

# **CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS**

## **Policy Session Worksheet**

**Presentation Date:** June 18, 2019 **Approx. Start Time:** 1:30 **Approx. Length:** 1 hr.

**Presentation Title:** Oregon Public Meetings Law

**Department:** County Counsel

**Presenters:** Stephen Madkour, County Counsel

**Other Invitees:** Anyone who would like to learn more about Oregon's public meetings law.

### **WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?**

None. This is a training session

**EXECUTIVE SUMMARY:** A training session on Oregon's Public Meetings Law.

### **FINANCIAL IMPLICATIONS (current year and ongoing):**

Is this item in your current budget? ☒ YES ☐ NO

What is the cost? \$0

What is the funding source? n/a

### **STRATEGIC PLAN ALIGNMENT:**

- How does this item align with your Department's Strategic Business Plan goals?
- How does this item align with the County's Performance Clackamas goals?

### **LEGAL/POLICY REQUIREMENTS:**

### **PUBLIC/GOVERNMENTAL PARTICIPATION:**

### **OPTIONS:**

### **RECOMMENDATION:**

### **ATTACHMENTS:**

### **SUBMITTED BY:**

Division Director/Head Approval \_\_\_\_\_

Department Director/Head Approval \_\_\_\_\_

County Administrator Approval \_\_\_\_\_

For information on this issue or copies of attachments, please contact Stephen Madkour @ 503-742-5391
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# Oregon Public Meetings Law

ORS 192.311-.478

2019

Stephen L. Madkour  
County Counsel



# Oregon's Public Meetings Law

- ▶ Oregon's Public Meetings Law requires that decisions of public bodies be arrived at openly.
- ▶ With few exceptions, members of the public have the right to attend all meetings of governing bodies at which decisions about the public's business are made or discussed.



# Purpose of Public Meetings Law

- ▶ The overarching principles of Oregon's Public Meetings Act are set forth in the purpose statement:
- ▶ "The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of [the Public meeting Law] that decisions of governing bodies be arrived at openly." ORS 192.620.
- ▶ Whenever new issues arise, courts look to the purpose statement.

# Public Meetings Law

- ▶ What is a public meeting?
- ▶ When is a public meeting required?
- ▶ What business may be accomplished in a public meeting?
- ▶ How is public meeting conducted?
- ▶ Location and notice requirements
- ▶ Minutes are required
- ▶ When can the Board discuss issues in executive session?

**Public Records Law is the state analog to federal requests under the Freedom of Information Act (FOIA).**

**Resources: Oregon Attorney General's Manual 2014**





# Who is subject to the law?

ORS 192.610(3)

“Governing body” means the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration.”

# Advisory Bodies and Subcommittees

- ▶ Advisory bodies and subcommittees of a governing body are subject to the act.
  - ▶ Hamlets and Villages and other alphabet agencies.
  - ▶ BCC subcommittees
  - ▶ If the subcommittee makes a collective recommendation to the BCC, it is subject to the act.
  - ▶ If the subcommittee members make individual recommendations to the BCC it is not subject to the act.
  - ▶ If the subcommittee is purely information gathering, it is exempt.



# What does the act require?

- ▶ All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by law.
- ▶ A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by law. ORS 192.630
- ▶ Location
- ▶ Notice
- ▶ Minutes

# What is a Meeting?

The “convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter.”

# “Meeting” Does Not Include:

- Attendance at conferences and associations
- On-site Inspections
- Board Retreats
- Some Trainings



# Executive Sessions

- ▶ An executive session is a properly noticed closed-door session where members of the public are excluded.
- ▶ The media is generally allowed to attend. Only exception in the county.
- ▶ Board may deliberate, discuss and provide direction to staff, but no votes and no final action may be taken in an executive session.
- ▶ Executive sessions may be held to discuss certain matters specified in the Public Meetings Law including: attorney-client communications, litigation, labor negotiations, real property negotiations, and hiring, disciplining of an officer or employee or performance evaluation of an officer or employee.





# Serial Deliberations, *Seriatim* Conversations, a Walking Quorum, Collective Concurrence, or Daisy Chaining



# Dumdi v Handy

- ▶ Lane County Circuit Court decision holding that serial, or successive deliberations can rise to the level of a violation of the public meetings – even if using surrogates or intermediaries.
- ▶ Citizens brought claim for public meeting violations against 3 of 5 sitting county commissioners
- ▶ The court stated that searching for a bright-line rule in these types of situations is a “fool’s errand.”
- ▶ Even though three commissioners were never in the same room at the same time discussing the same matter, the continuing multiple or serial conversations by board members amounted to private deliberations in violation of the Public Meeting law.



# Dumdi v Handy cont.

- ▶ Handy, Sorenson and Dwyer voted to adopt a supplemental budget to fund positions for new commissioner staff assistants. The other two commissioners voted against it.
- ▶ Communications were done through emails, and meetings with assistants, who served as intermediaries. “Here is the last list of agreed upon items with six votes for the meeting tonight.”
- ▶ Public records request from Register Guard resulted in county counsel stating that the emails “look badly.” Handy’s email essentially admits serial deliberations and seals his fate.
- ▶ Court found that the subsequent board meeting and votes “went exactly as Handy had orchestrated it in the few days before.”
- ▶ Court ruled that Handy and Sorenson acted willfully and awarded attorney fees against them.

# Handy v Lane County, 274 Or App 644 (2015)

- ▶ Handy was a former County Commissioner. He was one of two commissioners that were found to have willfully violated the public meetings law in Dumdi v Handy et al.
- ▶ Handy sued Lane County for alleged violations of the public meeting law by meeting in private and holding an emergency meeting.
- ▶ Facts: Handy was running for reelection to the board and was also attempting to repay the debt of \$20,000 to Lane County as a result of the attorney fee award against him and Sorenson. Handy solicited donations from citizens and informed them that donations would be confidential and anonymous. Recipient of the request informed the DA, who contacted the DOJ. Recipient's lawyer also sent Handy a letter alleging that Handy violated state ethics laws and campaign finance laws. Might be risk to the county is it was the recipient of some of those donations.
- ▶ Media outlets then requested the letter. County Administrator emailed and spoke with two other commissioners. Emergency meeting was scheduled to determine whether to release letter. 3 out of 5 commissioners attended and voted to release the letter. Handy sued county and three commissioners.

# What's a Deliberation?

- ▶ The Public Meeting's Law does not define "deliberation."
- ▶ Webster's defines as "to think about and discuss issues carefully" and "to think about deliberately and often with formal discussion before making a decision."

# Handy v Lane County, 274 Or App 644 (2015)

## The Court's Analysis:

- ▶ Question for the court was whether a series of communications, each comprising less than a quorum may be in effect aggregated so as to implicate a quorum for purposes of the statute.
- ▶ “A quorum of a governing body may not meet in private for the purpose of deciding on or deliberating toward a decision on any matter” with limited exceptions.
- ▶ Court focused on the terms “meet” and “meeting.” A violation of ORS 192.630(2) depends not on the method by which communications take place but rather on the purpose and content of the communication.
- ▶ Officials could be polled through an intermediary;
- ▶ Officials could deliberate in group email messages and declare their positions on upcoming issues; or
- ▶ Officials could deliberate in rapid, serial, group text messages in the moments before convening for a meeting.

# Handy v Lane County, 274 Or App 644 (2015)

## Conclusion:

- ▶ Public Meetings Law contemplates something more than just a contemporaneous gathering of a quorum.
- ▶ A series of discussions may rise to the level of a prohibited “deliberation” or “decision”; the determinative factors are whether a sufficient number of officials are involved, what they discuss, and the purposes for which they discuss it – not the time, place or manner of their communications.
- ▶ The Public Meetings Law does not prohibit the same two commissioners from privately meeting and gathering information, and later sharing it with their fellow board members, provided that it was done during a public meeting.

- ▶ Supreme Court affirmed in part and reversed in part. 360 Or 605 (2016)



# O'Neill v. City of Shoreline, 170 Wash.2d 138 (2010)

- ▶ Washington Supreme Court held that public records law applies to records stored on a personal computer.
- ▶ The Court recognized that a government employee could circumvent the public records law by using their own computers for government business.



# Nissen v. Pierce County, 183 Wash2d 863 (2015)

- ▶ Court found that public employee text messages are public record of the employer, even if employee uses private cell phone.
- An agency's public record includes those of its employees if:
  - The record is within the scope of employment.
  - The record relates to conduct of government.
  - The record is prepared, owned, used, or retained by the government.

# How does an employer search a government employee's personal phone absent consent or warrant?

- ▶ In the absence of a policy regarding retaining text and other messages on a personal device, the court held that an employee's good faith search for public records on the personal device satisfies the obligation.

## How can this be verified?

- ▶ Employee or agency would submit a reasonably detailed non-conclusory affidavit attesting to the nature and extent of the search.

# Solutions?

- ▶ Public agencies could develop ways to capture public records related to employee personal cell phone use.
- ▶ Public agencies could provide employees with agency-issued devices.
- ▶ Public agencies could prohibit use of personal phones.



# Violations of Public Meetings Law

- ▶ Violations of Oregon's Public Meeting Law are civil in nature. Successful petitioner may recover their attorney fees
- ▶ A defect in the meeting is voidable
- ▶ If willful misconduct then officials jointly and severally liable for fees
- ▶ A complaint for violations of the executive sessions provisions of the Public Meetings Law may be filed with the Oregon Government Ethics Commission.

# QUESTIONS?

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