

Knowing the Waters

Basic Legal Guidelines for Port District Officials

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It is essential for all port officials, especially commissioners and managers, to understand the nature, purposes, powers and limitations of port districts, their own legal roles and their inter-relationships with others. Otherwise, unnecessary problems arise that can frustrate their ability and the ability of those around them, to provide effective public service.

Introduction

Keep in touch with your legal counsel.

Port district government is uniquely entwined with a vast body of constitutional, statutory, and decisional law. The port district attorney can and should play a vital role in the understanding and administration of that law.

*Another excellent port law reference is the publication, **Laws of the State of Washington Relating to Port Districts.***

Published by Code Publishing Company (1-800-551-CODE), in cooperation with the Washington Public Ports Association, this guide contains all pertinent RCWs related to ports as well as the Constitution of the State of Washington.

The Municipal Research Services Center (MRSC) provides a wide range of assistance to Washington's local governments, including port districts. Inquiries may be submitted by visiting www.mrsc.org or calling 206-625-1220.

The Washington Public Ports Association (WPPA) has prepared this handbook to help port management and staff provide effective service while avoiding legal troubles.

Although meant to be comprehensive, *Knowing the Waters* does not necessarily include all statutes and regulations, or case law, that possibly may apply. Furthermore, the law frequently changes with new enactments and interpretations; even legal interpretations may vary depending upon the facts of a particular case. Hence, it is important to develop a healthy working relationship with the various offices and other sources of help available to you. Do not hesitate to seek information and advice, especially on legal matters. The result may make the difference between a smooth passage and a disaster; between success or failure in asserting a claim or defense, particularly when the good faith of the official may be an issue in the lawsuit.

*– Robert F. Hauth, Attorney Owens Davies Mackie
WPPA Retained Counsel December 1996*

1. Port Districts as Municipal Corporations

Port districts are created by law as “municipal corporations” of the state.¹

Like private corporations, they are capable of contracting, suing and being sued. As “municipal” corporations, however, their functions are wholly public. They are, in a sense, incorporated agencies of the state, exercising local governmental powers.²

I. Basic Powers - The Distribution and Exercise of Governmental Powers

A. NATURE AND POWERS, GENERALLY

Because of their unique and relatively broad spectrum of powers, port districts in this state bear a closer resemblance to “general purpose” municipal corporations than do other types of local government agencies

For purposes of this discussion, municipal corporations are either “general purpose” or “limited purpose” municipal corporations. Counties, cities and towns are “general purpose” municipal corporations because they possess general governmental authority in all matters of local concern, including “police power” (subject to legislative control).³

Port districts are created for special purposes and their powers, though extensive, are limited to those areas of jurisdiction. Consequently, like fire protection, water, sewer and similar districts, ports often are called “special purpose” districts, “limited purpose” municipal corporations, or, sometimes, “quasi” municipal corporations. On the other hand, because of their unique and relatively broad spectrum of powers, port districts in this state bear a closer resemblance to “general purpose” municipal corporations than do other types of local government agencies.⁴

2. Port District Powers

The Legislature, in creating port districts, described their basic purposes as follows:

*Port districts are hereby authorized to be established in the various counties of the state for the purposes of acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, rail or motor vehicle transfer and terminal facilities, water transfer and terminal facilities, air transfer and terminal facilities, or any combination of such transfer and terminal facilities, and other commercial transportation, transfer, handling, storage and terminal facilities, and industrial improvements.*⁵

Powers to implement those purposes are granted in numerous statutes, mainly in Title 53 of the Revised Code of Washington (RCW), but also in other RCW titles and chapters such as chapter 14.08 RCW relating to airports, chapter 39.84 RCW relating to industrial revenue bonds (implementing Amendment XXXII, Washington State Constitution) and possibly other incidental provisions. Some of those powers have been added in relatively recent times, mainly to facilitate trade promotion and industrial and economic development.⁶

Some port district powers resembling county and city governmental powers are eminent domain,⁷ the power to levy taxes and special local improvement assessments,⁸ to create incidental park and recreation facilities (with certain limitations),⁹ to adopt and enforce regulations relating to moorage and toll facilities,¹⁰ and to cooperate with counties and cities in order to apply general police and traffic regulations to port properties and operations.¹¹

3. General Limitations on Port District Powers

As creatures of the state, generally municipal corporations can exercise only powers that are delegated to them by law either expressly, or by implication from the terms of a particular statute. Usually their powers are narrowly construed, and doubts are resolved against the existence of a questionable power. As our Supreme Court said in one typical case: “If the power is not expressly granted or fairly implied, the power must be denied.”¹² Other cases limit implied powers to those that are “necessarily” implied, which indicates an even more narrow restriction.¹³

That principle, called the “Dillon Rule,”¹⁴ still prevails but is sometimes modified by statute. The Legislature has, in fact, directed the application of a liberal rule in construing certain port district powers, such as the acquisition and operation of toll facilities.¹⁵ Furthermore, insofar as a municipal power can be classified as “proprietary” (like a private business), our courts have applied a liberal rule rather than a strict rule of construction.¹⁶

4. Powers of Officers

Regardless of how broad the powers of a particular municipal corporation may be, its officers may exercise only those powers that are delegated to them by law or pursuant to law.¹⁷

1. In General

The Legislature has built into the management of port districts, like other local governmental bodies, a system of checks and balances to minimize dangers of error or abuse. That system is a reflection of the “separation of powers doctrine” in the structure of our federal and state governments. Consequently, although the “doctrine” may apply to port districts only to a limited extent or by analogy, it is important to understand it as a basis for sound decisions and practices in all local government agencies including port districts.

2. The Separation of Powers Doctrine

Our founding fathers adopted a political system based upon the idea that governmental powers should not be overly concentrated in one person or body of persons. The Washington State Supreme Court, in a 1976 decision applying the separation of powers doctrine to a county, quoted an early author on the subject as follows:

*All would be lost if the same man or the same body of leaders, either of the nobles or of the people, exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminal and civil cases.*¹⁸

As our court explained in that case, governmental powers at both federal and state levels are distributed among three separate branches or departments: “legislative,” “executive or administrative” and “judicial.” Each of those departments exercises certain defined powers, free from unreasonable interference by the other branches, yet all three departments interact with and upon each other as component parts of a “check and balance” system. The court further explained that the doctrine, although an essential part of our democratic form of government, is flexible and adaptable, particularly in its application to local governments.¹⁹

Local government in our state resembles state government, most noticeably in “general purpose” municipal governments such as cities and counties. The principal role of the city or county council or commission is to enact local law and policy by ordinance or resolution, and in that respect the body resembles the Legislature. The functions of the mayor, city manager or county executive, in varying degrees, resemble those of the governor as chief executive in state government.

B. THE SEPARATION AND DISTRIBUTION OF POWERS

District courts and municipal courts exercise a part of the judicial function along with the superior courts and appellate courts. However, they are courts of “limited jurisdiction”, and their role in the “check and balance” system accordingly is more limited.

3. Principles Applied to Port Districts

Port districts differ from counties and cities in that they have no “judicial” department, and a sometimes less clearly defined separation between their “legislative” and “executive” or “administrative” functions. However, there are significant divisions of responsibilities in port districts that follow the same pattern.

(a) The Functions of a Port Commission

Most powers of a port district are directly vested in its board of commissioners, or “commission.”²⁰ The commission, like a city council, is the port district’s policy making and regulatory body responsible for making the policy decisions of the district in both internal and external matters and providing for their implementation. Examples are: the adoption of a plan of harbor improvements;²¹ creating industrial improvement districts;²² establishing rates, charges and regulations applicable to users of port facilities;²³ establishing positions and employment policies including compensation and expense reimbursement;²⁴ adopting periodic and supplemental budgets;²⁵ levying taxes;²⁶ borrowing money and issuing bonds;²⁷ providing for and regulating promotional hosting expenditures;²⁸ and a host of property, infrastructure and other decisions under chapter 53.08 and other RCW chapters.

The commission, like a city council, is the port district’s policy making and regulatory body responsible for making the policy decisions of the district in both internal and external matters.

Those kinds of functions are recognized as “legislative” or “quasi legislative” (meaning “as though” adopted by a lawmaking body).²⁹

Other port commission functions may be classified as “administrative” or “executive” in nature. Those generally include all actions necessary for overseeing, enforcing or carrying out the established policies of the district; such as the acts of appointing, employing and discharging subordinate officers and employees, executing contracts, supervising lessees, constructing and repairing facilities, and collecting revenues.

Most of those latter fall within the broad range of powers delegated by law to the port commission; however, the Legislature has prescribed some mandatory divisions and some optional positions of responsibility, as follows:

(1) The Port District Treasurer

One of the mandatory divisions of responsibility relates to the custody of port district funds. The county treasurer is designated by law to act as port district treasurer; or, except that in districts having a certain level of operating revenues, the port commission may by resolution designate a qualified individual to fill that office.³⁰ In either case, the port treasurer generally exercises the same powers as the county treasurer. The port commission may, as a policy matter, direct the handling and investment of port funds. However, the treasurer still can exercise some independent authority in that respect.³¹

(2) The Port District Auditor

As a part of the necessary “check and balance system” to ensure the accountability of port funds, the Legislature has established a mandatory auditing process to monitor expenditures. RCW 53.36.010 requires the port commission to appoint a port auditor for that purpose.

(b) Management Authority - Optional Delegation by Port Commission

In General

Powers delegated by law to a public officer or body cannot be delegated to others without additional legislative permission. Usually, purely administrative or “ministerial” powers (powers that do not involve the independent exercise of governmental discretion) may be delegated to subordinates. Accordingly, like other local government entities, port districts are authorized to create and fill subordinate positions, and prescribe their powers and duties.³² When exercising that authority the governing body must provide sufficient guidelines to ensure that the subordinates merely carry out the governing body’s established policy, and not substitute their own discretion.

(1) The Port Manager

One such position that may be created is that of manager, executive director, or similar managing official. Each port commission is authorized to appoint and, by resolution, delegate some of its powers and duties to such an official, as follows:

Each port commission is authorized to appoint and, by resolution, delegate some of its administrative powers and duties to the port manager. To the extent thus authorized, and with appropriate guidelines in place, the manager may carry out port commission policies such as negotiating and managing leases and other contracts, contracting for consultant services, and the overseeing of personnel and salary administration.

The commission may delegate to the managing official of a port district such administrative powers and duties of the commission as it may deem proper for the efficient and proper management of port district operations. Any such delegation shall be authorized by appropriate resolution of the commission, which resolution must also establish guidelines and procedures for the managing official to follow.³³

(2) Promotional Hosting

The law directs each port commission to adopt written regulations governing promotional hosting expenditures by its employees or agents. Notably, that statute expressly forbids individual commissioners from personally making such expenditures without commission approval.³⁴

(3) Enforcement and Administrative

Other powers may be delegated pursuant to similar legislative authorization. For example, certain port districts may appoint police officers.³⁵ Port districts are authorized to coordinate their administrative programs through the Washington Public Ports Association (WPPA).³⁶

In summary, although port commissions have considerable authority to make and administer port district policies, the Legislature has (a) directed the exercise of certain critical functions by others (such as the port treasurer and port auditor), and (b) permitted a limited delegation of administrative functions to managers, other officials and agencies.

(c) Practical Considerations in Delegating Powers

To the extent that a commission has lawfully delegated portions of its responsibility, the resulting spheres of authority should be recognized and honored, almost as though the separation of powers doctrine applied to the district in full force. Having appointed an auditor, treasurer or manager, and having established necessary policies and guidelines, the commission should generally respect the ability of those officers to exercise their powers within their legally established limits. On the other hand, all must recognize that the commission is ultimately responsible for the operations of the district and cannot abdicate either its policy making or its supervisory function. Perhaps one of the most challenging practical duties of any governing body is to exercise the correct amount of oversight without unduly interfering with the routine operations or day-to-day exercise of duties entrusted to others.

(d) Other Considerations

The enforcement of policies and regulations may involve individual personal or property rights and thus, under existing case law, may require hearings. An example would be enforcing regulations relative to toll facilities or moorage.³⁷ As other examples, a governing body must hold informal “pretermination” hearings, when terminating employees under certain circumstances; e.g., if a governing body or agent of a governing body has expressly or impliedly contracted, in writing or verbally, that an employee will be terminated only “for cause”; or “name clearing” hearings if defamatory public statements are made by officials when terminating or disciplining employees.³⁸

Hearings involving individual personal or property rights are “quasi (as though) judicial” insofar as they are the types of hearings normally held before judges. Accordingly, they are treated in some respects “as though” they were judicial hearings. And, when such hearings are legally required, they are subject to the “appearance of fairness doctrine” to be discussed more fully later in this work.³⁹ Briefly, the appearance of fairness doctrine requires the members of the hearing body to remain free of all entangling influences which might give an unfair appearance to such a hearing. For example, a governing body should build safeguards into required hearings involving the enforcement of its regulations, to ensure that the same individual or body does not act as both the accuser and hearing tribunal in a particular case.⁴⁰ A failure to provide a fair and objective hearing when required also may constitute the violation of a person’s constitutional right to due process of law.⁴¹

Perhaps one of the most challenging practical duties of any governing body is to exercise the correct amount of oversight without unduly interfering with the routine operations or day-to-day exercise of duties entrusted to others.

Public officers and employees are generally accountable for their actions, like any other individuals, under civil and criminal laws.¹ There are additional statutory provisions and case law governing their conduct, including state and federal civil rights laws,² ethics and conflict of interest laws;³ penalties for violations of the Open Public Meetings Act,⁴ public disclosure law,⁵ or for violations of competitive bid laws,⁶ to name only some of them.

Until 1961 an ancient common law principle, “The King can do no wrong,” prevailed in Washington. Under that principle the state and its municipalities were immune from civil liability for their negligent acts or omissions (“torts”).⁷ However, by a series of enactments 1961 through 1967, the Legislature virtually abolished the “sovereign community” concept.

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damag-

II. Basic Duties, Liabilities and Immunities of Officers

A. IN GENERAL

*es within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.*⁸

Case law has continued to recognize a narrow ground of immunity for a municipality and its officials from “tort” actions in the exercise of certain functions. The principal kind of exempt activity is described as a “discretionary act involving a basic policy determination by an executive level officer which is the product of a considered policy decision,” (e.g., the enactment of a regulatory ordinance or, in the case of a port district, a similar policy resolution).⁹ Cases in which the government agency was found not liable because the challenged action was found to be a high level discretionary act exercised at a truly executive level include: the Governor’s decision to declare a volcanic activity emergency and close a portion of the state to travel;¹⁰ a decision by the state fisheries director to limit certain salmon fishing seasons;¹¹ a decision by a police chief not to prosecute an individual for an alleged violation of a city ordinance.¹²

In 1987, the Legislature repealed an earlier immunity statute applicable to a district’s elected officials and replaced it with the following broader provision:

*An appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity but liability shall remain on the public agency for the tortious conduct of its officials or members of the governing body. (Emphasis supplied)*¹³

Questions as to any remaining immunity of a port district in the light of previous court decisions regarding discretionary immunity may have to be resolved in future cases. Some doubt also remains as to what decisions of port district officials now qualify as “discretionary.” Case law is not always clear in this area; such as whether or not the decision in favor of the municipality was based upon a determination of non-negligence or upon the doctrine of immunity, and what “immunity” test applies.¹⁴

Also be aware that this immunity is qualified because damages can be assessed for violations of the Federal Civil Rights Act (42 U.S.C. 1983) if the offender’s conduct violates clearly established statutory or constitutional rights of which a reasonable person should have known.¹⁵

Courts universally have held public office to be synonymous with public trust; a public officer’s relationship with the public is that of a fiduciary.¹⁷ The state Legislature has expressly recognized that relationship in various statutes discussed in this work relating to ethics,¹⁸ and the Open Public Meetings Act.¹⁹ The people themselves, in passing Initiative 276²⁰ by a 72% popular vote in 1972, likewise declared it to be the public policy of the State of Washington among others:

That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty and fairness in their dealings; and

*That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interests.*²¹

Understandably, the law places upon treasurers and other custodians of public funds the strictest of all duties. Case law in Washington and other states holds that custodians of public funds are “insurers”; they and their bonding companies are absolutely liable for

The Public Duty Doctrine

Some particular immunity is provided in case law by the “public duty doctrine.” Under that doctrine, where a duty is owed to the public at large (such as general law enforcement), an individual who is injured by a breach of that duty has no valid claim against the municipality, its officers, or employees. There are certain exceptions; e.g., in cases where a special relationship is created (such as when an officer or employee makes direct assurances to a member of the public under circumstances where the person justifiably relies on those assurances); or when an officer or employee (such as a building official) knows about an inherently dangerous condition, has a duty to correct it and fails to perform that duty.¹⁶

There are other protections from tort liability that are available to municipal officers and employees, even though the municipality may be liable; e.g., insurance and indemnification. They will be discussed under a later heading.

B. DUTIES AS TRUSTEES OR FIDUCIARIES

People have the right to expect from their elected representatives the utmost of integrity, honesty and fairness in their dealings.

any losses of public funds in their custody, except for “acts of God” (floods and similar natural catastrophes), or “acts of a public enemy” (war).²² The surety bonds (“official bonds”) posted by officers are to protect the public, not the officer.²³ For personal protection, insurance may be available for officers and employees who act in good faith. This subject will be discussed in more detail in a later section of this handbook.

1. In General

As a means of preventing the use of public office for self-enrichment, the state constitution initially prohibited any changes in the pay applicable to an office having a fixed term, either after the election or during the term of the officer. However, in 1967 the constitution was amended to permit pay increases for officials who do not fix their own compensation.¹ In other words, members of governing bodies who set their own compensation still cannot, during the terms for which they were elected, receive any pay increase enacted by that local body either after the election or during that term. Furthermore, midterm or post-election decreases continue to be forbidden by the constitution, regardless of which body enacts them.²

The constitutional provision applies to the term, not just the individual. Therefore, a person appointed to fill an unexpired term is bound by the same restriction.³

C. CUSTODIANS OF PUBLIC FUNDS, ABSOLUTE LIABILITY

2. Current Application to Port Commissioners

In 1992 the Legislature changed the commissioner compensation statute,⁴ in several respects. Two new paragraphs were added, and the statute was divided into four subsections. One of the new subsections provides:

III. Potential Conflicts and Ethical Guidelines

A. THE PROHIBITION AGAINST MIDTERM OR POST-ELECTION PAY INCREASES

(2) In lieu of the compensation specified in this section, a port commission may set compensation to be paid to commissioners.

In other words, commissioners now have the option of fixing their own compensation instead of accepting the statutory rates and amounts. If that option is exercised, it undoubtedly would fall within the prevailing view (and opinion of the Washington State Attorney General's office) that the constitutional prohibitions against increases or decreases would apply to the initial compensation thus established, as well as to any future changes.⁵

Current Port Commissioner Compensation

A. *Most port commissioners receive \$90 per day for meetings and other services on behalf of their district.*

B. *Commissioners of a port district with \$1-25 M gross revenues may receive a salary of \$200 per month.*

C. *Commissioners of a port district with \$25 M or more gross revenues may receive a salary of \$500 per month.*

NOTE: *Per diem amounts will be adjusted for inflation on July 1, 2008, and every five years thereafter. In 2007, total per diem compensation shall not exceed \$8,640 in a year or \$10,800 for districts grossing \$25 M or more.*

Meritorious awards and bonuses are valid only if a prior agreement or written policy was communicated to the recipient in advance of the services being performed.

The term "compensation," as used in that constitutional prohibition, includes salaries and other forms of "pay" but does not include authorized rates of reimbursement for travel and subsistence expenses incurred on behalf of the district.⁶ The Legislature has authorized various kinds of insurance for port officials and employees, including commissioners, expressly stating that such benefits are not "compensation."⁷

A similar constitutional prohibition forbids payments of retroactive or extra compensation to officers, employees or contractors.⁸

Thus, payments of typical bonuses or awards to employees for meritorious service are invalid unless they were made pursuant to a prior agreement or written policy that was communicated to the recipient at the time the services were being performed. Then the payment is not a prohibited "bonus" or "retroactive" compensation but is viewed as an agreed contractual compensation that is deferred until after the required service or condition is performed.⁹ Several papers and memoranda have been written by members of the attorney general's staff, and are available, for help in determining how to structure such payments to avoid legal errors.

1. In General

Our Washington State Supreme Court, on principles "as old as the law itself," has held that a member of a governing body may not vote on a matter where his or her financial interest is especially affected.¹⁰ Furthermore, with some exceptions described later in this section, statutory law strictly forbids public officials from having personal financial interests in municipal employment or other contracts under their jurisdiction, whether they vote on the matter or not.

The public's concern is also reflected in several sections of the "open government law." A major segment of that act is devoted to requiring candidates and public officials to make financial disclosures at various times so that the public can be informed about potential conflicts.¹¹

2. The Statutory Prohibition Against Private Interest In Public Contracts

(a) In General

Conflicting private interests in public contracts can be acquired through inadvertence; e.g., because a public official fails to realize the legal implications of a particular employment or financial transaction. Ignorance of the law, of course, is not a legal excuse; con-

B. PROHIBITED USES OF PUBLIC OFFICE CONFLICTING FINANCIAL INTERESTS

sequently it is very important to know the applicable statutes, think ahead, and avoid even the appearance of conflict in any doubtful cases.

The statutes directly governing municipal officers on this subject are contained in Chapter 42.23 RCW, the 1961 Municipal Conflict of Interest Act. This 1961 law was patterned after an earlier statute that was originally part of the 1909 criminal code. The purpose of the new act was partly to create some modifications and exemptions in order to attract qualified persons to public office and partly to make the law, as modified, more easily enforceable.¹²

The 1961 Municipal Conflict of Interest Act, like the earlier general law, contains a general prohibition that:

*No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein...*¹³

(b) General Application and Definitions:¹⁴

(1) The act applies to all municipal and quasi-municipal corporations, including port districts.

(2) Although the act refers to “officers” rather than employees, the word “officers” is broadly defined to include deputies and assistant officers, such as a deputy or assistant treasurer, as well as others undertaking to perform the duties of an officer.

(3) The word “contract” includes sales, purchases, leases, and other financial transactions of a contractual nature. (There are some monetary and other exceptions including qualified exemptions, which will be described in following paragraphs.)

(4) The phrase “contracting party” means any person or firm doing business with the district.

(c) Interpretation

No municipal officer shall be beneficially interested, directly or indirectly, in any contract...

(1) The statutory language does not necessarily prohibit a port district officer from being interested in any contract whatsoever with the district. However, it does apply to those contracts which are subject to his or her control or supervision in whole or in part (whether actually exercised or not); or contracts made for the benefit of his or her particular office. A treasurer, for example, as a rule would be prohibited from having an interest only in contracts affecting the treasurer’s office, such as the purchasing of supplies or furnishing help for the office’s operation. On the other hand, members of a port commission or other municipal governing body are more broadly affected because all of the municipality’s contracts are made, as a general rule, by or under the supervision of that body, in whole or in part. The port manager or executive director, presumably, would be in that same “officer” category, assuming that the commission has delegated to him or her the type of authority usually delegated to such an official.

(2) Subject to certain “remote interest” exceptions explained later in this section of the handbook, a member of a governing body who has a forbidden interest may not escape liability simply by taking no part in the governing body’s action in making or approving the contract. Nor does it matter that the contract was let on competitive bidding.¹⁵

(3) Both direct and indirect financial interests are prohibited, and the law also prohibits an officer from receiving financial benefits from anyone else having a contract with the district, if the benefits are in any way connected with the contract. For instance, in an early case involving a similar statute, where a mayor had subcontracted with a prospective prime contractor to provide certain materials, the supreme court struck down the entire contract with the following eloquent expression of its disapproval:

*Long experience has taught lawmakers and courts the innumerable and insidious evasions of this salutary principle that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void...*¹⁶

(4) The statute applies if a public official hires his or her own spouse because of the financial interest each spouse possesses in the other's earnings under Washington community property law (subject to possible exceptions described in later paragraphs). However, a bona fide separate property agreement between the spouses may eliminate such a prohibited conflict.¹⁷ Because of a similar financial relationship, a contract with a minor child or other dependent of the officer may be prohibited. However, this law is not an anti-nepotism law and, in the absence of such a direct or indirect financial interest, does not prohibit employing or contracting with an official's relatives. A mere emotional or sentimental interest is not the type of interest prohibited by that chapter.¹⁸ As the court observed in that case: "That which touches one's pocket is apt to warp the judgment ... To come within the statutory prohibition, it must appear that (a municipal officer) directly or indirectly profited ..."

A municipal officer with a forbidden interest may not escape liability simply by not taking part in the governing body's action in approving the contract. Nor does it matter that the contract was put out for competitive bidding.

A question often arises when the spouse of a municipal employee or contractor is elected or appointed to an office of that same municipality: Must the existing employment or contract be terminated immediately if it does not fall within any of the statutory exceptions?

The answer to that question is, ordinarily, "NO;" however, any subsequent renewal or modification of the employment or other contract probably would be prohibited. For example, in a letter opinion by the attorney general to the state auditor, the question involved the marriage of a county commissioner to the secretary of another official of the same county. If the employment had occurred after the marriage, the statute would have applied because of the community property interest of each spouse in the other's earnings. The author of the letter opinion concluded that the statute was not violated in that instance because the contract (employment) preexisted and could not have been made "by, through, or under the supervision of" the county commissioner or for the benefit of his office. However, the letter warned, the problem would arise when the contract first came up for renewal or amendment. That might be deemed to occur, for instance, as soon as the municipality adopts its next budget. Or, in a case where the spouse is an employee who serves "at the pleasure of" the official or body in question, the employment might be regarded as renewable at the beginning of the next monthly or other pay period after the official takes office.¹⁹

(d) Exceptions

The act entirely exempts certain types of contracts from its general provisions,²⁰ such as:

(1) The furnishing of electrical, water or other utility services by a municipality to its officials, at the same rates and on the same terms as are available to the public generally.

(Although there are no cases or official opinions of the Attorney General on the subject, moorage is generally regarded as a “utility service” under this subsection.)

(2) The designation of public depositories for municipal funds. (Conversely, this does not permit an official to be a director or officer of a financial institution which contracts to provide more than mere “depository” services to the district.)

(3) The publication of legal notices required by law to be published by a municipality, upon competitive bidding or at rates not higher than prescribed by law for members of the general public.

(4) The employment of any person, except in certain larger classes of counties, cities, irrigation and school districts, for unskilled day labor at wages not exceeding \$200 in any calendar month.

(5) Other contracts in those same municipalities (except sales or leases by the municipality as seller or lessor)²¹ provided:

...the total amount received under the contract or contracts by the municipal officer or municipal officer's business does not exceed \$1,500 in any calendar month... [and] The municipality shall maintain a list of all contracts awarded under this subsection. The list must be made available for public inspection and copying.”

(6) The leasing by a port district as lessor of port district property to a municipal officer or to a contracting party in which a municipal officer may be beneficially interested, if in addition to all other legal requirements, a board of three disinterested appraisers, who shall be appointed from members of the American Institute of Real Estate Appraisers by the presiding judge of the Superior Court in the county where the property is situated, shall find and the court finds that all terms and conditions of such lease are fair to the port district and are in the public interest.

Even if a contract falls under a specific exemption, a commissioner with a potential conflict should still refrain from voting on the matter, and the exemption should be disclosed to the entire commission and noted in the official minutes.

(“Municipal officer” in this case refers to a commissioner or other port officer.)

It is important to note that the language of this section is so structured that the statute cannot be evaded by making a contract or contracts for larger amounts than permitted, and then spreading the payments over future months (in the case of day labor) or future calendar years, as the case may be.

(e) Qualified Exceptions – “Remote Interests”

A separate section²² permits a municipal officer to have certain limited interests in municipal contracts, under certain circumstances. Those types of interests are as follows:

(1) The interest of a nonsalaried officer of a nonprofit corporation.

(2) The interest of an employee or agent of a contracting party where the compensation of such employee or agent consists entirely of fixed wages or salaries (i.e., without commissions or bonuses). For example a commissioner may be employed by a contractor with whom the district does business, for more than the amounts allowed by RCW

42.23.030, but not if any part of his or her compensation includes a commission or bonus.

(3) That of a landlord or tenant of a contracting party; e.g., a commissioner who rents an apartment from a contractor who bids on a port district contract.

(4) That of a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.

The conditions for the exemption in those cases of “remote interest” are as follows:

(i) The officer must fully disclose the nature and extent of the interest and it must be noted in the official minutes or similar records, before the contract is made.

(ii) The contract must be authorized, approved or ratified after that disclosure and recording.

(iii) The authorization, approval or ratification must be made in good faith.

(iv) Where the votes of a certain number of commissioners or other governing body members are required to transact business, that number must be met without counting the vote of the member who has a “remote” interest.

(v) The officer having the “remote” interest must not influence or attempt to influence any other officer to enter into the contract.

A municipal officer may have certain limited interests in municipal contracts, under certain circumstances.

It is accordingly recommended that the officer who has such a remote interest should not participate or even appear to participate in the governing body’s action on the matter in any way. (In fact it is a good idea to be absent from the room during discussions or voting on the matter.)

(f) Penalties²³

(1) A public officer who violates chapter 42.23 RCW may be held liable for a \$500 civil penalty, “...in addition to such other civil or criminal liability or penalty as may otherwise be imposed...”²⁴

(2) The contract is void and the district may avoid payment under the contract even though it may have been fully performed by another party.

(3) The officer may have to forfeit his or her office.

3. Miscellaneous New Prohibitions: RCW 42.23.070

RCW 42.23.070 was enacted in 1994 expressly as a new section in chapter 42.23, effective January 1, 1995. Its provisions were copied, with some slight modifications, from chapter 42.22 RCW, an existing “Code of Ethics for Public Officers and Employees,” which was repealed simultaneously.

Subsection (2) of its four subsections presents the greatest difficulties in its interpretation, and will be discussed out of order.

Subsection (1) in general, prohibits any public officer from using his or her position “to secure special privileges or exemptions for himself or others”. Subsections (3) and (4) specifically prohibit any official from disclosing confidential information, or engaging in any employment or other activity in which he or she could reasonably expect to be induced or required to disclose such confidential information.

Subsection (2), which is the most frequently encountered and troublesome provision of that statute, provides in relevant part as follows:

No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from any source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.

The broad language of that subsection would include gross offenses such as bribery, that are also prohibited by the state's criminal code;²⁵ however, it covers a broader scope. Also, the new subsection might have less room for interpretation than its predecessor in chapter 42.22 RCW. For illustration, the following are some frequent questions and answers that have been asked and given regarding the interpretation of the earlier provisions.

Question: Does the statute prohibit a port official from accepting even promotional gift items of minimal intrinsic value from someone who does, or may seek to do, business with his or her office?

Answer: Many officials, either because of the broad language of the statute or on principle, refuse to accept even a business lunch under those circumstances. Others might regard items of only token or trivial value to be “de minimis,”²⁶ (of insufficient amount to cause legal concern).

Question: May a port district official accept a valuable gift from a foreign dignitary in connection with a visit?

Answer: A common policy has been to allow the acceptance of such a gift on behalf of the public; but not for personal use. Possibly, under certain wording of the statute the commission may adopt a formal policy resolution as local “law,” allowing exceptions in appropriate cases involving essentially personal items, subject to disclosure and other procedures to guard against abuse. That is only arguable, however, and any such proposed resolution or policy should be reviewed carefully by the district's own legal counsel.

In view of Article VIII sec. 8 of the state constitution and accompanying statutes²⁷ which recognize a public policy in favor of promotional hosting by port districts, and depending upon the circumstances of a particular occasion, the state auditor and attorney general might not challenge the acceptance by port officials of reasonable reciprocal business hosting, because of its practical necessity for this unique class of officials. However, we do not have the comfort of a court decision or other official interpretation on the subject. The problem is expected to continue until resolved in that manner or by amendatory legislation.

Question: May a port official permit an individual or company to pay his or her expenses for travel to view a site or plant in connection with business related to the official's office?

RCW 42.23.070 In the past we have recommended prudence to avoid even the appearance of impropriety. That recommendation is strengthened by the passage of this new section. Although the prevailing view is that enforcement agencies probably will continue to apply the same “de minimis” interpretations as before, there is less certainty now. The 1994 Legislature enacted RCW 43.23.070 as a section of a broader act covering state officials and employees, without any similar express exceptions for municipal officers. Also, the words “token” and “trivial” may receive varying interpretations. A port commission may wish to provide specific guidance on that subject, in its own supplementary code of ethics.

RCW 42.23.070 prohibits a municipal officer from:

O using his/her position to secure special privileges;

O giving or receiving any compensation, gift, reward, or gratuity relating to his/her employment from a source except the employing municipality;

O disclosing confidential information acquired by his/her official position, or using such information for personal gain; or

O accepting a position which may be reasonably expected to require or lead to a breach of confidentiality.

Answer: The statute can be construed to prevent an official from being “compensated” in that manner. Prudence, at least, requires that if the trip is determined to be meritorious the district itself should pay the expenses; any payment or reimbursement from the private source should be made to the district.

Question: Do the new provisions of RCW 42.23.070 apply to all employees as well as officers of port districts?

Answer: In general, no. The reason is that the word “employee” as it appeared in the earlier sections was deleted; the new section refers only to “officer.” However, the definition of “officer” in RCW 42.23.020(2) includes deputies and assistants, and possibly other subordinates, who otherwise might be classified merely as “employees.” The Legislature expressly directed that RCW 42.23.070 be made a part of chapter 42.23 RCW without qualification. Consequently, the prevailing view is that those who would be “officers” for purposes of the existing provisions of the chapter would be “officers” for the purposes of the new section as well.

Question: Would violations of RCW 42.23.070 carry the same penalties as other violations of the chapter?

Answer: Apparently so, based on the same rationale as in answering the question just prior to this, (to the extent that the penalty or remedy can be adapted in a particular situation).

1. In General

The election or appointment of a person to public office, unlike “public employment,” is not considered to be a “contract” within the meaning of chapter 42.23 RCW and similar statutes.²⁸ Under case law, however, it is unlawful for a public officer to appoint himself or herself to another public office unless clearly authorized by statute to do so.²⁹ There also are statutory provisions and case law governing the holding of multiple offices by the same person. To apply those general principles it is necessary to know the distinction between a public “office” and “employment.”³⁰ In an oft-cited Washington case,³¹ our Washington State Supreme Court, quoting from another source, held the following five elements to be indispensable in order to make a public employment a “public office”:

(a) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature;

(b) it must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;

(c) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the Legislature or through legislative authority;

(d) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the Legislature and by it placed under the general control of a superior officer or body; and

CAUTION! *These examples cannot cover all possible statutes or problems that might be encountered. One must always be alert to new legislative enactments and judicial or official interpretations. Our purpose is to alert readers to the potential sources of trouble that are commonly encountered.*

C. DUAL OFFICE-HOLDING

(e) it must have some permanency and continuity and not be only temporary or occasional.

As the cases also point out, usually a public officer is required to execute and file an official oath and bond. For example, the port district's commissioners and treasurer clearly are "officers." If the commission appoints a manager and delegates to him or her the kind of powers evidently contemplated by the statute,³² that person probably also would be classified as an "officer" rather than a mere employee.

2. Statutory Provisions

There is no single statutory provision governing dual office-holding. In fact, statutory law is usually silent on that question except where the Legislature has deemed it best either to prohibit or permit particular offices to be held by the same person regardless of whether they may or may not be compatible under common law principles. For example, city law expressly permits the offices of city clerk and city treasurer to be combined in certain cases.³³

3. The Judicial Doctrine of "Incompatible Offices"

In the absence of a statute on the subject, the same person may hold two or more public offices unless those offices are "incompatible." A particular body of judicial decisions (case law "doctrine") prohibits an individual from simultaneously holding two offices that are "incompatible."

As the Washington State Supreme Court explained in one opinion:

*Offices are incompatible when the nature and duties of the offices are such as to render it improper, from considerations of public policy, for one person to retain both (citing authorities) the question...is...whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.*³⁴

Other authorities point out that the question is not simply whether there is a physical impossibility of discharging the duties of both offices at the same time, but whether or not the functions of the two offices are inconsistent, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both. Incompatibility may arise where the holder cannot in every instance discharge the duties of both offices.³⁵

Applying those tests, the Washington State Attorney General's Office has found various offices to be incompatible with each other, such as mayor and county commissioner,³⁶ county engineer and city engineer,³⁷ and others. Courts in other jurisdictions have held incompatible the positions of mayor and council member, mayor and city manager, city marshal and council member, to mention only a few.³⁸

In port districts, the positions of commissioner and manager are obviously incompatible with each other and with every other port district office unless otherwise provided by statute.³⁹ The commission must be free to exercise independent supervision over all other port officers, including the manager (or executive director), and that official in turn must be free to exercise independent judgment and supervision within the range of his or her delegated powers. That independence would be destroyed if the same individual were allowed to occupy both positions. Similarly, to preserve the necessary check and balance system in financial matters, the incompatible office doctrine would prohibit the

office of treasurer and auditor from being held by the same person. Those positions probably would be held to be incompatible with every other port district office as well, unless otherwise provided by statute.

Until 1969, Washington law dealing with conflicts of interest generally applied only to financial interests, as opposed to emotional, sentimental or other biases. The “appearance of fairness doctrine,” however, which governs the conduct of certain hearings, covers broader ground. That doctrine was first applied in this state in 1969. In several cases decided in that year, the Washington State Supreme Court indicated a concern that when governing bodies, planning commissions, civil service commissions, and similar bodies are required to hold hearings that affect individual or property rights (“quasi judicial” proceedings), they should be governed by the same strict fairness rules that apply to judicial proceedings in courts. Basically, the rule requires that for justice to be done in such cases, the hearings not only must be fair, they also must be free from even the appearance of unfairness. The cases usually involve zoning matters, but the doctrine has been applied to civil service and other hearings as well.

The appearance of fairness doctrine has been used to invalidate proceedings for a variety of reasons; for example, if a member of the hearing tribunal has a personal interest of any kind in the matter or takes evidence improperly outside the hearing (“ex parte”). In those cases, that member is required to disassociate totally from the case, or the entire proceeding can be overturned in court.

In 1982, the Legislature reacted to the proliferation of appearance of fairness cases involving land use hearings. The result was the enactment of some specific statutory law on the subject.⁴⁰ This RCW chapter defines and codifies the appearance of fairness doctrine, insofar as it applies to land use decisions. In substance, those statutes now provide that in land use hearings:

1. The doctrine does not apply to legislative or administrative types of actions, but only to “quasi-judicial” actions; e.g., a hearing involving an individual’s personal or property rights.
2. Candidates for public office may express their opinions about pending or proposed quasi-judicial actions while campaigning (but see paragraph 8 below);
3. Candidates who comply with the public disclosure and ethics laws may accept campaign contributions (but see paragraph 8 below);
4. During the pendency of any quasi-judicial proceeding, no member of a decision-making body may engage in ex parte (outside the hearing) communications with proponents or opponents about a proposal involved in the pending proceeding, unless that member:
 - (a) Places on the record the substance of such oral or written communications; and
 - (b) Provides that a public announcement of the content of the communication and of the parties’ rights to rebut the substance of the communication shall be made at each hearing where action is taken or considered on that subject. This does not prohibit correspondence between a citizen and his or her elected official if the correspondence is made a part of the record (when it pertains to the subject matter of a quasi-judicial proceeding.)

D. THE “APPEARANCE OF FAIRNESS DOCTRINE” IN HEARINGS

5. Participation by a member of a decision-making body in earlier proceedings that result in an advisory recommendation to a decision-making body does not disqualify that person from participating in any subsequent quasi-judicial proceedings (but see paragraph 8 below);

6. Anyone seeking to disqualify a member of a decision-making body from participating in a decision on the basis of a violation of the appearance of fairness doctrine must raise the challenge as soon as the basis for disqualification is made known or reasonably should have been known prior to the issuance of the decision; upon failing to do so, the doctrine may be relied on to invalidate the decision;

7. A challenged official may participate and vote in proceedings if his or her absence would cause a lack of a quorum, or would result in failure to obtain a majority vote as required by law,⁴¹ provided a challenged official publicly discloses the basis for disqualification prior to rendering a decision; and

Hearings not only must be fair, but also free from the appearance of unfairness.

8. The appearance of fairness doctrine can be used to challenge land use decisions where a violation of an individual's right to a fair hearing is demonstrated. For instance, certain conduct otherwise permitted by these statutes may be challenged if it would actually result in an unfair hearing, (e.g., where campaign statements reflect an attitude or bias that continues after a candidate's election and possibly into the hearing process). Unfair hearings may also violate the constitutional "due process of law" rights of individuals.⁴² Questions of this nature may still have to be resolved on a case-by-case basis.

Eight points on the appearance of fairness doctrine, as it applies to land use decisions.

Most such cases involve municipal land use decisions of a regulatory nature (such as the application or amendment of specific zoning ordinances) and there are few situations where the appearance of fairness doctrine might be expected to surface in port district operations. Port districts do not directly regulate private land uses as do cities and counties under their broader powers. Nevertheless, in a 1992 case a port district's amendment to its comprehensive scheme of harbor improvements was challenged on the basis of an argument stemming mainly from a commissioner's ownership of land near (but not adjacent to) the property involved. The trial court upheld a challenge based upon the appearance of fairness doctrine. The port district appealed, and WPPA filed a supporting amicus curiae (friend of the court) brief. WPPA argued, along with the Port, that the Commission's decision in adopting or amending a comprehensive scheme of improvements was not "quasi judicial" but "legislative", like the adoption or amendment of a comprehensive plan by a city council; did not involve individual property rights, and therefore was not subject to the doctrine. Happily, while that case was pending on appeal the Washington State Supreme Court handed down its decision in *Raynes v. City of Leavenworth*,⁴³ and held that: (1) The appearance of fairness doctrine in land use cases has been incorporated into chapter 42.36 RCW; (2) the doctrine expressly applies only to decisions of a "quasi judicial" nature; (3) the zoning ordinance amendment involved in that case had "area wide significance," conformed to the city's comprehensive plan, and was "legislative" in character, not "quasi judicial." Based upon that holding and the analogous facts of the port's case, the port's case was settled and dismissed by mutual agreement. For that reason the case did not become a published precedent, but the WPPA brief is available as a guideline if necessary in the future, together with the Washington State Supreme Court's opinion in *City of Leavenworth*, supra.

The case also illustrates how readily a port commission's decisions made pursuant to required hearings (as in adopting or amending a comprehensive plan or industrial development district) which even conceivably might affect individual property rights, can be challenged, whether justifiably or not. Lawsuits can be disruptive and costly to a port district even when the district prevails.

Unless otherwise authorized by the Constitution, a public purpose may not be accomplished by gifts or loans of public funds to private persons or organizations (except certain aid to the poor or infirm).

1. In General

The Washington State Constitution establishes a general policy that taxes and other public funds may be spent only for public purposes,¹ and further provides:

The making of profit out of county, city, town or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.²

Suits or prosecutions involving violations of this latter provision are usually brought under specific civil or criminal statutes that implement the constitutional policy stated therein.³

2. Prohibition Against Gifts/Lending Credit

This specific provision of the constitution requires no legislative implementation and often has been the direct basis of lawsuits against municipal corporations and officials. The constitutional prohibition is as follows:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.⁴

Municipal bodies including port districts frequently are asked to use their funds, property, or taxing or borrowing power (credit) to subsidize or assist endeavors by individuals, private businesses, or private organizations; for example, the construction or operation of recreational facilities or treatment centers, industrial or economic development, tourist promotion, and other civic or charitable works. Some of them may be classified as “public” purposes or even port purposes. However, the Washington State Supreme Court long has held that generally (unless otherwise authorized by the Constitution) a public purpose may not be accomplished by gifts or loans of public funds to private persons or organizations (except certain aid to the poor or infirm).⁵

3. Special Constitutional Provisions for Port Districts

In 1965 the people amended Article VIII of the Washington State Constitution by adding a provision empowering the Legislature to authorize uses of port district funds for industrial development, trade promotion and promotional hosting, as a “public purpose.”

The use of public funds by port districts in such manner as may be prescribed by the Legislature for industrial development or trade promotion and

IV. Prohibited Uses of Public Funds, Property or Credit

A. CONSTITUTIONAL PROHIBITIONS

*promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift within the provision of section 7 of this Article.*⁶
(Emphasis added)

4. Legislative Authorization under Washington State Constitution Article VIII, Section 8 (Amendment 45)

Statutes enacted before and after the adoption of Amendment 45 authorize industrial development and related expenditures of various kinds by port districts. Those statutes, for example:

(a) Expressly recognize “industrial improvements” and “industrial development” as a port district purpose;⁷

(b) Authorize acquisition of lands for all of the district’s purposes;⁸

(c) Authorize districts to, among other things, “construct, condemn, purchase, acquire, add to, maintain, conduct, and operate . . . improvements relating to industrial and manufacturing activities within the district...”⁹

(d) Authorize a district to “improve its lands by dredging, filling, bulkheading, providing waterways or otherwise developing such lands for industrial and commercial purposes...”¹⁰

(e) Authorize a district to lease “real and personal property owned and controlled by it, for such purposes and upon such terms as the port commission deems proper.”¹¹

(f) Authorize port districts which have created industrial development districts to acquire land by purchase or condemnation or both, and to

*...develop and improve the lands within such industrial development district to make the same suitable and available for industrial uses and purposes; to dredge, bulkhead, fill, grade, and protect such property; to provide, maintain, and operate water, light, power and fire protection facilities and services, streets...water transfer and terminal facilities and other harbor and industrial improvements; to execute leases of such lands or property...*¹²

Sales of such lands are permitted under that chapter, subject to provisions which include, among others, requirements for the continuing devotion of the property to the purposes of the chapter.¹³

(g) Authorize port districts to make studies, investigations and surveys for industrial development within the district when the development “...is carried out by a public agency...for a public purpose,” and to make necessary expenditures “for the property promotion, advertising, improvement and development of its properties and facilities.”¹⁴

This is not necessarily an exhaustive compilation of all such statutory authority. For example, the Legislature has authorized port districts to engage in “economic development” programs¹⁵ which may fall within the term “industrial development”, or “trade promotion” authorized by the Washington State Constitution as amended in 1965, and to contract with nonprofit corporations for that purpose. However, each proposal of that nature should be carefully reviewed by legal counsel for its compliance with the constitution.

5. Legislative Restrictions and Conditions

Additionally, every statute authorizing expenditures should be examined carefully for possible limitations. For example, as just noted, certain expenditures may be made if the development to which they relate "...is carried out by a public agency...for a public purpose." Harbor improvements constructed under chapter 53.20 RCW must conform to the district's general plan and must be owned by the district, county, city, state or United States.¹⁶ Any expenditures for industrial development must be made pursuant to "specific budget items as approved by the port commission at the annual public hearings..."¹⁷ Acquisitions and improvements under chapter 53.25 RCW must be encompassed in the port's comprehensive scheme.¹⁸

6. Case Law Under Article VIII, Section 8 (Amendment 45), Washington State Constitution

Notwithstanding the broad and seemingly sufficient language of this 1965 amendment, in *Port of Longview v. Taxpayers* (1974),¹⁹ the Washington State Supreme Court held that a port district was prohibited from using its revenue bonding capability to finance the construction of on-site pollution control facilities for private businesses. The court reasoned that under the facts of that case the district's role was that of a "financing conduit" for the private businesses involved and an unconstitutional lending of the district's credit. That case appears to be inconsistent with the court's decisions in later analogous cases²⁰ construing a similar constitutional ban against any lending of the state's credit. Under the rationale of these later cases, the general test appears to be whether the objective purpose of a public expenditure is primarily for public benefit with only incidental private benefit, or vice versa. Still, any financial participation by a port district in an industrial development wherein the district's participation may be characterized as a "lending of credit" remains clouded by the *Port of Longview* case. In a more recent decision the state court of appeals upheld the constitutionality of a port district project under its general industrial development powers, involving the acquisition and development of lands for eventual lease to private industry.²¹

It seems clear under those cases that the general statutory provisions authorizing industrial development by port districts provide sufficient authority for districts to acquire land for industrial development; to construct improvements relating to industrial and manufacturing activities on land acquired for that purpose; and to improve their lands in that manner for²² lease to private industry. Furthermore, if the project is undertaken pursuant to chapter 53.25 RCW (involving the creation of industrial development districts) it appears that the ultimate purpose of the land acquisition and improvements may be for sale to private industry, whether it is classified as "marginal" or not.²³

However, insofar as the details of a particular project, e.g., a customized building by prearrangement with and for a specific business entity, may be viewed as a mere financing conduit, it might be challenged as a prohibited lending of credit under *Port of Longview*, supra,²⁴ particularly where the proposed improvements would be outside the scope of what would be considered as "port" facilities.²⁵

Consequently, it is a prudent "rule of thumb" that if the port district would have no legal power to use a proposed structure or facility, the port has no power to build it for lease to others. Therefore, any and all proposals should undergo a thorough review by the district's legal counsel.

Some port related projects for which a private organization may seek port district aid; e.g. tourist promotional advertisements by a chamber of commerce, or industrial or eco-

conomic opportunities to be published by an economic development council, can be legally accomplished without making a prohibited gift. For example, a port district may contract with the private organization, as with any other business entity, to provide the desired public service as an agent or contractor for the port. In fact, it is that type of contract that the Legislature presumably had in mind in enacting RCW 53.08.245, authorizing ports to engage in “economic programs” and contract with nonprofit organizations. Such contracts should be carefully drawn, however, so that the program or project remains a port district operation and is not an unlawful delegation of port district authority or grant of port funds or lending of credit to the private organization.

That caution applies to any and all cooperative ventures or “public-private partnerships” with private industry. Those undertakings may be constitutional or otherwise, depending upon how and to what extent they are structured so as to avoid a lending of the port district’s credit to any private entity.²⁶

7. Other Constitutional Authority Industrial Development Revenue Bonds

Pursuant to a constitutional amendment and corresponding statutes, counties, cities and port districts are authorized to issue tax-exempt nonrecourse revenue bonds to finance industrial development projects as defined by the Legislature. The constitutional provision forbids the amendment of the initial statutory definition of “industrial development project” without a three-fifths majority of each house, and the amendment must be subject to referendum.²⁷

1. In General

Various statutes described earlier in this handbook prohibit uses of public office for private gain and other abuses,²⁸ including private uses of one’s official position, subordinates, and confidential information. Other statutes may apply to particular activities.

2. Using Public Office Facilities for Political Purposes

A specific section of the “public disclosure” law²⁹ prohibits the use of public facilities, with few exceptions, for certain political purposes, as follows:

No elective official nor any employee of his [or her] office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body... to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members

A prudent “rule of thumb:”

If the port district would have no legal power to use a proposed structure or facility, the port probably has no power to build it for lease to others.

Any and all proposals should undergo a thorough review by the district’s legal counsel.

of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elective official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are a part of the normal and regular conduct of the office or agency.³⁰

The term “normal” means “usual”, and “regular” means that the activity must be legally authorized.³¹ For example, if a port commission customarily rents a vacant meeting space to private groups for community activities, it may allow its use for political meetings also, as long as fair and equal use is given to all candidates or both sides of a ballot issue.³²

Procedural requirements for municipal purchasing and public works projects are extensive and varied; consequently, they are treated separately and in-depth in other publications. Contact the WPPA for information about recent publications.

Competitive bidding on public works or purchases, or property sales, is legally necessary only when required by statute or a municipal charter or local ordinance (or possibly the port commission’s own resolution). Even when it is not legally required, the submission of public purchases and contracts to competitive bidding is generally favored because the primary purpose of that requirement is to secure the best bargain for the public, and to discourage favoritism, collusion and fraud.¹ Accordingly, requirements in statutes, charter provisions and ordinances to that effect are liberally construed in favor of bidding, and exceptions are narrowly construed.²

B. STATUTORY PROHIBITIONS AGAINST MISUSES OF PUBLIC OFFICES AND FACILITIES

Material requirements may be purchased in the open market or by contract; work may be done by day labor without outside contracting, or it may be done by contract.³ The port district must make a determination whether or not a construction project over \$40,000 can be accomplished less expensively by contracting out; if so, the district “may contract out such project.”⁴ If work is contracted out, and the estimated cost exceeds \$200,000, competitive bidding is required.⁵ The procedures for letting bids and awarding contracts are also prescribed.⁶ There are special procedures for obtaining proposals from contractors on a “small works roster” for contracting on projects costing \$200,000 or less.⁷

Generally, as is usually required by bidding laws, the district is directed to award the contract to the “lowest and best” or “lowest responsible” bidder; not merely the “lowest” bidder; i.e., the one with the lowest price.⁸

SUMMARY OF STATUTORY BIDDING REQUIREMENTS AND NON-REQUIREMENTS FOR PORT DISTRICTS

(1) Requirements

O Contracts for “work” costing more than \$200,000: RCW 53.08.120-150.

- O Sales of property when a large block in excess of \$10,000 value is broken into smaller components of \$10,000 or less: RCW 53.08.090.⁹
- O (Optional) Sales of industrial development district property by commission: RCW 53.25.150.
- O Contracting with a developer to build a facility for leasing to a port may require competitive bidding. Also, if fifty percent or more of the space is to be leased by the port, or by the port and other state or local agencies, the law requires compliance with the prevailing wage statutes.¹⁰
- O Alternative forms of public works, such as design-build and GC/CM processes, on projects costing in excess of \$10 million.¹¹

**(2) Non-Requirements
Exceptions or Exemptions From Competitive Bidding**

V. Public Works and Competitive Bidding Requirements

- O Purchases of equipment, materials, goods, etc. not for public works contract.
- O Work of any kind not done “by contract.”
- O Public works contracts of \$200,000 or less: RCW 53.08.120
- O Legal and similar professional services, generally; i.e., services requiring primarily mental or intellectual rather than physical or manual skills. But see chapter 39.80 RCW regarding selection procedure for architectural and engineering services.
- O Emergencies; i.e., necessary works to prevent actual or imminent (serious) danger to life or property.¹²
- O Sole source contracts. However, that exception generally is applied to purchases where single sources of supply exist or certain “brand names” may be required.¹³

Note: Situations where only one contractor is reasonably available for a public works contract would be more rarely encountered.

In cases where competitive bidding is not required, the law may still necessitate notice or other procedures.¹⁴

Examples of prohibited practices:¹⁵

Bid Splitting; i.e., dividing what should be a single project into two or more in order to avoid the competitive bidding requirement. A flagrant example, just for illustration, would be negotiating a contract for a \$500,000 building with the same contractor in three separate segments, each under \$200,000, when there are no compelling reasons other than an effort to avoid exceeding the \$200,000 bidding threshold.¹⁶

A low bidder who fails to enter into a contract on account of error, is not allowed to bid upon a resubmitted contract for the same project.¹⁷

**A. COMPETITIVE
BIDDING
- IN GENERAL**

**B. STATUTORY
REQUIREMENTS**

The submission of public purchases and contracts to competitive bidding is generally favored because the purpose of that requirement is to secure the best bargain for the public, and to discourage favoritism, collusion and fraud.

Negotiating with bidders after bids are submitted and opened.¹⁸

In addition to any other remedies or penalties contained in any law, municipal charter, ordinance, resolution or other enactment, any municipal officer by or through or under whose supervision, in whole or in part, any contract is made in willful and intentional violation of any law, municipal charter, ordinance, resolution or other enactment requiring competitive bidding upon such contract shall be held liable to a civil penalty of not less than \$300 and may be held liable, jointly and severally with any other such municipal officer, for all consequential damages to the municipal corporation. If, as a result of criminal action, the violation is found to have been intentional, the municipal officer shall immediately forfeit his office. For purposes of this section, "municipal officer" shall mean an "officer" or "municipal officer" as those terms are defined in RCW 42.23.020 (2).¹⁹

Presumably this section would be enforced by the State Attorney General or by the local Prosecuting Attorney based on a State Auditor's examination report.

Remedies for a taxpayer or a disappointed low bidder are limited.²⁰

1. Sale of Unneeded Port District Property

As a rule, a port district may sell unneeded port district property, both personal and real property, at its discretion and without calling for competitive bidding.¹ However, public bidding or other procedures may be required by statute, depending upon the kind or situation of the property, and sound business discretion must be exercised in all cases. The basic requirements of RCW 53.08.090 are:

- (a) The transaction must be authorized by Commission resolution.
- (b) The commission may, by annual resolutions, authorize such sales by its managing official as to property valued at ten thousand dollars or less. The managing official, in advance of each sale, must itemize and list the property to be sold and certify to the commission in writing that it is no longer needed. If a larger block of property is divided into blocks of ten thousand dollars or less in value for purposes of such a sale, the sale of each such smaller block must be by competitive bidding.
- (c) The commission may sell property of more than ten thousand dollars in value:
 - (1) The sale must be pursuant to a commission resolution declaring such property to be "no longer needed for district purposes."
 - (2) If the property is included within the District's comprehensive plan or modification thereof, the plan must be modified to declare the property surplus, pursuant to public notice and hearing.
 - (3) This statute does not modify provisions of chapter 53.25 RCW relating to industrial development districts.²

(4) The ten thousand dollar figures in this section are to be adjusted annually.³

2. Sale on Contract

The law also provides certain requirements and procedures for contract sales of port district property.⁴

As indicated above under the subject of competitive bidding, special requirements apply to sales of land owned by the port within an industrial development district and may involve competitive bidding at the commission's discretion.

Port districts have broad, flexible powers to dispose of unneeded airport property.⁵

C. PENALTIES FOR VIOLATIONS OF COMPETITIVE BID LAW

Chapter 39.33 RCW grants broad authority to the state, and to port districts and other local governments, to sell, exchange, transfer, or lease or otherwise dispose of property or property rights to each other upon mutually agreeable terms. However, before disposing of surplus property valued at more than fifty thousand dollars, the governing body must hold a public hearing in the county where the property or greatest portion of it is located. The chapter prescribes certain notice procedures for the hearing.⁶

Leases of port property are authorized with certain provisions as to length and security for rent.⁷

D. OTHER REMEDIES: TAXPAYER OR DISAPPOINTED LOW BIDDER

When disposing of any property by sale or lease or otherwise, except to another governmental agency under chapter 39.33 RCW, the commission ordinarily should (and under chapter 53.25 RCW must) have the property appraised by at least two independent appraisers to be certain that the port district is receiving fair market value. Besides being good business practice, the constitutional prohibition against gifts of port property and lending the port's credit apply to those transactions between the port and private persons or entities. If it is later determined that port property has been sold or leased for substan-

VI. Sales of Port District Property

A. IN GENERAL

tially less than fair market value or fair rental value, the transaction may be challenged. In all such transactions, especially by port districts, there may be values other than money that can be considered in that determination, but they must be real and substantial. In any such case, where there is justification for a money amount that is less than market value, the commission's resolution should contain clear factual findings and a sound legal basis supporting its decision. Reasonably supported findings of fact in the commission's resolutions of that kind are always helpful and may be conclusive in a lawsuit challenging the transaction.

Before 1971, this state had an "open meeting" law.² It became increasingly frustrating to the public and news media, however, and ineffective, because it required only the "final" action of the council or other body to be taken in public (such as the final vote on an ordinance, resolution, motion or contract). There were frequent complaints that governmental decisions actually were being made in private long before the "open" meeting. The Open Public Meetings Act (OPMA) of 1971³ made drastic changes. It requires:

(1) all meetings of multi-member governing bodies of state and local government agencies (except courts and the Legislature) must be open and public. More importantly, it also defines, "meeting," generally, to include any situation in which a majority of the governing body (including certain kinds of committees created by governing bodies) meet and transact or even "discuss" the agency's business.⁴

(2) Social gatherings and travelling together are expressly excepted, unless the body's business is discussed.⁵

1. The declared purpose of the 1971 act is to make all meetings of the governing bodies of public agencies, even informal sessions, open and public, with only minor specific exceptions.

(a) The Legislature intends that public agencies' actions and deliberations be conducted openly.⁶

(b) Meetings must be open and public; all persons must be allowed to attend unless otherwise provided by law.⁷

(c) Ordinances, rules, regulations, orders, and directives are invalid unless adopted at public meetings;⁸

(d) A vote by secret ballot at any meeting that is required to be open is also declared null and void.⁹ Furthermore, as a general rule, a final decision is not allowed even in a permissibly closed (executive) session.

B. PORT DISTRICT LANDS IN INDUSTRIAL DEVELOPMENT DISTRICTS

C. AIRPORT LAND

D. INTERGOVERNMENTAL DISPOSITION OF PROPERTY

2. The act must be liberally construed to accomplish its purpose.¹⁰

1. To What Bodies the Act Applies

E. LEASES OF PORT DISTRICT PROPERTY

All multi-member governing bodies of state and local agencies, their subagencies and certain of their “committees”.¹¹

Thus, the Act does not apply to meetings of an agency governed by a single individual.¹²

F. CAVEAT

However, in a multi-member governing body such as a port commission, or a multi-member subagency or committee formed by the commission to do certain things, the OPMA applies when a majority of those members gather and discuss the body’s business. For example, whenever two or more members of a three member commission get together and discuss the port’s business, even in a social setting, the Act applies. There are exceptions, of course, which will be discussed later in this work.¹³

“Subagency” means a board, commission or similar entity created by or pursuant to state or local legislation, such as a city planning commission or civil service commission or similar entity that is created by a local ordinance and has a policy or rule making governing body.¹⁴ An industrial development corporation created by a port district under chapter 39.84 RCW probably would fall within this category.

“Governing body” includes not only the principal governing body of the agency, but also includes a committee of such a governing body, “...when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.”¹⁵ Note

VII. The Open Public Meetings Act of 1971¹

A. IN GENERAL

that this phrase is in the disjunctive; if the committee does any of the three listed functions it is a “governing body.” “Acts on behalf of the governing body” is understood to mean the exercise of delegated authority, such as an actual decision-making authority, or possibly the formulation of a recommendation that is legally required as a condition for further action by the principal governing body. A purely advisory committee which does not perform any of those three functions is not subject to the Act.¹⁶

2. To What the Act Does Not Apply

(a) Courts or the Washington State Legislature.¹⁷

(b) Proceedings expressly excluded by RCW 42.30.140 namely:

(1) Certain licensing and disciplinary proceedings.

(2) Certain quasi-judicial proceedings that affect individual rights but not the general public; i.e., a governmental decision-making process to determine the rights of an individual (“like a judge”).

(3) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; also, that portion of a meeting held during labor or professional negotiations, or grievance or mediation proceedings, to formulate strategy or to consider proposals submitted.

(4) Generally, matters governed by the state Administrative Procedure Act.¹⁸

(c) Social gatherings if no “action” (as defined in RCW 42.30.020(3)) is taken.¹⁹ Note, however, the ensuing definition of “action.”

(d) Attendance of port representatives at a meeting of another agency which is not subject to the OPMA.²⁰

1. “Meeting” means meetings at which “action” is taken.²¹

2. “Action” means all transactions of a governing body’s business including receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, as well as “final” action.²²

From these definitions it appears that a “meeting,” as defined in the act, could occur in the course of a social gathering or in the course of some other non-public gathering.

For instance, if a majority of a district’s commissioners merely attend a WPPA conference, the Act does not automatically apply because WPPA itself is not a public agency.²³ Attendance at such meetings is scheduled by some careful agencies as a “study session.”²⁴

C. APPLICATIONS

However, if a majority of the port commission members were to meet separately during that event to discuss a position to be taken by their own port district, a meeting may occur, the Act may apply, and the Act may be violated, if the usual notice and other procedural requirements have not been followed.

1. Regular Meetings²⁵

- (a) Definition: A recurring meeting held pursuant to a schedule fixed by statute, ordinance or other appropriate rule. (A port commission's regular meeting dates should be established by resolution).
- (b) A schedule of a state agency's regular meetings, and changes, must be filed with the code reviser for publication in the Washington State Register.
- (c) If the designated time falls on a holiday, the regular meeting may be held on the next business day.
- (d) There is no statutory limitation as to the kind of business that may be transacted at a "regular" (as distinguished from "special") meeting.
- (e) There is no requirement in the open public meetings act for any written notice of a regular meeting or publication of regular meeting agendas, of port districts. However, there are separate statutory requirements of that nature when a port district acquires property by eminent domain as provided in RCW 53.08.010. In those cases the port must publish prior notice and a preliminary meeting agenda, as required for first class cities.²⁶

2. Special Meetings²⁷

- (a) Definition: Any meeting other than "regular."
- (b) May be called by the presiding officer or a majority of the members.
- (c) Must be announced by written notice to all members of the governing body; also to members of the news media who have filed a written request for such notice. The notice:
 - (1) Must specify the time and place of the meeting and the business to be transacted. (Other business can be discussed, but final action may be taken only on business referred to in the notice).
 - (2) Must be delivered personally or by mail 24 hours in advance.
 - (3) May be waived by a member of the body in writing or by attending without objection.
 - (4) Is not necessary in specified emergencies.²⁸

1. As far as the Open Public Meetings Act is concerned, the meeting may be held any place within or outside the territorial jurisdiction of the body unless otherwise provided in

D. KEY DEFINITIONS

the Act under which the agency was formed.²⁹ However, the meeting place should not be designed to exclude members of the public.³⁰

2. The place of a special meeting must be designated in the notice.³¹

3. In certain emergencies requiring expedited action, the meeting or meetings may be held in such place as is designated by the presiding officer and notice requirements are suspended.³²

1. All persons must be permitted to attend except unruly persons as provided in this Act.³³

Unless the meeting or portion of it is conducted as a “hearing”, the governing body is not required to allow members of the public to speak, although usually some time is scheduled for that purpose. Taping or videotaping by a member of the public cannot be forbidden unless it is done in an unduly disruptive manner.

2. Attendance may not be conditioned upon registration or similar requirements.³⁴

However the Act does not prohibit a requirement that persons identify themselves prior to testifying at hearings.

3. In cases of disorderly conduct:³⁵

(a) Disorderly persons may be expelled. However, it is generally held that persons may not be prohibited from recording a meeting if it is not actually disruptive. (It may be wise to endure even mildly disruptive activity of that nature than to appear to be unduly suppressive).

(b) If expulsion is insufficient to restore order, the meeting place may be cleared and/or relocated.

(c) Non-offending members of the news media may not be excluded.

(d) If the meeting is relocated, final action may be taken only on agenda items.

4. Adjournments/Continuances.³⁶

(a) Any meeting or hearing may be adjourned/continued to a specified time and place.

(b) Less than a quorum may adjourn or continue.

(c) If no members are present the clerk or secretary may adjourn/continue in the same manner. In that case the clerk or secretary then must give written notice as required for a special meeting.

(d) A copy of the order or notice must be posted immediately on or near the door where the meeting was being held.

(e) A regular meeting continues to be a regular meeting for all purposes.

E. TWO KINDS OF MEETINGS

Taping or videotaping a meeting by a member of the public cannot be forbidden unless it is done in an unduly disruptive manner.

F. PLACE OF MEETINGS

G. CONDUCT OF MEETINGS

1. Definition (as commonly understood):

That portion of a meeting from which the public may be excluded.

2. When Permissible:

- (a) To consider matters affecting national security;
- (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 must be taken in a meeting open to the public;
- (d) To review negotiations on the performance of publicly bid contracts when public knowledge... 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 must 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.³⁸ However, (except when certain exempted labor negotiations are involved), "...discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public..."³⁹ (Furthermore, the final action of hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, must also be taken in an open public meeting);
- (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 must be in a meeting open to the public;
- (i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.
- (j) (Relates to the state library commission).

3. Conduct of Executive Sessions:

- (a) An executive (closed) session must be part of a regular or special meeting.⁴⁰

(b) Before convening in executive session, the presiding officer must publicly announce the purpose for excluding the public and the time when the executive session will conclude. The executive session may be extended by announcement of the presiding officer.⁴¹

(c) Final adoption of an “ordinance, resolution, rule, regulation, order or directive” must be done in the “open” meeting.⁴²

4. Improper Disclosure of Information Learned in Executive Session:

(a) It is clear that the legislative purpose in allowing executive sessions was to protect confidentiality. However, the OPMA itself contains no specific prohibition or penalty for disclosure of information learned in those sessions.

(b) However, there is a general statute which prohibits disclosure of confidential information learned by reason of an official’s position.⁴⁴

1. Minutes of regular and special meetings must be promptly recorded and open to public inspection.⁴⁵

2. No minutes are required to be recorded for executive sessions. (However, prudence may suggest that a record of some kind indicating the legitimacy of the subject matter be kept for protection of the governing body.)

3. Notes and tapes are not “minutes” but are “public records.”⁴⁶ They may be exempt from public disclosure for particular reasons; e.g., notes or tapes of executive sessions may be withheld while the “vital governmental interest” or “personal privacy” reason for the executive session itself continues to exist.

There are differing opinions as to whether or not minutes of an executive session, if taken, are “public records”.⁴⁷ If minutes are kept they should be carefully worded so as not to frustrate the purpose of the executive session, if later they are held to be “public” records.

1. Ordinances, rules, resolutions, regulations, orders or directives adopted in violation of the act are invalid.⁴⁸

2. A member of a governing body who knowingly participates in violating the act is subject to a \$100 civil penalty.⁴⁹

3. “Mandamus” or injunctive action may be brought to stop or prevent violations.⁵⁰

4. Any person may sue to recover the penalty or to stop or prevent violations.⁵¹ The auditor/attorney general may enforce violations of the act.⁵²

5. A person prevailing against an agency is entitled to be awarded all costs including reasonable attorneys’ fees. However, if the court finds that the action was frivolous and advanced without reasonable cause, the court may award to the agency reasonable expenses and attorneys’ fees.⁵³

H. EXECUTIVE SESSIONS³⁷

The following are some helpful questions and answers taken verbatim and/ or adapted from the Attorney General's Open Public Meetings Act, ante.

Question: What final action is required to be taken only in open session?

Answer: Any final action, regardless of the subject, which is manifested by the adoption of an ordinance, resolution, rule, regulation, order or directive must occur at a meeting open to the public even though preliminary consideration lawfully may have occurred in the executive session. However, the appellate court decisions in the State of Washington are not consistent and have held that other types of action taken in violation of the Act are void and unenforceable.

Question: Can the commission members meet before a regular or special meeting for dinner, or at other locations, to discuss agenda items without scheduling it as part of the meeting?

Answer: The answer is NO because such discussions constitute action pursuant to the Act. These types of meetings before a regular or special meeting should be scheduled on the agenda as study sessions, which would be part of the meeting and thus open to the public.

Question: May a port manager, executive director or staff member call a commissioner to discuss agency business without violating the Act?

Answer: The answer is YES since it does not constitute a regular or special meeting of the commission and it is less than a quorum of the multimember governing board discussing such issues.

Question: May one of the commission members call or meet with each of the other individual commission members and discuss an issue?

Answer: If your port has a five-member commission, YES, because at no point would there be a majority of the five in attendance.

However, in the case of a three-member commission, the answer would be NO, because it takes only two commissioners to constitute a majority. Furthermore, even in the case of a five-member body, it would not be permissible to hold a "round robin" telephone conversation in which #1 calls #2 who calls #3 etc., because that would involve a collective discussion.

Question: May a manager or other staff member call or meet with each of the commission members and discuss an issue do so?

Answer: If the manager or other staff person independently discusses a matter with each commissioner in the others' absence, without any direct or indirect relay or exchange between commissioners, there would not be a "meeting," but that would be dangerous and not a wise practice to follow.

Question: Is it possible to have a telephonic meeting with commission members situated at different locations and still comply with the Act?

Answer: The answer is YES if it is done correctly. A site must be picked for the meeting with a speaker telephone available at the site for the public who may wish

I. MINUTES⁴³

to attend and listen to the proceedings. With proper scheduling of the meeting and agenda, this procedure would meet the requirements of the Act.

Question: Where a governing body appoints a search committee for the selection of finalists for a manager or executive director, must the committee comply with the Act?

Answer: This answer is YES if the body actually takes final action in selecting only the finalists for the position, but most of the activities could take place in executive session, including interviews and evaluations of the candidates for that position.

J. VIOLATIONS/ REMEDIES

If the search committee provides only a recommendation to the governing body and actually submits names of all the applicants but indicates which ones it would recommend as finalists it probably would not be subject to the Act because its action is not a necessary antecedent to final action by the governing body. However, one cannot answer this question definitely without a review in each case to determine the full scope of the mission delegated to the committee.

Question: May a governing body hold a “retreat” to discuss its business without complying with the Act?

Answer: The answer is NO since it would constitute a regular or special meeting. Such retreats should be scheduled and an agenda published indicating that it is a retreat, the location, and that no final action will be taken. Public attendance must be allowed and the location must be accessible to the public.

Question: What is the critical difference between a regular meeting and a special meeting?

Answer: The difference is that the governing body may take action on any matter whatsoever at a regular meeting, but a special meeting is limited to specific items contained in the agenda for that special meeting. Note: other business may be discussed at a special meeting, with no final action being taken on it.

K. OPEN PUBLIC MEETINGS ACT QUESTIONS AND ANSWERS

Question: Does the chair of the governing body have the power to limit public input during a meeting (as opposed to a “hearing”)?

Answer: YES. Although the Act requires the meeting to be open to the public, the Act nowhere authorizes those in attendance with the right to participate verbally in the issues being considered by the board. Hence, the chair of the governing body would have the absolute power to refuse to hear those attending, or to limit discussions, or subject them to a time limit for comments from members of the public, unless the port commission has adopted a different rule on that subject.

Question: Once a meeting is scheduled at a particular location and the governing body finds that the site will be insufficient in size to hold all those who intend to be there, must the location be changed to accommodate all individuals?

Answer: NO. Although the Act does allow that “all persons shall be permitted to attend the meeting,” we believe that the requirements of the Open Public Meeting Act are met if the meeting is in fact open to the public. We do not believe that the Act requires that the meeting be moved to a location where every single individual who wishes can attend. If it is possible to do so as an accommodation that would be fine, but it is not legally required.

Question: Under the Interlocal Cooperation Act, chapter 39.34 RCW, where two or more agencies join to carry out a common function and establish an administrative board, is that administrative board subject to the Act?

Answer: YES. The administrative board is subject to the Act because it is a governing body created pursuant to statute by agreement of the agencies. “Which is created by or pursuant to statute...” (RCW 42.30.020 (c)).

Question: Is a governing body obligated to advise a public officer or employee against whom it plans to hear complaints or charges lodged in an executive session that the public officer or employee has a right to ask that the meeting be held in open?

Answer: NO. Since the Act (RCW 42.30.100 (f)) indicates only that “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,” there is no requirement that the governing body notify the officer or employee prior to the executive session that he (or she) has the right to request that it be public.

Question: Is it necessary for the governing body to list all the items on the agenda that are going to be included within an executive session?

Answer: NOT if it is a regular meeting. This would be pertinent only with a special meeting. The important thing (as to either a regular or special meeting) is simply that the chair of the governing body must announce specifically the reason for the executive session prior to going into the executive session and must announce the time which will elapse before they will reconvene in public session. It is not necessary that the reason for the executive session be stated on the agenda. For a special meeting it need only be noted on the agenda that an “executive session” will be held. It could also be noted on the agenda that “an executive session may be held for any of those items for which an executive session may be held under the Act” (RCW 42.30.100 (f)). Notice of a special meeting must state the purpose of the meeting itself and the special meeting may be called solely to consider a matter in executive session, without taking final action, if the Commission chooses to do so.

This multifaceted subject heading reflects the complex provisions of Initiative 276,¹ approved by the people in 1972. The Act contains four subchapters, seemingly diverse but all properly falling under the category of “openness in government.”²

Three of the subchapters deal separately with the subjects of campaign financing, legislative lobbying (including lobbying by municipal and other governmental agencies), and personal financial disclosure by public officials and candidates. The fourth is modeled after the federal “Freedom of Information Act” and for convenience will be referred to herein as the “WFOIA” (Washington Freedom of Information Act). Those sections which deal with the public’s right to inspect and/or copy public records are contained mainly in RCW Chapter 42.56. However, they must be read together with the general provisions and definitions in RCW 42.17.010 et seq. The Act also contains administrative provi-

sions, including the establishment of the Public Disclosure Commission as a state agency to administer and enforce the provisions of the act. Candidates and public officials, as one of the first steps in their election process, should become familiar with the commission and the wealth of information and assistance that it provides, including detailed instructions regarding political campaigns and personal financial disclosure requirements of the act. Similar information as to regulations on municipal lobbying is readily available from that same source. Consequently, we will not attempt to duplicate that information in this publication.

However, the provisions dealing with public records; namely, RCW 42.56, to a great extent are “self enforcing,” and there is relatively little administrative law on that subject. The following brief outline and discussion is intended to supply a basic working knowledge of those “freedom of information” provisions.

TELEPHONE MEETINGS:

A.G. informal advice on this subject is contained in a letter opinion by Assistant Attorney General Carole A. Ressler, July 31, 1992, Telephone Conference Meetings. It is suggested that a televised conference of that nature would be better.

1. Mindful of the right of individuals to privacy and the desirability of efficient administration of government, full access to information concerning the conduct of government on every level must be assured.

The provisions of this chapter shall be liberally construed to promote full access to public records so as to insure continuing public confidence in governmental processes, and so as to assure that the public interest will be fully protected.³ Exceptions are narrowly construed.

2. Conflicting provisions of other laws are superseded.⁴

3. Unless otherwise provided by law,⁵ agencies may not release or withhold records based upon the identity of the requestor, and must rely solely on statutory exemptions and prohibitions for refusing to disclose public records.⁶ However, a preliminary inquiry can be made to help in determining whether one of the exemptions or exclusions applies; e.g., whether or not a requested list of individual names is sought for commercial purposes.⁷ Because the requestor may not be compelled to answer, some agencies merely require the person to certify that the request (such as a request for a list of individuals) is not made for the prohibited purpose in question.

4. This Act, like the Open Public Meetings Act, applies to all state and local agencies except the judiciary. Access to the Legislature’s records is limited.

1. “Public Record” includes:

Any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.⁸

Accordingly, there are few imaginable exceptions. However, an agency is not required to create a new record in order to respond to a request for production or information.⁹

2. “Writing” Means:

...handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents, including existing data compilations from which information may be obtained or translated.¹⁰

The definitions also include electronic data to the extent that it is analogous in form to other identifiable records.¹¹

1. Agencies are required to publish procedures for access to their records.¹²
2. Records must be made available for public inspection and copying during customary office hours. If an agency does not have regular office hours they are set by this statute.¹³
3. Agencies must make their facilities available for copying their records, or make copies upon request; they must honor requests by mail. They may charge for the copies, but only a “reasonable charge” representing the amount necessary to reimburse the agency (port

VIII. The Open Government Act - Public Records - Freedom of Information

A. INTRODUCTION TO THE ACT

district) for the actual costs incident to the copying. Agencies may make no charge for staff time in locating records or mere inspections of records.¹⁴

1. General Exemptions

The WFOIA recognizes that certain other statutes allow or require nondisclosure of particular kinds of records and specifically refers to some that are not superseded. Exemptions are provided in RCW 42.56.210 and throughout chapter 42.56.

2. Public agencies are forbidden from providing lists of individuals “requested for commercial purposes” unless specifically authorized or directed by law.¹⁵

For example, in a 1975 letter opinion the attorney general concluded that a request by a business promotional organization for a list of individuals’ names to enable that organization to distribute advertising materials had to be denied.¹⁶ However, the section allows lists of professional licensees and applicants to be available to recognized professional associations or educational organizations.

3. Some records are exempt from public inspection, but only to the extent required to protect a right of privacy (as that term is defined in the act) and/or a vital governmental interest.

There is no separate general “right of privacy” exemption, aside from specific statutory exemptions, from public disclosure. Furthermore, where “privacy” is a factor, a right of privacy is deemed to be breached only when disclosure (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.¹⁷ Mere inconvenience or embarrassment is not sufficient to constitute a violation of privacy.¹⁸ Likewise, there is no general exemption for a “vital governmental interest.”¹⁹

4. Specific Exemptions

The law grants qualified exemptions from public inspection for some specific kinds of records, and some total exemptions for a few other classes. Those that appear to have some application to port district records or records of other agencies with which a port may have dealings include the following exemptions.²⁰ Some are abbreviated or summarized here to save time and space.

(a) Personal information in files maintained for employees, appointees or elected officials of any public agency to the extent that disclosure would violate their right to privacy.²¹

This exemption applies to such items as social security numbers, charitable and other personal deductions²² and employee evaluations which do not discuss specific instances of misconduct or public job performance.²³ Thus, questions of whether to disclose or not under this “privacy” exemption must be decided on a case by case basis. In *Ollie v. Highland School District*, 50 Wn.App. 639, 749 P.2d 757 (1988), information about public on-duty job performance of public employees was held to be disclosable although their names and identifying details could be withheld to protect privacy.

B. PURPOSE OF THE “FREEDOM OF INFORMATION ACT”

C. BROAD DEFINITION OF PUBLIC RECORDS

- (b) Certain taxpayer information.
- (c) Certain intelligence and investigative records compiled by investigative, law enforcement and penology agencies and certain state agencies.²⁴
- (d) Information revealing the identity of persons who file complaints with investigative, law enforcement or penology agencies (other than the Public Disclosure Commission) if disclosure would be a danger to a person's life, safety or property. If at the time a complaint is filed the complainant, victim or witness indicates a desire for disclosure or non-disclosure, that desire governs. However, all complaints filed with the Public Disclosure Commission about any elected official or candidate must be made in writing and signed by the complainant under oath.
- (e) Test questions, scoring keys and other examination data used to administer a license, employment or academic examination.
- (f) Certain real estate appraisals.
- (g) Valuable formulae, designs, drawings and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.
- (h) Preliminary drafts, notes, recommendations and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

D. DUTIES OF PUBLIC AGENCIES (STATE AND LOCAL)

RCW 42.56.120 specifies that charges for photocopying must be in accordance with the actual per page cost or other costs established and published by the agency (port district). If the agency has not determined actual per page costs, the charge may not exceed fifteen cents per page.

This commonly is referred to as the "deliberative process" exemption, and generally it applies only to records generated in that process, such as policy recommendations, as opposed to raw factual data. Furthermore, this exemption does not apply after the policies or recommendations contained in the requested document(s) have been implemented.²⁵

- (i) Records that are relevant to a controversy to which the agency is a party but which would not be available to another party under pretrial court discovery rules.²⁶
- (j) Records of archeological sites.
- (k) Certain library information.
- (l) Financial information required in connection with prequalifying bidders on certain state contracts, including ferry system construction or repair.

E. WHAT RECORDS MAY BE WITHHELD?

- (m) Railroad company contracts filed with the utilities and transportation commission (except summaries of those records).
- (n) Financial and commercial information and records supplied by private persons pertaining to export services provided pursuant to Ch. 53.31 RCW.
- (o) Financial and commercial information and records supplied by businesses or individuals during application for loans or program services under certain statutes, or during application for economic development loans or program services provided by any local agency. (Underscoring added).

It may be noted that this Act does not contain an express “attorney-client” exemption. However, that exemption and the related “attorney work product” exemption are discussed in a presentation by Laurie Flinn Connelly, Asst. City Attorney of Spokane, entitled The Status of Attorney-Client Privilege and Attorney Work Product in Municipal Law Practice and Relationship to Public Records Act in Legal Notes, April, 1994.

- (p) Applications for public employment including names, resumes and other related information.
- (q) Residential addresses and telephone numbers of employees and volunteers of a public agency.
- (r) Residential addresses and telephone numbers of utility customers.
- (s) Financial information, business plans, examination reports, and any information produced or obtained in evaluating or examining a business and industrial development corporation organized or seeking certification under chapter 31.24 RCW.
- (t) Financial and valuable trade information under RCW 51.36.120.
- (u) Information identifying certain persons seeking advice as an agency employee regarding their rights in connection with a possible unfair practice under chapter 49.60 RCW.
- (v) Investigative records compiled by an employing agency investigating an unfair practice under that act or a possible violation of other laws against discrimination in employment.

Most of those exemptions are qualified, in that the exemption is inapplicable to the extent that disclosable information can be separated from nondisclosable information. Furthermore, when the reason for the exemption ceases, the files may lose their exemption.²⁷

1. All agencies are required to make their records available “promptly” on request.

They must, within five days of the request, either (a) provide the record. (b) acknowledge the request and give an estimated response time, or (c) deny the request.²⁸

They must give written reasons for denials of access or copies. There must be procedures for reviewing requests. If a request is denied, the review is considered complete at the end of the second business day following the denial.²⁹

Port commissions should adopt procedures to protect their records and prevent interference with district functions. An agency may seek a court order to protect a particular record.³⁰

2. A person whose request for inspection or copying is wrongly denied may sue on his or her own behalf.

The court may order the agency to comply. A person who prevails in such a lawsuit against an agency is entitled to reimbursement for all court costs including a reasonable attorney’s fee; and may be awarded an amount not less than five dollars nor more than one hundred dollars per day for each day the request was denied. The burden of proof is generally on the agency to justify its decision, on the basis of a specific statutory exemption from disclosure.³¹

A. Appointed and elected officials are immune from civil liability under state law to third parties for making or failing to make a discretionary decision in the course of their official duties.¹

However, this immunity is limited because damages can be assessed for violations of the Federal Civil Rights Act (42 U.S.C. 1983) if the conduct in question violates clearly established statutory or constitutional rights of which a reasonable person should have known.²

However, the municipal corporation itself may be held liable even though the individual officer may be protected.³

B. Port districts, like the state and other municipalities, have the authority to provide liability insurance to protect their officers and employees from loss due to their acts or omissions in the course of their duties.⁴

This kind of authority has been held to permit the interpretation of an insuring agreement so broadly as to indemnify a public utility district's treasurer against claims by the district itself.

C. Port districts are authorized to indemnify their officers and employees by paying defense costs and even judgments in proper cases.⁵

This includes the authority to pay the necessary expenses of defending an elective officer of a port district or other local entity in a judicial hearing to determine the sufficiency of a recall charge.⁶

D. The law generally requires a determination of good faith as a condition of indemnity.⁷

A. Be knowledgeable.

Know the statutes and the rules, and follow them strictly.

B. Keep in touch with your legal counsel.

Port district government is uniquely entwined with a vast body of constitutional, statutory, and decisional law. The port district attorney can and should play a vital role in the understanding and administration of that law.

C. Develop clear, sound policies, including insurance, to protect the district, and its officers and employees.

Obtain adequate liability insurance when available; or explore membership in one of the several insurance pools that may be available.

To borrow another nautical term, the purpose of this publication is to assist port district officials to navigate a safe course and avoid certain trouble areas most frequently encountered by municipal officials. Although it is meant to be comprehensive, it does not necessarily include all statutes and regulations, or case law, that possibly may apply. Furthermore, as indicated at the outset, the law frequently changes with new enactments and interpretations; even legal interpretations may vary depending upon the facts of a particular case. Therefore, it is important to develop a healthy working relationship with the various offices and other sources of help available to you. Do not hesitate to seek information and advice, especially on legal matters. The result may make the difference between a smooth passage and a disaster; between success or failure in asserting a claim or defense, particularly when the good faith of the official may be an issue in the lawsuit.

The Washington Public Ports Association and I are grateful for the continuing interest of port districts in this publication. We hope that these updated guidelines will continue to be a useful source of information and benefit.

F. PROCEDURES FOR ACCESS – REMEDIES

– Robert F. Hawth
December 1996

I. Basic Powers— The Distribution and Exercise of Governmental Powers

¹ RCW 53.04.060. Sometimes the terms "political subdivision," "municipality," and "local government agency," are used interchangeably by the Legislature when referring to counties, cities and districts.

² See 1 McQuillin, *Municipal Corporations* (3rd ed rev. 1987) sec. 2.08 at p.142; also State ex rel. *Port of Seattle v. Superior Court*, 93 Wash. 267, 160 Pac. 755 (1916) at p. 273.

³ See Wash. const. art. XI secs. 10 and 11.

⁴ See 1 McQuillin, *Municipal Corporations*, supra, sec. 2.29, and further discussion later in this handbook.

⁵ RCW 53.04.010.

⁶ See Wash. const. art. VIII sec. 8 (amendment 45) and art. XXXII (amendment 73).

⁷ RCW 53.08.010 and 53.08.020.

⁸ RCW 53.36.020, 53.08.050 and 53.25.100.

⁹ RCW 53.08.260.

¹⁰ RCW 53.08.320 and 53.34.190.

¹¹ RCW 53.08.220 and 53.08.230.

¹² *Griggs v. The Port of Tacoma*, 150 Wash. 402, 273 Pac. 521 (1928) at p. 408.

¹³ State ex rel. *Hill v. Port of Seattle*, 104 Wash. 634, 180 Pac. 137 (1919).

¹⁴ The "Dillon Rule" is a judicially established rule of statutory construction of municipal powers, described in the writings of John J. Dillon, a jurist and leading authority on the subject, circa 1890.

¹⁵ See RCW 53.34.220.

¹⁶ However, a study of existing case law makes it very difficult to generalize as to which port district powers would be held to be "governmental" and which would be classified as "proprietary" in a given case. Specific legal determinations have to be made on a case by case basis. See, also, *Tacoma v. Taxpayers*, 108 Wn. 2d 679, 693-96, 743 P.2d 793 (1987).

¹⁷ See 3 McQuillin, *Municipal Corporations*, sec. 12.126; also State ex rel. *Eastvold v. Maybury*, 49 Wn.2d 533, 304 P.2d 663 (1956).

¹⁸ See In re Juvenile Director, 87 Wn.2d 232, 238, 552 P.2d 163 (1976).

¹⁹ *Id.*, at p. 240.

²⁰ See RCW 53.12.010.

²¹ RCW 53.20.

IX. Immunities From Tort Liability

²² RCW 53.25.

²³ RCW 53.08.070.

²⁴ RCW 53.08.170.

²⁵ RCW 53.35.

²⁶ RCW 53.36.

²⁷ RCW 53.36 and RCW 53.40.

²⁸ RCW 53.36.120 et seq.

²⁹ See *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (1982).

³⁰ RCW 53.36.010.

³¹ See RCW 36.29.020 and Opinion of the Attorney General (AGO) 1972 No. 21, interpreting that statute. (References in this handbook to “AGO” or “AGLO” mean “Attorney General’s Opinion” or “Attorney General’s Letter Opinion”, respectively.)

³² RCW 53.08.170 and RCW 53.12.270.

³³ RCW 53.12.270.

³⁴ RCW 53.36.140.

³⁵ RCW 53.08.280.

³⁶ See ch. 53.06 RCW. A similarly authorized designation of an association as a “coordinating agency” was upheld in *State ex rel. Cruikshank v. Baker*, 2 Wn.2d 145, 97 P.2d 638 (1949). See, also, memorandum opinion from the attorney general’s office to the state auditor, August 28, 1969, for further discussion.

³⁷ See chapters 53.08 and 53.34 RCW.

³⁸ See Municipal Research and Services Center (MRSC) Information Bulletin No. 424, p. 137; This and other MRSC publications are available from the Municipal Research and Services Center, 1200 Fifth Avenue, Suite 1300, Seattle, WA 98101-1159. See, also, *Cleveland Board of Education v. Loudermill*, 105 S.Ct., 1487, 84 L. Ed 2d 494 (1985);

³⁹ See *Dorsten v. Port of Skagit County*, *supra*.

⁴⁰ See *State ex rel Beam v. Fulwiler*, 76 Wn.2d 313, 456 P.2d 322 (1969).

⁴¹ *Id.*

II. Basic Duties, Liabilities and Immunities of Officers

¹ See *Clipse v. Gillis*, 20 Wn. App. 691, 582 P.2d 555 (1978) as modified by *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983).

² See 42 USC sec. 1983, for example.

³ Chapters 42.20 and 42.23, for example.

⁴ Chapter 42.30 RCW.

⁵ Chapter 42.17 RCW.

⁶ RCW 39.30.020.

⁷ See *Kelso v. Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964).

⁸ RCW 4.96.010. See, also, RCW 4.96.020 specifying the necessity and contents of a preliminary claim in damage actions.

⁹ *Chambers-Castanes v. King County*, *supra*.

¹⁰ *Cougar Business Owners Ass’n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982).

¹¹ *Bergh v. State*, 21 Wn. App. 393, 585 P.2d 805 (1978).

¹² *Walters v. Hampton*, 14 Wn. App. 548, 543 P.2d 648 (1975). 43.

¹³ RCW 4.24.470 (1). See, also, *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991).

¹⁴ See and compare *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979) and *Ruff v. King County*, 125 Wn.2d 697 (1995).

¹⁵ *Sintra v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992).

X. Safeguards and Precautions

¹⁶ See *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988) and cases cited therein. See, also, *Sundberg v. Evans*, 78 Wn.App. 616, 897 P.2d 1285 (1995).

¹⁷ See *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 P. 204 (1902).

¹⁸ See, e.g., ch. 42.23 RCW.

¹⁹ Ch. 42.30 RCW.

²⁰ Now codified as ch. 42.17 RCW, the "Open Government Law" or "Public Disclosure Act."

²¹ RCW 42.17.010(2)(3).

²² See *State v. Engen*, 60 Wn.2d 52, 371 P.2d 638 (1962).

²³ RCW 42.08.080, *Rood v. Horton*, 132 Wash. 82, 231 P. 450 (1924). The law requires the premiums on such official bonds to be paid by the public agency served. RCW 48.28.040.

III. Potential Conflicts and Ethical Guidelines

¹ Wash. Const; art XXX (amendment 54).

² Wash. Const., art. XI sec. 8.

³ State ex rel. *Wyrick v. Ritzville*, 16 Wn.2d 36, 132 P.2d 737 (1942).

⁴ RCW 53.12.260.

⁵ See AGO 1989 No. 5.

⁶ See State ex rel. *Jaspers v. West*, 13 Wn.2d 514, 125 P.2d 694 (1942); also State ex rel. *Todd v. Yelle*, 7 Wn.2d 442, 110 P.2d 162 (1941).

⁷ See RCW 53.08.170.

⁸ Article II, section 25, Washington State Constitution: Extra Compensation prohibited. The Legislature shall never grant any extra compensation to any public officer, agent, employee, servant, or contractor, after the services shall have been rendered, or the contract entered into, nor shall the compensation of any public officer be increased or

Conclusion

diminished during his term of office. Nothing in this section shall be deemed to prevent increases in pensions after such pensions shall have been granted.

⁹ See *Christie v. Port of Olympia*, 27 Wn.2d 534, 179 P.2d 294 (1947).

¹⁰ See *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797 (1909) (vacation of an abutting street).

¹¹ See RCW 42.17.240.

¹² RCW 42.23.010.

¹³ RCW 42.23.030.

¹⁴ RCW 42.23.020.

¹⁵ AGO 53-55, No. 317.

¹⁶ *Northport v. Northport Townsite Co.*, 27 Wn. 543, 549 68 Pac 204 (1902).

¹⁷ *State v. Miller*, 32 Wn.2d 149,201 P.2d 135 (1948).

¹⁸ See *Mumma v. Brewster*, 174 Wash. 112, 24 P.2d 438 (1991).

¹⁹ Letter of the attorney general to the state auditor June 8, 1970.

²⁰ RCW 42.23.030.

²¹ The statute allows no exceptions based upon value or otherwise, for a sale by the district to an official.

²² RCW 42.23.040.

²³ RCW 42.23.050.

²⁴ Legislative debates and amendments during the passage of this act indicate that those penalties include the criminal penalties imposed by ch. 42.20 RCW (the 1909 predecessor of this act).

²⁵ Title 9A RCW

²⁶ From the legal phrase "de minimis non curat lex" - the law does not concern itself with trifles.

²⁷ RCW 53.36.120 et seq.

²⁸ See 3 McQuillin; *Municipal Corporations*, 3rd ed. (rev.); sec. 12.29, p. 149; also *Powerhouse Engineers v. State*, 89 Wn.2d 177, 570 P.2d 1042 (1977) (at p. 184).

²⁹ McQuillin, *Municipal Corporations*, supra, sec. 12.75. However, it has been held that where an officer must be appointed from the membership of the appointing body, a member of that body may vote for himself or herself.

³⁰ See, for a detailed analysis, 3 McQuillin, *Municipal Corporations*, supra, sec. 12.30.

Footnotes

³¹ State ex rel. *Brown v. Blew*, 20 Wn. 2d 47, 145 P.2d 554 (1944).

³² See RCW 53.12.270.

³³ See *Kennett v. Levine*, 50 Wn.2d 212, 310 P.2d 244 (1957).

³⁴ *Kennett v. Levine*, supra, at pp. 216, 217.

³⁵ McQuillin, *Municipal Corporations*, supra, sec. 12.67, p. 271.

³⁶ AGO 57-58 No. 91.

³⁷ Letter to the prosecuting attorney of Douglas County, July 16, 1938.

³⁸ McQuillin, *Municipal Corporations*, supra, sec. 12.67 (a).

³⁹ See AGO 59-60 No. 157.

⁴⁰ Ch. 42.36 RCW.

⁴¹ This is known as the "doctrine of necessity."

⁴² See RCW 42.36.110; also, State ex rel. *Beam v. Fulwiler*, 76 Wn.2d 313, 456 P.2d 322 (1969) (summarized in Appendix A.)

⁴³ 117 Wn. 2d 237 (1992).

¹⁹ *Port of Longview v. Taxpayers*, 85 Wn.2d 216, 533 P.2d 128 (1974).

²⁰ See, e.g., *The Higher Education Facilities Authority v. Gardner*, 103 Wn.2d 838, 699 P.2d 1240 (1985); *Washington Health Care Facilities Authority v. Spellman*, 96 Wn.2d 68; 633 P.2d 866 (1981) (at p. 76); *Washington Health Care Facilities Authority v. Ray*, 93 Wn.2d 108, 605 P.2d 1260 (1980) (at pp. 112, 116); and dissenting opinions in *Housing Financing Comm. v. O'Brien*, 100 Wn.2d 491 (1983) at p. 501) and *Marysville v. State* 101 Wn.2d 50 (1984) at p. 59. See, also, *U.S. v. Town of No. Bonneville*, 94 Wn.2d 827, 621 P.2d 127 (1980) at pp. 836, 839. *Hadley v. Dept. of Labor and Industries* Supreme Court #57284-4 Wn.2d 5/16/91.

²¹ In re Port of Grays Harbor, 30 Wn.App.855, 638 P.2d 633 (1982) citing In Re Port of Seattle, 70 Wn.2d 392, 495 P.2d 327 (1972). See also, *Paine v. Port of Seattle*, 80 Wash. 294, 127 Pac.580, (1912).

²² A district's land may be sold when declared to be surplus, or pursuant to ch. 53.25 relating to industrial development districts.

²³ See In re Port of Grays Harbor, supra; also Appeal of Chiyoda Chemical Engineering and Construction Co.,Ltd., 35 Wn.App.785, 670 P.2d 663 (1983).

²⁴ See, also, memorandum from Asst. Atty. Gen. Leland T. Johnson to the state Director of Commerce and Economic Development, Jan. 5, 1977, supra. The danger is especially acute if the project will result in private ownership, and more so if the improvements are not traditional port district facilities.

²⁵ See In re Port of Seattle, *Paine v. Port of Seattle*, and In re Port of Grays Harbor, supra. The acquisition and improvement of a private theater by a city for immediate sale to a specific private entity has been held to be a "lending of credit." See *Lassila v. Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978); also In re Seattle, supra.

²⁶ In re Port of Grays Harbor, 30 Wn. App. 855, 638 P.2d 633 (1980). For a more expanded discussion of the subjects of "lending credit" and "industrial development," see the following two presentations which may be obtained from the WPPA: (1) Port Districts and Economic Development - Public and Private Partnerships (Part II), November 29, 1994; and (2) Development of Land for Industrial Purposes, September 29, 1995 (both written by Robert F. Hauth).

²⁷ Article 32 (Amendment 73), Washington State Constitution; and chapter 39.84 RCW. See Development of Land for Industrial Purposes, ante.

²⁸ Ch. 42.23 RCW (conflicts of interest); also portions of ch. 42.20.

²⁹ Ch. 42.17.130, a section of Ch. 42.17 (Initiative 276), technically called the "Open Government Law," which took effect in 1972.

³⁰ RCW 42.17.130.

³¹ See *King County Council v. Public Disclosure Commission* 93 Wn. 2d 559 611 P.2d 1227 (1980).

³² See AGO 1979 No. 3.

⁷ See RCW 39.04.155 and RCW 53.08.120.

⁸ For more knowledge as to the meaning of those terms, see Municipal Research & Services Center Memorandum No. 108 (Revised October 1990) and Information Bulletin No. 488, pages 6-1 through 6-9 (October 1994). Note also the language of those statutes permitting the optional advertisement for and acceptance of the "...best bidder submitting his own plans and specifications." Although this language gives what appears to be a modified "design-build" authorization, it envisions something less than the "design-build" method apparently understood in the industry and as authorized by the Legislature for certain other public bodies in Chapter 39.10 RCW. Some attorneys refer to this optional port district procedure as the "best bid" method in contrast with the alternative "low bid" ("lowest possible bidder") requirement. Unlike the "design build" method as authorized in Chapter 39.10 RCW, this "best bid" method still involves a firm sealed bid with security, as the basis for a binding contract when accepted by the port commission.

⁹ The \$10,000 figure is to be adjusted annually as provided in subsection (2) of the statute.

¹⁰ See RCW 39.04.260 and the following presentation which may be obtained from the WPPA: Port Districts and Economic Development - Public and Private Partnerships (Part II), ante.

¹¹ RCW ch. 39.10

¹² *Green v. Okanagon County*, 60 Wash. 309, 111 Pac.226 (1910)

¹³ See, e.g., *Washington Fruit etc. Co. v. Yakima*, 3 Wn.2d 152, 103 P.2d 1106 (1940); *Smith v. Seattle*, 192 Wash. 64, 72 P.2d 588 (1937); AGO 61-62 No.24.

¹⁴ See, for example, ch. 39.04 RCW; and also, in connection with the procurement of architectural and engineering services, ch. 39.80 RCW. These requirements are found mainly in Title 39 RCW, and are fairly extensive. See, also, the WPPA presentations listed above.

¹⁵ See, also, the following presentation which may be obtained from the WPPA: Port Districts and Economic Development -Public and Private Partnerships (Part I).

¹⁶ See also RCW 39.12.040(2e).

¹⁷ RCW 53.08.130 as amended by Chapter 18, Laws of 1996.

¹⁸ *Platt Electric Supply, Inc., v. City of Seattle et al.*, 16 Wn.App. 265, 555 P.2d 421 (1976).

¹⁹ RCW 39.30.020.

²⁰ The remedies available to a disappointed bidder or a taxpayer in cases of unlawful acceptance of a bid are very limited. See *Dick Enterprises, Inc. et al v. King County*, 83 Wn. App. 566 (1996), supra. Plaintiffs, who submitted the second lowest bid, challenged the award of a contract to the lowest bidder on the ground that the low bid had not met set-aside goals for minority and women business enterprises (MWBES). The Court of Appeals dismissed the Plaintiffs' suit because:

- 1) A disappointed bidder has no standing to sue for damages;
- 2) A disappointed bidder may sue to enjoin the awarding of an unlawful contract, but not to enjoin the performance of a contract that has been created;
- 3) A taxpayer may sue to enjoin the execution or performance of an illegal contract that would increase the tax burden. To qualify, the plaintiff must be one who pays the type of taxes funding the project, and must have asked the Attorney General to take action before bringing the suit. The bidder in this case was not a King County taxpayer and lacked standing on those grounds.
- 4) An appeal from the denial of a temporary restraining order is too late once the contract has been executed.

IV. Prohibited Use of Public Funds, Property or Credit

¹ Wash. const. art VII sec. 1 amendment 14; see, also, State ex rel *Collier v. Yelle*, 9 Wn.2d 317, 115 P.2d 373 (1941) and AGO 1988 No. 21.

² Wash. const. art. XI sec. 14.

³ See, e.g. ch 42.23 RCW and similar statutes discussed earlier in this handbook.

⁴ Wash. const. art. VIII sec. 7.

⁵ *Johns v. Wadsworth*, 80 Wn. 352, 141 P. 892 (1914) held that the Legislature may not authorize the use of public funds to aid a private fair; *Lassila v. Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978) held that a city could not buy a building for resale to a private movie theater operator. In re Seattle, 96 Wn.2d 616, 627 (1981).

⁶ Wash. const. art. VIII section 8 (amendment 45).

⁷ RCW 53.04.010 and 53.04.016. See, also, RCW 53.08.041, expressly referring to Wash. const. art VIII sec. 8 for validation.

⁸ RCW 53.08.010.

⁹ RCW 53.08.020.

¹⁰ RCW 53.08.040. In AGO 51-53-195, construing an earlier version of what is now RCW 53.08.040, the attorney general's office concluded that the Legislature had not authorized a port district to construct a plant for manufacturing hardboard. Whether or not the same conclusion would be reached now, it probably would not apply to improvements which relate to a port district's usual purposes; i.e., handling, storing, processing, and preparing commodities for shipment. (c.f. memorandum from Asst. Atty. Gen. Leland T. Johnson to the state's director of commerce and economic development Jan. 5, 1977.)

¹¹ RCW 53.08.080. Note: the phrase "for such purposes and" was added by sec. 2, ch. 289, laws of 1989.

¹² 53.25.100 RCW. That authority was validated by const. art. VIII Sec. 8. See In re Port of Seattle, 35 Wn. App. 785, 670 P.2d 663 (1983). See, also, ch. 53.36 RCW and Wash. const. art. XXXII, amendment 73, containing special financing provisions for industrial development.

¹³ Ch. 53.25 RCW.

¹⁴ RCW 53.08.160.

¹⁵ See RCW 53.08.245.

¹⁶ RCW 53.20.030.

¹⁷ RCW 53.36.120.

¹⁸ RCW 53.25.090.

V. Public Works and Competitive Bidding Requirements

¹ *Reiter v. Chapman*, 177 Wash. 392, 31 P.2d 1005 (1934). See, also, *Dick Enterprises, Inc. et al v. King County*, 83 Wn. App. 566 (1996).

² *Id.*

³ RCW 53.08.120.

⁴ RCW 53.08.135.

⁵ RCW 53.08.120.

⁶ RCW 53.08.130.

VI. Sales of Port District Property

- ¹ See RCW 53.08.090 and RCW 14.08.120.
² RCW 53.08.090; also note the reference in that statute to RCW 53.20.010.
³ See subsection 2 of RCW 53.08.090 and its reference to RCW 82.14.200.
⁴ RCW 53.08.091 and .092.
⁵ See RCW 14.08.120.
⁶ See RCW 39.33.010 - .020.
⁷ See RCW 53.08.080 and RCW 14.08.120 and the following presentation which may be obtained from the WPPA: Development of Land for Industrial Purposes, ante.

VII. The Open Public Meetings Act of 1971

- ¹ Please note that this is a more detailed discussion than in previous editions. For even more comprehensive information on this subject, please refer to the additional publications cited herein, which are easily obtained.
² Chapter 42.32 RCW.
³ Now codified as ch. 42.30 RCW.
⁴ RCW 42.30.020.
⁵ RCW 42.30.070.
⁶ RCW 42.30.010.
⁷ RCW 42.30.030.
⁸ RCW 42.30.060. See, also, *Slaughter v. Fire District No. 20*, 50 Wn. App. 733, 750 P.2d 656 (1988). The court of appeals, in a later case, also held invalid a labor agreement that had been negotiated at meetings that violated the Act. *Mason County v. PERC*, 54 Wn. App. 36, 771 P.2d 1185 (1989). In apparent reaction to that case, however, section 1, chapter 98, laws of 1990 broadened the Act's exemptions to include all collective bargaining sessions and related meetings and discussions with employee organizations.
⁹ RCW 42.30.060(2).
¹⁰ RCW 42.30.910.
¹¹ RCW 42.30.020.
¹² *Salmon For All v. Department of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (1992); AGO 1971 No. 33.
¹³ Some argue that a discussion of the agency's business on such occasions, when that is not a purpose of the gathering, is not a violation. However, in this author's opinion that would be a dangerous assumption.
¹⁴ RCW 42.30.020. "Subagency does not include a purely advisory body unless it is legally required that its recommendations be considered by the governing body." AGO 1971 No. 33.
¹⁵ RCW 42.30.020(1)(c). A committee "acts on behalf of a governing body only when it exercises delegated authority, such as fact-finding." AGO 1986 No. 16.
¹⁶ See the publication *Open Public Meetings Act*, by Richard M. Montecucco, Senior Assistant Attorney General (May, 1995) pp. 13-17.
¹⁷ RCW 42.30.020.
¹⁸ Ch 34.05 RCW.
¹⁹ RCW 42.30.070.
²⁰ *Salmon For All v. Department of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (1992).
²¹ RCW 42.30.020(4).
²² RCW 42.30.010 and 42.30.020(3).
²³ See *Salmon For All v. Department of Fisheries*, supra.
²⁴ *Open Public Meeting Act*, supra, p.86.
²⁵ See RCW 42.30.060 - 42.30.075.
²⁶ See *Port of Edmonds v. Fur Breeders*, 63 Wn.App. 159, 816 P.2d 1268 (1991). It is wise to review these

statutes periodically to determine whether the law may have been amended to add such a notice requirement affecting regular port district meetings or a particular kind of meeting, in addition to "special" meetings.

- ²⁷ RCW 42.30.080.
²⁸ See RCW 42.30.070.
²⁹ *Id.* Wherever the meeting is held, it must be open and accessible to the public, and should not be held in a place or manner so as to prevent the port district's inhabitants or other members of the public from attending.
³⁰ RCW 42.30.030.
³¹ RCW 42.30.080.
³² RCW 42.30.070.
³³ RCW 42.30.030 and 42.30.050.
³⁴ RCW 42.30.040.
³⁵ See RCW 42.30.050.
³⁶ RCW 42.30.090 - 42.30.100.
³⁷ RCW 42.30.110.
³⁸ As indicated by footnote in the preceding edition of this work, a 1985 amendment (ch. 366, Laws of 1985), together with some contemporaneous circumstances (see AGO 1985 No. 4), raised a question as to whether or not this section continued to allow executive sessions to review applications for appointive public office, or the performance of such appointees, as distinguished from "public employment" or "employees." However, attorneys for many public agencies, including members of the attorney general's staff, take the position that the Act continues to allow executive sessions for those purposes. (Memorandum to MRSC's general counsel from Senior Assistant Attorney General Richard M. Montecucco, dated March 15, 1990.) That position is based, in part, upon a gubernatorial veto of a proposed amendment of the Open Government Act, ch. 42.17 RCW, in the 1987 legislative session, which would have required applications for such positions to be disclosable. See, in particular, ch. 404, Laws of 1987 and the Governor's veto message at p. 1553, vol. 2, Laws of 1987.
³⁹ RCW 42.30.110(1)(g).
⁴⁰ RCW 42.30.110. There is no prohibition against holding a special meeting solely to consider one or more subjects in executive session, but the subject matter must be identified at least in general terms in the meeting notice, e.g., "to consider a building site," or "to consider applicants for employment." (See RCW 42.30.080.)
⁴¹ RCW 42.30.110(2).
⁴² RCW 42.30.060.
⁴³ RCW 42.23.070. This statute formally existed as part of a more general code of public officers' ethics which the Legislature repealed in 1994. It was reenacted as a section of Chapter 42.23 RCW, along with certain other municipal officer ethics provisions discussed later in this work. This section would appear to apply to information obtained in executive sessions. See, for a similar discussion, *Knowing the Territory: Basic Legal Guidelines for Washington Municipal Officials*, MRSC Information Bulletin No. 492 (1995).
⁴⁴ This section is not a part of Ch. 42.30 RCW, but a section preserved from the earlier act, Ch. 42.32 RCW.
⁴⁵ RCW 42.32.030. Note that this is the single remaining provision of the former open meetings law.
⁴⁶ See RCW 42.17.020(41).
⁴⁷ See *The Open Public Meetings Act*, supra, pp.77-88.
⁴⁸ RCW 42.30.060. Agreements negotiated or adopted in closed meetings held in violation of the Act also may be invalid. See *Mason County v. PERC*, 54 Wn. App. 36, 771 P.2d 1185 (1989); however, note the exemption

language in RCW 42.30.140 regarding collective bargaining and related matters.

- ⁴⁹ RCW 42.30.120. According to a letter from the Attorney General to Senator Paul Conner May 8, 1984, it would not be a violation of the Act for all three (or five) port commissioners to attend an exit conference held by the State Auditor. However, that would not permit the commissioners to engage in discussions of port business among themselves. The word "knowingly" in this section is significant; acting in good faith upon the advice of the port's legal counsel that the meeting is properly held in executive session would appear to be sufficient to avoid penalty. See *Open Public Meetings Act*, supra, pp. 64-65.
⁵⁰ RCW 42.30.130.
⁵¹ RCW 42.30.120 - 42.30.130.
⁵² See RCW 43.09.260 - 43.09.330.
⁵³ RCW 42.30.120(2). See *Open Public Meetings Act*, supra, p. 65.

VIII. The Open Government Act Public Records - Freedom of Information - Privacy

- ¹ Now codified in chapters 42.17 and 42.56 RCW.
² *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974).
³ RCW 42.17.010(11). See, also, RCW 42.17.920.
⁴ RCW 42.17.920.
⁵ The term "agency" includes port districts. See RCW 42.17.020(2).
⁶ RCW 42.56.080.
⁷ AGO 1988 No. 12.
⁸ RCW 42.17.020(41).
⁹ See *Public Records Disclosure For Washington Cities and Towns*, Municipal Research and Services Center ("MRSC") Report No. 34, March, 1996, page 5.
¹⁰ RCW 42.17.020(48).
¹¹ A.G. Overview, ante. For further explanation of electronic data disclosure see *Public Records Disclosure*, ante.
¹² RCW 42.56.040.
¹³ RCW 42.56.090.
¹⁴ RCW 42.56.080, 42.56.100, and 42.56.120; also AGO 1991 No. 6.
¹⁵ RCW 42.56.070(9).
¹⁶ AGLO 1975 No. 38.
¹⁷ RCW 42.56.050.
¹⁸ *Police Guild v. Liquor Control Board*, 112 Wn.2d 30, 769 P.2d 283 (1989).
¹⁹ *Progressive Animal Welfare Society v. The University of Washington*, 114 Wn.2d 677, 790 P.2d 604 (1990).
²⁰ These exemptions are contained in RCW 42.56.050.
²¹ Whether information is "personal" depends mainly on whether or not the information pertains to the public's business versus the individual's business. AGO 1973 No. 4.
²² AGO 1971 No. 33.
²³ *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993) (overruled in other part by PAWS, supra).
²⁴ This exemption is limited to agencies which have the authority to investigate and penalize. See A.G. Overview, supra, and cases cited therein.
²⁵ *Dawson v. Daly*, supra at p.793; see, also PAWS, supra; *Open Public Records*, ante, and *Update on Public Disclosure After PAWS*, ante.
²⁶ This includes what is generally known as the "attorney work product" exemption which was applied in *Dawson v. Daly*, supra.
²⁷ *Hearst v. Hoppe*, supra.

²⁸ Permissible reasons for additional time to respond include time needed to clarify the intent of the request, or to determine whether any of the information is exempt. RCW 42.56.550. A person who believes that the estimated time is unreasonable may petition the superior court to have the agency justify it. The burden of proof in such cases is on the agency. RCW 42.56.550 (2).

²⁹ RCW 42.56.520.

³⁰ RCW 42.56.540.

³¹ RCW 42.56.550.

IX. Immunities From Tort Liability

¹ RCW 4.24.470; also *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965); *Sidor v. Public Disclosure Commission* 25 Wn. App. 127, 607 P.2d 859 (1980); *Chambers-Castanes v. King County*, 100 Wn.2d 275, supra. However, the public agency may be liable even if the official is immune.

² *Sintra v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992). It is not a defense that the official acted in accordance with advice from legal counsel. *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992).

³ RCW 4.24.470(1) and 4.96.010(1); *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991).

⁴ RCW 53.08.205; also RCW 36.16.138.

⁵ RCW 53.08.208; also RCW 4.96.041.

⁶ RCW 4.96.041(3).

⁷ See Wash. P.U.D.s' Utilities System, supra; also *State v. Hermann*, 89 Wn.2d 349, 572 P.2d 713 (1977); AGO 61-62 No. 71; AGO 63-64 No. 118; AGO 63-64 No. 124; also, letter from Deputy Attorney General Philip H. Austin to Senator Quigg, dated February 10, 1982. RCW 53.08.208 specifically forbids such indemnification where a court has found the person not to be acting in good faith, or not within the scope of duty.

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