

Information from Executive Session is Divulged – Now What?

By Chip McKenna

The Open Public Meetings Act (OPMA) allows a governing body to hold an executive session during a regular or special session under limited circumstances (RCW 42.30.110). This includes, but is not limited to, allowing the city/town council to close a meeting to the public in order to discuss: 1) personnel matters – to discuss performance of city/town employees; and 2) litigation or potential litigation – to meet privately with legal counsel. Others may be invited to attend, but their presence must be necessary for the council to fulfill the purpose of the executive session. Information communicated in an executive session is confidential.

WCIA provides multiple trainings addressing OPMA, such as Risk Management Fundamentals – ESB 5964, and Land Use Decision Making for Elected Officials. The training featuring ESB 5964 can be provided onsite or through the WCIA Online Academy. Land Use Decision Making for Elected Officials can be tailored to a member's specific needs with additional topics and offered on-site. Contact Member Services for additional information at memberservices@wciapool.org. Another resource for OPMA training includes the State of Washington Department of Commerce's Short Course on Local Planning (contact Anne Fritz at anne.fritzel@commerce.wa.gov). The Municipal Research and Services Center (MRSC) also has a number of resources regarding the OPMA and executive sessions. Links to the two MRSC resources used for this article are shown below.

Any information divulged from executive session regarding a personnel matter, litigation or potential litigation may impair the ability of WCIA to defend a claim or lawsuit. Unfortunately, this arises more often than it should. Consider the following scenario: At last night's board meeting, the board went into executive session to discuss pending litigation of a wrongful termination and harassment claim. The agency attorney started the executive session by instructing those in attendance that information regarding the claim was confidential and should not be shared with others outside the meeting. The claim involved an executive assistant who was recently terminated and has sued the agency for wrongful termination and harassment. To compound matters the executive assistant had been involved in a romantic relationship with the agency executive, which ended about a year ago. The lead story in the morning paper was a story about the executive assistant and agency executive. It contained several items that had been communicated in last night's executive session, including the strengths and weaknesses of the litigation strategy and potential settlement. It was clear that this information came directly from someone who attended the executive session of the board meeting, despite the attorney's instruction/warning about keeping what was communicated at the meeting confidential.

What can be done if the information obtained in an executive session is disclosed? Options to consider include but are not limited to: 1) adopt specific ethics rules or ordinances dealing with confidential information; 2) apply applicable state law – including penalties, forfeiture of office and recall; or 3) punish/sanction members for violating secrecy of an executive session under *Roberts Rules of Order*.

1. Ethics Rules:

A member may adopt ethics rules or ordinances regarding confidential information and impose a duty of confidentiality on member officials and employees. Possible penalties for violation of the rules or ordinance include but are not limited to: fine, loss of pay and/or jail sentence. Please refer to the municipal codes for the City of Marysville (MMC Sec. 2.80.045 & 2.80.050) and Renton (RMC Sec. 1-5-2 C & 1-6-6).

2. State Law:

It is also possible that a statutory penalty may be applied. RCW [42.23.070\(4\)](#) prohibits disclosure of confidential information learned by reason of a municipal officer's position, and RCW [42.23.050](#) provides for a \$500 penalty and possible forfeiture of office for a violation of chapter RCW 42.23. MRSC opines it is arguable that the prohibition in RCW [42.23.070\(4\)](#) applies to the unauthorized disclosure of information learned in executive session.

3. *Roberts Rules of Order*:

Most members operate under Roberts Rules of Orders (RRO). Under RRO, an executive session is closed to all but the members. Business conducted in executive session is confidential and known only to its members. Others may attend, however, their presence must be necessary to fulfill the purpose of the executive session. A member (or attendee) can be punished if the secrecy of the executive session is violated. However, no specific penalty is mentioned. A possible sanction may include censure of the offending member(s) by the other members, publicly rebuking him or her for violating the confidentiality of the executive session.

For further reference please refer to the following article and presentation from the Municipal Research and Services Center (MRSC):

- What Can Be Done if an Elected Official Divulges Information from an Executive Session: <http://insight.mrsc.org/2013/04/19/what-can-be-done-if-an-elected-official-divulges-information-from-an-executive-session/>
- Legal Considerations and Practical Tips Regarding Executive Sessions for Elected City and Town Officials: <http://www.mrsc.org/artdocmisc/levanexec.pdf>