conducted openly.” RCW 42.30.010. The Legislature has also instructed that the OPMA “be liberally construed.” RCW 42.30.910. The OPMA is also structured, as we noted above, as a general requirement that governing bodies of public agencies conduct all of their meetings in the open. RCW 42.30.030. Executive sessions are but an exception to that general rule of openness. RCW 42.30.110. “Liberal construction of a statute ‘implies a concomitant intent that its exceptions be narrowly confined.’” Miller v. City of Tacoma, 138 Wn.2d 318, 324, 979 P.2d 429 (1999) (quoting Mead Sch. Dist. 354 v. Mead Educ. Ass’n, 85 Wn.2d 140, 145, 530 P.2d 302 (1975)).

These principles could suggest that we should not infer an obligation for participants in an executive session to hold those discussions in confidence. That is, it could be argued that the OPMA’s general policy of openness, coupled with the principle that the Act is construed liberally and its exceptions narrowly, mean that we should not infer a duty of confidentiality where none is expressly stated. In other words, it might be argued that if the Legislature had intended to create a duty of confidentiality it would have said so. See Davis v. Cox, 183 Wn.2d 269, 282, 351 P.3d 862 (2015) (“We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” (internal alteration and quotation marks omitted)). Indeed, some authorities around the country have reached conclusions similar to this. See, e.g., Bellamy v. Brown, 305 S.C. 291; 294, 408 S.E.2d 219 (1991) (declining to find a duty of confidentiality in a South Carolina statute permitting executive sessions); Op. Att’y Gen. (Miss. Mar. 4, 1982), 1982 WL 44189, at *1 (“nothing in the law prohibits a member of a public body from informally [original page 9] revealing what occurred at an executive session”); Op. Att’y Gen. No. 91-48*, at 1 (La. 1991) (Louisiana’s open meeting law did not address making public those matters discussed in executive session, but a duty to maintain confidentiality could arise from another law protecting privacy).
All of that said, to conclude that the OPMA allows participants to freely disclose the discussions taking place at executive session would undermine the statutory provision allowing governing bodies to discuss a limited range of issues outside the presence of the public. RCW 42.30.110(2); see McDougal, 120 Wn.2d at 351; see also Kleitman, 74 Cal. App. 4th at 334 (the confidentiality of an executive session would be rendered meaningless if an individual member could publicly disclose the information he or she received in confidence (citing 80 Op. Att’y Gen. 231, 239 (Cal. 1997))). It would make no sense for the Legislature to allow a governing board to exclude the public from an executive session if any individual member remained free to recount the entire proceeding immediately afterward.

Another possible counterargument to our conclusion begins with the observation that the OPMA does not oblige the discussion of topics listed in RCW 42.30.110(1) in executive session. The statute is permissive, providing that nothing in the OPMA “may be construed to prevent a governing body from holding an executive session[.]” RCW 42.30.110(1) (emphasis added). The Washington Supreme Court has noted the discretionary nature of executive sessions. In re Recall of Bolt, 177 Wn.2d 168, 177, 298 P.3d 710 (2013). This argument contends that if the OPMA did not require public exclusion, then exercising the option of doing so should not create an obligation among the members to maintain the confidentiality of executive session discussion. We reject this argument because RCW 42.30.110 vests governing bodies with the discretion to treat a discussion confidentially. The option to proceed in public amounts to nothing more than a recognition that the governing body—but not its individual members—can make the discussion public if it so chooses.

Representative Riccelli called to our attention a final potential counterargument. His letter requesting our opinion appends a letter written by a former Open Government Ombuds in our office, who expressed the view that by authorizing executive sessions the OPMA “does not limit [a participant’s] first amendment right to speak about non-confidential information that concerns the public.” Letter from Timothy D. Ford, Office of Attorney General, Open Government Ombudsman, to the Honorable John Knutsen, Puyallup City Council (Mar. 31, 2009), at 3 (Letter). That letter continued: “Any rule that seeks to limit all information discussed in executive session may be overly broad, and likely restricts [a participant’s] constitutional rights.” Letter at 3. That view was not expressed in an Attorney General Opinion and thus does not represent the considered view of our office, and is open to serious question on the merits. See, e.g., Asgeirsson v. Abbot, 696 F.3d 454, 462-63 (5th Cir. 2012) (rejecting a First Amendment challenge to a statute that criminalized violations of the Texas Open Meetings Act). But even if that letter was correct, the First Amendment concern it raised was expressly limited to “non-confidential information.” Letter at 3. As we explained above, however, RCW 42.30.110 only precludes the disclosure of information that pertains to the statutorily authorized purpose for which the executive session was called. To the extent that the discussion at an executive session might stray from that topic the information would not be rendered confidential by RCW 42.30.110. Sharing information outside that duty of confidentiality would not violate the OPMA and therefore would not fall within the concerns expressed in the letter attached to Representative Riccelli’s opinion request.
We therefore conclude in response to your first question that participants in an executive session have a legal duty under the OPMA to hold in confidence information that they obtain in the course of a properly convened executive session, but only if the information at issue is within the scope of the statutorily authorized purpose for which the executive session was called.

2. **Are the members of the governing body of a public agency prohibited by the Code of Ethics for Municipal Officers from disclosing information shared during executive sessions that are properly called under the Open Public Meetings Act?**

You next ask whether the Code of Ethics for Municipal Officers, RCW 42.23, also prohibits disclosing information shared during executive sessions. We conclude that the disclosure of information made confidential by the OPMA by an officer covered by the Code of Ethics for Municipal Officers would violate RCW 42.23.070(4).

As its name implies, the Code of Ethics for Municipal Officers applies only to municipal officers. These are defined to include, “all elected and appointed officers of a municipality, together with all deputies and assistants of such an officer, and all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer[,]” RCW 42.23.020(2). Your questions arise in the context of school directors and city council members, both of whom fall within the scope of this Act. RCW 42.23.020(1) (defining “municipality” to include “all counties, cities, towns, districts, and other municipal corporations and quasi-municipal corporations organized under the laws of the state of Washington”).

The applicable provision of the Act reads:

No municipal officer may disclose confidential information gained by reason of the officer’s position, nor may the officer otherwise use such information for his or her personal gain or benefit.

RCW 42.23.070(4). This language states two prohibitions: it prohibits a municipal officer from disclosing confidential information, and it also prohibits otherwise using confidential information for personal gain. RCW 42.23.070(4). That is, a municipal officer could violate RCW 42.23.070(4) either by disclosing confidential information or by “otherwise” using that information for personal gain without disclosing it. See *Chicago Manual of Style* § 5.198 (16th ed. 2010) (describing the use of “nor” as a disjunctive conjunction to negate a series of separate items).

RCW 42.23 does not itself define “confidential information.” We turn to the Ethics in Public Service Act, which was part of the same legislation by which RCW 42.30.070 was enacted. Laws of 1994, ch. 154, § 121. That act also included the statute now codified as

RCW 42.52.010, the definitional provision for the Ethics in Public Service Act. Laws of 1994, ch. 154, § 101. The definition of “confidential information” in RCW 42.52.010(5) can therefore reasonably be applied to RCW 42.23.070(4). See *Hubbard v. Spokane County*, 146 Wn.2d 699, 712-13, 50 P.3d 602 (2002) (applying the intent section of the Ethics in Public Service Act to construe RCW 42.23.070(1)), *overruled on other grounds*, *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 281, 358 P.3d 1139 (2015).
The term "confidential information" for purposes of RCW 42.23.070(4) therefore means: "(a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law." RCW 42.52.010(5). Information learned during a properly convened executive session fits within both possible definitions. The information is not available to the general public on request because it was learned during a meeting from which the public was excluded. RCW 42.30.110(2). And, as we concluded in response to your first question, information pertaining to the statutorily authorized purpose of the executive session is made confidential by the OPMA.[5]

We therefore conclude that the disclosure of information learned in an executive session made confidential by the OPMA also violates RCW 42.23.070(4).

3. **If the law prohibits public officials from disclosing information exchanged during executive sessions, would a violation of that prohibition constitute a misdemeanor under RCW 42.20.100 and/or "official misconduct" under RCW 9A.80.010?**

You next ask whether the breach of the duty not to disclose certain information learned during an executive session would constitute a crime under either RCW 42.20.100 or RCW 9A.80.010. These two statutes could form the basis of criminal charges under some facts, but discretion might not often lead prosecutors to invoke this remedy.[6]

Proving a criminal violation is a substantially more daunting task than showing a civil violation of the law. This is true partly due to the requirement that guilt of a crime be proven beyond a reasonable doubt. RCW 9A.04.100. Criminal convictions also require evidence not merely that a person took a prohibited action but that the person did so with the required mental state. RCW 9A.08.010. The paucity of case law[7] decided under either of the statutes you ask about demonstrates at least a reluctance to use them to convert civil violations into criminal cases, if not the practical difficulty of doing so.

Turning to each of the statutes in turn, RCW 42.20.100 provides:

Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their wilful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor.

In one of the few cases discussing this statute, the Washington Supreme Court referred to this offense as "wilful neglect of duty." *State v. Twitchell*, 61 Wn.2d 403, 404, 378 P.2d 444 (1963) (sheriff accused of permitting a house of prostitution to operate). It seems difficult to describe the act of disclosing information learned in an executive session as a neglect of duty, but if we are correct in our response to your first question that the OPMA imposes a duty to keep certain information confidential, then such an allegation is not inconceivable. *But see State v. Torgeson*, 19 Wn. App. 17, 22, 573 P.2d 817 (1978) (holding that evidence was insufficient to support a violation of RCW 42.20.100 for lack of a duty for the public officer to act).
The most daunting element that a prosecutor must prove beyond a reasonable doubt in order to obtain a conviction may be the necessary mental state. In order to be guilty of a misdemeanor, a public official must willfully neglect to perform a duty. RCW 42.20.100. Under Washington's criminal code, "[a] requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears." RCW 9A.08.010(4). Further:

A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(1)(b). And since the act potentially constituting the crime would be the disclosure of information learned during an executive session under the OPMA, the prosecutor would be required to prove more than mere "negligent ignorance" that the OPMA precludes such disclosure. See State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980) (rejecting a construction of RCW 9A.08.010(1)(b)(ii) as equating "knowledge" with "negligent ignorance" because "[k]nowledge is intended to be a more culpable mental state than recklessness").

Recall that the OPMA nowhere states in so many words that information learned in an executive session is confidential. See RCW 42.30.110. Our conclusion in response to your first question stemmed from a thorough consideration of RCW 42.30.110 in light of its context and purpose, and with consideration of authorities from both Washington and other jurisdictions touching upon the subject. We cannot, however, discount the possibility that facts could arise under which a member of a governing board might disclose information from an executive session under circumstances constituting a criminal violation of RCW 42.20.100. Indeed, a California court determined that a statute similar to RCW 42.20.100 can be used to enforce a violation of their open meetings law. Adler v. City Council, 184 Cal. App. 2d 763, 774, 7 Cal. Rptr. 805 (1960) (discussing Cal. Gov't Code § 1222). Training or other steps that provide members of a governing body with actual notice that executive session information is confidential might be factors in assessing intent for this purpose. But a conviction would require a jury to conclude beyond a reasonable doubt that the member of a governing body violated the OPMA willfully: that is, being aware of facts, or with information that would lead a reasonable person to know that the information they are disclosing is confidential,[8] even though RCW 42.30.110 does not expressly prohibit sharing the information. Given that this opinion is the first Washington authority to address this question at length, whether the conduct at issue occurred before or after this opinion was issued could also be a factor in whether the conduct was willful.

Convicting a member of a governing board under the other statute you ask about is a similarly remote possibility. RCW 9A.80.010 provides:

(1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege:
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(a) He or she intentionally commits an unauthorized act under color of law; or
(b) He or she intentionally refrains from performing a duty imposed upon him or
her by law.

(2) Official misconduct is a gross misdemeanor.

A public servant would only violate RCW 9A.80.010 by disclosing information
from an executive session if he or she did so “with intent to obtain a benefit or to deprive
another person of a lawful right or privilege.” RCW 9A.80.010(1); see State v. Groom,
80 Wn. App. 717, 722,
[original page 14]
911 P.2d 403 (1996) (generally describing the offense), affirmed on other grounds, 133
Wn.2d 679, 947 P.2d 240 (1997). This phrase embraces two distinct elements that a
prosecutor would be required to prove beyond a reasonable doubt. First, the
requirement that the person act “with intent” means that “he or she acts with the
objective or purpose to accomplish a result which constitutes a crime.” RCW
9A.08.010(1)(a). Second, the objective or purpose that the public servant must intend to
accomplish is the obtaining of a benefit or the deprivation of a lawful right or privilege for
another. RCW 9A.80.010(1). And the statute requires proof of a second element of
intent, that being an intent to either commit an unauthorized act under color of state law
or to intentionally refrain from performing a duty imposed by law. RCW 9A.80.010(1)(a),
(b); see also Liewer, 65 Wn. App. at 645 (a violation of RCW 9A.80.010 requires proof
of an unlawful act or an intentional failure to perform a required duty). Proving subjective
intent could be a significant difficulty, depending on what training and information
regarding the duty of confidentiality the member has received. Even more so, the
element of obtaining a benefit or depriving somebody of a right may rarely occur.
Examples come to mind, such as if a member of a governing board stood to gain
financially by disclosing that the body wants to purchase a particular parcel of real
estate. See RCW 42.30.110(1)(b). Thus, as with RCW 42.20.100, a successful
prosecution under RCW 9A.80.010 based on the disclosure of information from an
executive session seems conceivable but rare.

Finally, a member of a governing body charged criminally under either RCW
42.20.100 or RCW 9A.80.010 might argue that those statutes do not apply to a charge
grounded in a violation of the OPMA. This argument might be based on one of the civil
remedy provisions of the OPMA, which provides: “A violation of this chapter does not
constitute a crime and assessment of the civil penalty by a judge shall not give rise to
any disability or legal disadvantage based on conviction of a criminal offense.” RCW
42.30.120(3). One might argue that this statute creates some ambiguity about the
relation between the OPMA and RCW 42.20.100 or RCW 9A.80.010, and that a court
should resolve that alleged ambiguity by finding a criminal remedy unavailable under
the rule of lenity. See In re Pers. Restraint of Stenson, 153 Wn.2d 137, 149 n.7, 102
P.3d 151 (2004). But the rule of lenity doesn’t apply when statutory construction makes
the meaning of the statute clear. State v. Evans, 177 Wn.2d 186, 193-94, 298 P.3d 724
(2013). RCW 42.30.120(3) says only that “[a] violation of this chapter does not
constitute a crime” (emphasis added), but RCW 42.20.100 and RCW 9A.80.010 are not
in RCW 42.30 and specifically prohibit the disclosure of confidential information. RCW
42.30.120(3) thus appears not to immunize conduct from criminal prosecution that
would be subject to such prosecution under statutes in other chapters.
4. Under what circumstances, if any, may the governing body of a public agency exclude an elected member from executive session because of concerns about confidential information?

Your final question touches upon the potential difficulty in enforcing the duty not to disclose certain information learned in an executive session. You ask whether the governing body might exclude an elected member from executive session because of concerns about confidential information. We conclude that the most readily-available remedy for a governing body concerned that one of its members might disclose confidential information is the one provided in the OPMA itself. That is, the governing body can ask a court to issue either a writ of mandamus or an injunction to stop or prevent a threatened violation of the OPMA. RCW 42.30.130. Exclusion of an elected member is a less likely remedy.[9]

The OPMA provides a judicial enforcement mechanism. “Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body.” RCW 42.30.130. This statute has been applied in the past to a request by a citizens’ group to enjoin a board of county commissioners from future violations of the OPMA. Protect the Peninsula’s Future v. Clallam County, 66 Wn. App. 671, 677-78, 833 P.2d 406 (1992) (denying an injunction because under the facts of that case there was no evidence that the defendants would violate the OPMA in the future). RCW 42.30.130 might be most obviously applicable to enforcing the OPMA against a governing body, but nothing in its language would exclude its application to seeking an injunction against a member if evidence establishes a need for an injunction against future disclosures.

This remedy is not necessarily exclusive because it is phrased permissively, providing that any person “may” seek an injunction. See Jordan v. Nationstar Mortgage, LLC, 185 Wn.2d 876, 893, 374 P.3d 1195 (2016) (finding a statute similarly stating that a particular remedy “may” be sought did not establish an exclusive remedy). We therefore consider whether exclusion of a member from an executive session might be an additional remedy.
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The exclusion of an elected member of a governing body of a public agency would seriously interfere with the ability of an elected official to represent the voters who selected him or her to perform the job. "When the voters choose an elected official, they necessarily choose who will be responsible for the duties of that office." *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 179, 385 P.3d 769 (2016). As has long been recognized, an individual member of a multi-member body can do little “except at a meeting with the others.” *State ex rel. Heilbron v. Van Brocklin*, 8 Wash. 557, 565, 36 P. 495 (1894). Members of a governing body generally have the right to attend its meetings, including executive sessions. *Myers v. Elgin Cnty. Coll. Bd. of Trustees*, 46 Ill. App. 3d 768, 770-71, 361 N.E.2d 314 (1977) (upholding the right of a student member of a community college board of trustees to attend executive sessions of the board). Our counterpart in a sister state concluded that exclusion is not a remedy, noting that “the inherent right of a member of a governmental body to attend all meetings of that body, including executive sessions,” made exclusion inappropriate. Op. Att’y Gen. L-115 (N.D. 1999), at 1. And we have identified no statutory grant of authority to exclude members. Thus, any effort to exclude a member based on fears of a failure to maintain confidentiality would be legally risky. That said, courts have sometimes held that governing bodies have inherent authority to exclude individual members where the facts make such exclusion obviously appropriate (e.g., where one board member is suing the board, and the board meets in executive session to discuss the litigation).[10] so we cannot rule out the possibility that sufficiently extreme facts might arise that would make exclusion appropriate even without a court order.

A governing body might also be able to address the confidentiality of its executive sessions (including penalties for violating confidentiality) through its own ordinances or rules. This possibility might depend on consideration of several variables, including examining the statutes under which any particular governing body operates. For cities and counties, it may also matter whether the local government operates under a charter and, if so, what the charter says. Having identified no specific authority for excluding a member other than through the judicial remedy of RCW 42.30.130, we hold open the possibility that the law governing a particular governing body could allow for a local ordinance or rule excluding members from executive sessions under some circumstances.

We therefore conclude in response to your fourth question that a governing body may enforce the confidentiality of executive sessions through the judicial remedy provided in RCW 42.30.130, but we have identified no authority allowing for the exclusion of members without a court order.

We trust that the foregoing will be useful to you.

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Attorney General

JEFFREY T. EVEN
Deputy Solicitor General

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attachment

[Attachment page 1]
RCW 42.30.110
Executive sessions.
(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:
(a) (i) To consider matters affecting national security;
(ii) To consider, if in compliance with any required data security breach disclosure under RCW 19.255.010 and 42.56.590, and with legal counsel available, information regarding the infrastructure and security of computer and telecommunications networks, security and service recovery plans, security risk assessments and security test results to the extent that they identify specific system vulnerabilities, and other information that if made public may increase the risk to the confidentiality, integrity, or availability of agency security or to information technology infrastructure or assets;
(b) 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;
(c) 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 shall be taken in a meeting open to the public;
(d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;
(e) To consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;
(f) 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 a meeting open to the public shall be conducted upon such complaint or charge;
(g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), 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, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;
(h) 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;
(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an [Attachment page 2] 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. This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6 or RCW 5.60.060(2)(a) concerning:
(i) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party; (ii) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or (iii) 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; (j) To consider, in the case of the state library commission or its advisory bodies, western library network prices, products, equipment, and services, when such discussion would be likely to adversely affect the network’s ability to conduct business in a competitive economic climate. However, final action on these matters shall be taken in a meeting open to the public; (k) To consider, in the case of the state investment board, financial and commercial information when the information relates to the investment of public trust or retirement funds and when public knowledge regarding the discussion would result in loss to such funds or in private loss to the providers of this information; (l) To consider proprietary or confidential unpublished information related to the development, acquisition, or implementation of state purchased health care services as provided in RCW 41.05.026; (m) To consider in the case of the life sciences discovery fund authority, the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information; (n) To consider in the case of a health sciences and services authority, the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information.

(2) Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

[1] A copy of RCW 42.30.110 is attached for ease of reference. In addition to authorizing executive sessions on specified topics in RCW 42.30.110, the OPMA also excludes a few kinds of meetings from the scope of the act altogether. RCW 42.30.140. This provision does not affect the answers to your questions, but it is worth noting that certain topics, such as quasi-judicial hearings and collective bargaining, are not covered by the OPMA at all. RCW 42.30.140.
[2] Participation in executive sessions might not be limited to members of the governing body. As a practical matter, other individuals such as staff, legal counsel, or others with some necessary relationship to the matter being addressed might be invited to participate. See Wash. State Bar Ass’n, Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws § 22.5 (2d ed. 2014).
[3] The California case arose in the context of discovery in a civil action, in which a litigant sought “the personal recollections of city council members as to proceedings which took place during an unrecorded closed session of the city council.” Kleitman, 74 Cal. App. 4th at 326. The court’s reasoning was based in part on a California statute governing discovery related to executive sessions, which has no Washington parallel. Id. at 326-27. We do not address the question of whether Washington litigants might obtain information from executive sessions through discovery.

[4] The California legislature added a section to its open meetings law in 2002, expressly precluding the disclosure of information acquired in an executive session. Cal. Gov’t Code § 54963 (enacted by 2002 Cal. Stat., ch. 1119, § 1). We cite to California authorities that predate this statute, and that therefore reflect analysis based upon a law similar to ours that authorized executive sessions without expressly addressing the confidentiality of information shared at those meetings.

[5] Alternatively, if the definition in RCW 42.52.010(5) did not apply, the same conclusion would follow from a dictionary definition. See State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010) ("W[e] may discern the plain meaning of nontechnical statutory terms from their dictionary definitions." (alteration in original) (quoting State v. Cooper, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006))). “Confidential” can mean, “not publicly disseminated.” Webster’s Third New International Dictionary 476 (2002). That definition would support our conclusion as well as the statutory definition does.

[6] The two statutes apply only to limited classes of people. RCW 42.20.100 applies by its own terms to “any public officer or other person holding any public trust or employment.” One court has applied the statutory definition of “public officer” found in RCW 9A.04.110(13) to RCW 42.20.100. State v. Liewer, 65 Wn. App. 641, 645, 829 P.2d 236 (1992). Similarly, RCW 9A.80.010 applies to “public servants,” a term defined in RCW 9A.04.110(23). The OPMA applies to a wide variety of state and local governing boards, both elected and appointed. It is not readily apparent that every one of them falls within these terms, suggesting a threshold question in applying these statutes to any particular governing board as to whether its members fall within the scope of these statutes.

[7] Every published case discussing these two statutes is cited in the few pages that follow.


[9] This question is limited to elected bodies, such as the school boards and city councils that motivated your respective requests for our opinion. The OPMA, of course, includes any number of appointed bodies as well. RCW 42.30.020(1) (defining “public agency”). We need not consider whether our answer to your question would be any different as applied to an appointed member of a governing board.

[10] See Hamilton v. Town of Los Gatos, 213 Cal. App. 3d 1050, 1052, 261 Cal. Rptr. 888 (1989) (holding that a town council member was barred from listening to a tape of an executive session in which other counsel members had discussed litigation against that member with legal counsel); see also Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J. Super. 566, 569-70, 598 A.2d 1232 (1991) (affirming decision excluding a school board member from executive sessions called to discuss litigation filed against it by that board member).