



Making the Most of Social Media presented to the Bellevue City Council, March 5, 2018

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The Social Part: “Meetings” and Social Media

Open Public Meetings Act Refresher

Open Public Meetings Act (OPMA), chapter 42.30 RCW

Applies to all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of the state and its subdivisions. RCW 42.30.010.

- All meetings must be open to the public, except authorized executive sessions. RCW 42.30.030; RCW 42.30.110.
- The following are required: notice of meeting, agenda, and published meeting materials and minutes. RCW 42.30.070; RCW 42.30.060; RCW 42.030.075; RCW 42.030.077.
- Meeting where “action” is taken must include a quorum (here, a majority) of Members. See RCW 42.30.020(3).

Social Media & the OPMA: “Action”

Action at meetings:

- “Action” is defined as the transaction of official business including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. RCW 42.30.020(3).
- Replying all to an e-mail to all Members could constitute action in violation of the OPMA.
- Social media conduct (deliberation, discussion, consideration, etc.) may constitute “action” if it involves a quorum.
 - Four Members messaging, commenting, etc. in a group could constitute “action.”

Social Media-tings

Serial conversations between smaller groups may be treated as a “meeting.”

- *Wood v. Battle Ground School Dist.*, 107 Wn. App 550, 564, 27 P.3d 1208 (2001) (exchange of e-mails among board members was a meeting under the OPMA).



Social Media-tings, cont.

- Use of social media implicates the OPMA.
 - Members should be cautious as to the prospect of creating a “serial meeting” through the use of social media technology, e.g., via three Members discussing official business in a room and then one of the three texting a fourth and reporting back.

Citizens All. for Prop. Rights Legal Fund v. San Juan Cnty., 184 Wn.2d 428, 448 n.5, 359 P.3d 753 (2015) (left open whether such communications constitute a meeting).

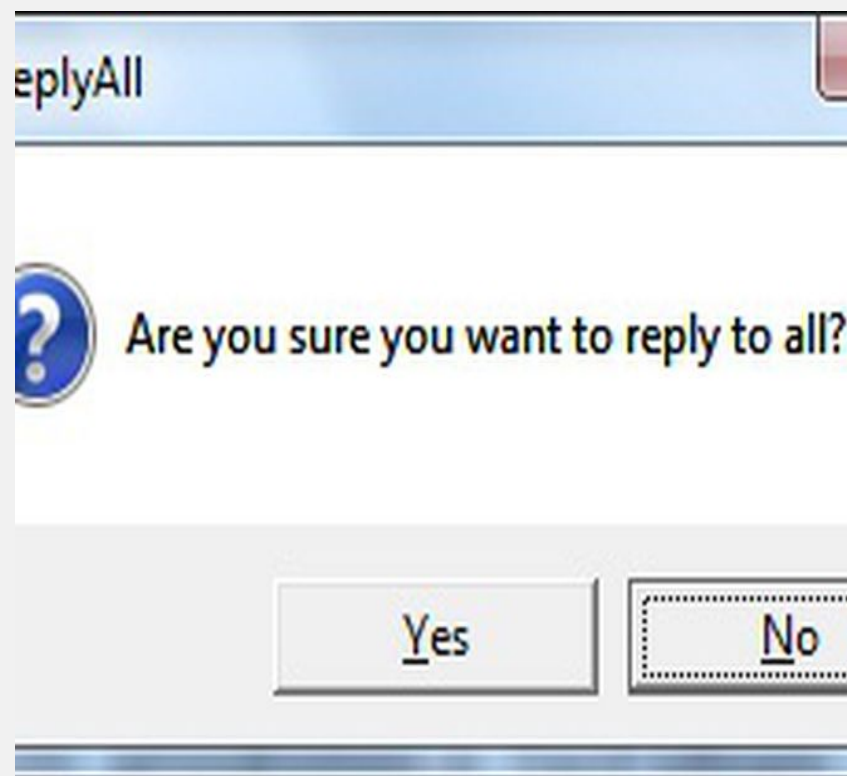
- OMPA restrictions apply regardless of the form of communication: texts, online comments, e-mails, phone calls, and in-person conversations all count.

Social Media-tings, cont.

The mere receipt of e-mail or social media is not automatically a meeting.

Citizens Alliance, 184 Wn.2d at 443-44.

Must intend to meet to transact official business & must communicate about issues that may or will come before the Council for a vote.



Meeting Outside of Meetings



Beware the meeting outside of a public meeting:

- Site visits
- Dinners
- Social gatherings, etc.

What's the Risk?

- Fees and penalties against the City
- Civil penalties against violating Members
 - \$500 for first violation
 - \$1000 for subsequent violation
- Invalidation of City's action
- Loss of public trust and confidence



The Media Part: Creating, Producing & Retaining Records

Public Records Act Refresher

Public Records Act (“PRA”), chapter 42.56 RCW

Requires disclosure of all public records unless they fall within a specific exemption. RCW 42.56.070(1).

- Courts liberally construe the disclosure provisions and narrowly construe the exemptions.
- A “record” is 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. RCW 42.56.010(3).
- A “writing” means handwriting, typewriting, printing, photostating, photographing, and *every other means of recording* any form of communication or representation. . . RCW 42.56.010(4).

Social Media & the PRA

- It's the content, not the form:
 - Electronic public records include text messages, online communications, blog postings, Facebook posts, “tweets”, and likely whatever other app you can download.
 - Just like hard copies, electronic public records must be retained pursuant to the applicable retention schedules. WAC 434-662-030.
 - Web content also must be retained in accord with the applicable retention schedule. WAC 434-662-140.
 - Public entities must employ security procedures to prevent additions, modifications, or deletion of a record by an unauthorized party. WAC 434-662-060.

Nissen: Personal Phones

- Text messages of Pierce County Prosecutor sent on personal device may be public records if they relate to the conduct of government.
- Call logs from personal cell phone may be public records if they relate to the conduct of government and are retained or used in the prosecutor's official capacity.
 - Logs are not public records if they play no role in County business and County never uses them.

Nissen v. Pierce Cnty., 183 Wn.2d 863, 357 P.3d 45 (2015).

Extending the *Nissen* Concept: *West v. Vermillion*

“[A]n agency's employees or agents must search their own ‘files, devices, and accounts,’ and produce any public records, including ‘e-mails,’... that are responsive to the PRA request...

[A]ffidavits by the agency employees, submitted in good faith, are sufficient to satisfy the agency's burden to show it conducted an adequate search for records.”

West v. Vermillion, 196 Wn. App. 627, 636–37, 384 P.3d 634, 638 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 339 (2017), and *cert. denied*, 138 S. Ct. 202, 199 L. Ed. 2d 115 (2017).

West v. City of Puyallup, Decided Feb. 21, 2018

Two Key Points:

“[A] public official's posts on a personal Facebook page can constitute an agency's public records subject to disclosure under the PRA if the posts relate to the conduct of government and are prepared within a public official's scope of employment or official capacity.”

“However,... [the] particular Facebook posts at issue in this case were not public records as a matter of law because [the Council member] did not prepare them within the scope of her official capacity....”

West v. Puyallup, No. 49857-0-II, 2018 WL 989868, at *1 (Wash. Ct. App. Feb. 21, 2018).

West Employs *Nissen* Test

To determine whether [the Council Member] was acting within the scope of her employment or official capacity... when she prepared the Facebook posts, the Court looked at whether:

- (1) her position required the posts,
- (2) the City directed the posts, or
- (3) the posts furthered the City's interests

West, 2018 WL 989868, at *5.

The West Court's Conclusions

- “Door's position as a City Council member clearly did not require that she post on Facebook. And there is no evidence in the record that the City in any way directed that Door prepare the posts. The question here is whether Door's posts furthered the City's interests.”
- “The Facebook page was not associated with the City and was not characterized as an official City Council member page. Instead, the Facebook page was associated with the ‘Friends of Julie Door,’ which according to Door's declaration was used to provide information to her supporters.”
- “Door was not ‘conducting public business’ on the Facebook page. The posts did not contain specific details of Door's work as a City Council member or regarding City Council discussions, decisions, or other actions. The posts merely provided general information about City activities and occasionally about Door's activities.”

West, 2018 WL 989868, at **5-6 (emphasis added).

West: Tangential Benefit to the City Not Enough

“[I]n a broad sense Door's informational posts may have furthered the City's interests to some minimal extent by providing a certain segment of the public with information about City events and activities. However, this tangential benefit to the City is not sufficient to establish that Door was acting within the scope of employment or her official capacity in disseminating general information about the City.”

West, 2018 WL 989868, at *6 (emphasis added).

The Expansion of *Nissen*



Campaign Speech

Public Disclosure Commission Guidance:

RCW 42.17A.555 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency.

The combination of a number of activities into a coordinated campaign involving close coordination between agency activities and citizens' committee activities which closely resembles traditional election campaign activities and which is targeted at and/or occurs close in time to a ballot measure election is likely to draw close scrutiny....

Port of Tacoma fined for violating Public Records Act

The port was delivered a \$159,000 fine for withholding public information.

Author: Jenna Hanchard

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A Pierce County Superior Court Judge fined the Port of Tacoma \$159,000 after determining they were negligent in withholding public information.

This comes after some citizens tried to stop the methanol plant and the LNG plant with a ballot initiative.

Questions?

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