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MEMORANDUM

To: Washington Fire Protection Districts and Regional Fire Authorities

From: Brian Snure

Re: Executive Sessions (January, 2014)

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EXECUTIVE SESSIONS

Executive sessions of a legislative body under the Open Public Meetings Act are portions of an open public meeting during which the public is excluded. Authorized executive sessions of the Boards of Fire Districts and Fire Authorities may be held during any regular or special meeting. Closed meetings, with one exception discussed below, are not permitted by statute and an executive session, therefore, can only be held during an open public meeting. In many cases, the public meeting will consist of the opening of the meeting, the adjournment into an executive session, the reconvening of the public meeting and the adjournment of the meeting.

The participants in an executive session may be limited to the Board members. The Board members, however, can invite anyone they wish to participate in the executive session. Participation in an executive session should be limited to essential persons since allowing non-essential persons to attend impairs the confidentiality of the session. It is recommended that the minutes of the meeting indicate who attended an executive session.

Since the minutes of the meetings of the Board are open public records, minutes are not taken during an executive session, as this would defeat the necessity for privacy by revealing what took place during the executive session (RCW 42.32.030). The executive session should also not be recorded. Participants in an executive session, however, may take personal notes for their own information, although such notes, if retained, could be subject to potential disclosure under the Washington State Public Record Act. During an executive session the Board should not take final action or make collective decisions on any matter except in rare situations.

The Open Public Meetings Act specifies the subject matter that may be considered by the Board in an executive session and the Board should always review the statutory provisions that authorize executive sessions before calling an executive session. The statutory language should be used to announce the purpose of the executive session. If the Board members cannot find statutory authorization then the executive session should not be held.

The Open Public Meetings Act also specifies the procedural requirements for announcing an executive session (RCW 42.30.110(2)). The procedural requirements are discussed in detail following the analysis of the various executive session provisions.

RCW 42.30.110 establishes thirteen areas in which a governing body may hold an executive session during either a regular or special meeting. In addition, RCW 42.30.140 authorizes a narrow category of meetings that are exempt from the Open Public Meeting Act requirements, however it is common practice to also treat these types of meetings as executive sessions and these limited areas are also discussed below. The statutory language is quoted below with explanatory comments to assist the reader in determining their applicability.

(a) *To consider matters affecting national security.*

Comment: This area will not normally be of concern to the Board of a Fire District or Fire Authority but could apply when discussing emergency planning or vulnerability assessments that affect the fire department.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1)(a) to consider matters affecting national security. The executive session will be for 15 minutes until 7:45.*

(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.*

Comment: If public knowledge of the proposed site selection would not be likely to affect the price of the real property the matter could not be considered during an executive session. This could occur if the fire protection district already had an option to purchase the subject real property at an established price. It should also be remembered that once the price has been established, that the adoption of a resolution authorizing the purchase and authorizing the execution of the closing documents by district personnel must be done in an open public meeting. Even though the deliberations of the Board regarding the selection of the real property to be acquired may be held during the executive session, the final decision to actually purchase the property once the price is agreed upon should normally be made in an open public meeting. The Board can, however, in the executive session, decide to make a specific offer to purchase specific property and appoint an individual to negotiate the purchase agreement on behalf of the district, subject to final approval by the Board in an open public meeting.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1)(b) to consider the selection of a site or the acquisition of real estate.” The executive session will be for 15 minutes until 7:45. [The Board may, but is not required to, identify the specific property.]*

(c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public.

Comment: The same considerations discussed under section (b) would be applicable under this paragraph. The final sentence of the section does mandate that a motion to sell or lease the property must be made and approved during an open public meeting.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1)(c) to consider the sale of real estate. The executive session will be for 15 minutes until 7:45. [The Board may, but is not required to, identify the specific property]*

(d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs.

Comment: This provision has a very limited application. It only applies to the performance of contracts that have been awarded under the bid process. It should be noted that it does not apply to the negotiation of the basic contract but only to negotiations relating to the performance of an existing contract.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1) (d) to review negotiations on the performance of a publicly bid contract] The executive session will be for 15 minutes until 7:45. [The Board may, but is not required to identify the specific contract]*

(e) Not applicable.

(f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge.

Comment: There is a need for an initial determination of whether the receipt or evaluation of a complaint or charge against any district employee, paid or volunteer, will be conducted in one of three proceedings; an executive session, an open public meeting, or a public hearing. The decision of which of the three forums will be used in any given situation is up to the employee, not the Board. Although this provision of the statute requires that the public employee or agent may request and receive the consideration during a public meeting or hearing, it does not preclude the Board from evaluating the complaint or charges during an executive session portion of an open public meeting. In other words, while the employee may be entitled to hear and refute charges or a complaint brought against the employee in public, the Board before or after holding the public hearing or public meeting, still has the ability to review and evaluate the complaint or charges during an executive session.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1)(f) to receive and evaluate a complaint brought against a public officer or employee. The executive session will be for 15 minutes until 7:45. [The Board may, but is not required to, identify the public officer or employee]*

(g) *To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4) discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class or employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public.*

Comment: The reference to RCW 42.30.140(4) relates to the exclusion from the open public meeting requirements of that portion of a meeting during which the Board plans or adopts its position to be taken during collective bargaining, professional negotiations, grievances or mediation proceedings that will be reviewed later in the material. The authorization for an executive session contained in this section applies only to the evaluation and review process. The final decision relating to the hiring, firing, disciplining, etc., of employees must be made in an open public meeting, which means that the motion must be made, seconded and voted on in public. Since the provision of the statute specifically requires that "final action" in the specific areas relating to employees be taken in open public meetings, it infers that the discussions and deliberations of the Board that lead up to the "final action" may be taken in an executive session. It should be noted, however, that the term "final action" now includes the formation of a collective positive or negative decision by the Board members. The passage of a motion in the open public meeting, therefore, should not be considered merely a formality but should include a deliberative process.

There is no statutory authority for the Board to consider all personnel matters in executive session. A term commonly used in districts by the chair to announce an executive session, "to discuss personnel matters," does not meet the requirements of the statutory provision that authorizes the executive session. The statute requires that more specific language be used and that only certain personnel matters may be reviewed in an executive session.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1)(g) to evaluate the qualifications of an applicant for public employment. The executive session will be for 15 minutes until 7:45. [The Board may, but is not required to, identify the applicant by name.]*

or

The Board will be going into executive session pursuant to RCW 42.30.110(1)(g) to review the performance of an employee. The executive session will be for 15 minutes until 7:45. [The Board may, but is not required to, identify the employee by name.]

(h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public.

Comment: The provision is self-explanatory and for fire protection districts relates only to the appointment of a Board member to fill a vacancy on the Board. Also note that candidates for appointment to a Board position, unlike prospective employees, can only be interviewed by the Board in an open public meeting.

Suggested language for calling session. *The Board will be going into executive session pursuant to RCW 42.30.110(1)(h) to evaluate the qualifications of a candidate for appointment to the open commissioner position. The executive session will be for 15 minutes until 7:45.*

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency's 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.

This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6 or RCW 5.60.060(2)(a) concerning:

(A) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

(B) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

(C) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency.

Comment: The authorization applies only to the discussion with legal counsel. The attorney, therefore, must be present at the meeting either in person or by telephone. The authorization does not cover the discussion by the Board of litigation or potential litigation or other problems of the district in the absence of its attorney. It is not possible, under the provisions authorizing an executive session, for the Board of a district to simply hold an executive session every time the Board is faced with a problem which it would "prefer" to discuss in private even though the problem, if not resolved, may result in litigation.

Suggested language for calling session.

The Board will be going into executive session pursuant to RCW 42.30.110(1)(i) to discuss with District legal counsel Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party The executive session will be for 15 minutes until 7:45.

or

The Board will be going into executive session pursuant to RCW 42.30.110(1)(i) to discuss with District legal counsel Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; The executive session will be for 15 minutes until 7:45.

or

The Board will be going into executive session pursuant to RCW 42.30.110(1)(i) to discuss with District legal counsel Litigation or legal risks of a proposed action or current practice that is likely to result in an adverse legal or financial consequence to the agency. The executive session will be for 15 minutes until 7:45.

(j), (k), (l) and (m) Not applicable.

There is an additional area where the Board is permitted to meet in a closed session. RCW 42.30.140 provides, in part, as follows:

...this chapter (chapter 42.30 RCW) shall not apply to:

(4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress."

Comment: The exclusion contained in part (b) from the requirements of the Open Public Meetings Act relates to the portion of a meeting where the Board plans or adopts a strategy or position or reviews proposals of the other side. Similarly, Part (a) allows for the actual collective bargaining negotiations with an employee organization, grievance proceedings and discussions relating to the interpretation or application of a labor agreement to be held in a closed session. The negotiation of a contract, other than a collective bargaining agreement or other professional services contract, is not authorized in an executive session. Although this statute authorizes the Board to have a "closed meeting" that is exempt from the open public meeting act, if the Board

uses this exemption during an open public meeting, the common practice is to use the same process that that the Board would use for an executive session.

Suggested language for calling session. The Board will be going into executive session pursuant to RCW 42.30.140 relating to collective bargaining issues and negotiations. The executive session will be for 15 minutes until 7:45.

PROCEDURE FOR CALLING AN EXECUTIVE SESSION

As previously mentioned, and except for RCW 42.30.140(4), an executive session can only be held during a regular or special open public meeting. RCW 42.30.020 (2) specifies the procedure to be used by the chair when the Board wishes to go into executive session. The statutory provision is as follows:

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

Comment: In announcing the purpose of the executive session, the chair should attempt to state the purpose in the statutory language contained in one of the subsections of RCW 42.30.110 in the manner outlined above to insure that the purpose fits within an authorized purpose and meets the statutory requirements. The minutes should also reflect the purpose of the session in the statutory language. The obligation of the chair to advise the public in attendance at the meeting of the time at which the open public meeting will resume can present difficulties.

In no event should the public meeting be resumed prior to the announced time since members of the public, in reliance on the announcement, may have left the meeting place and not have returned at an earlier time. It would be a better practice to initially announce an early time for resumption of the public meeting and, if the Board has not completed its deliberations in the executive session by such time, for the chair, at the originally stated time, to announce that the executive session will continue until a later stated time. This procedure may be repeated if necessary.

The minutes of the meeting must reflect the time at which the executive session begins, the announced time of the resumption of the public meeting and the actual time of the resumption together with any announced continuances. It is also recommended that the minutes show the names of those who attended all or any part of the executive session.