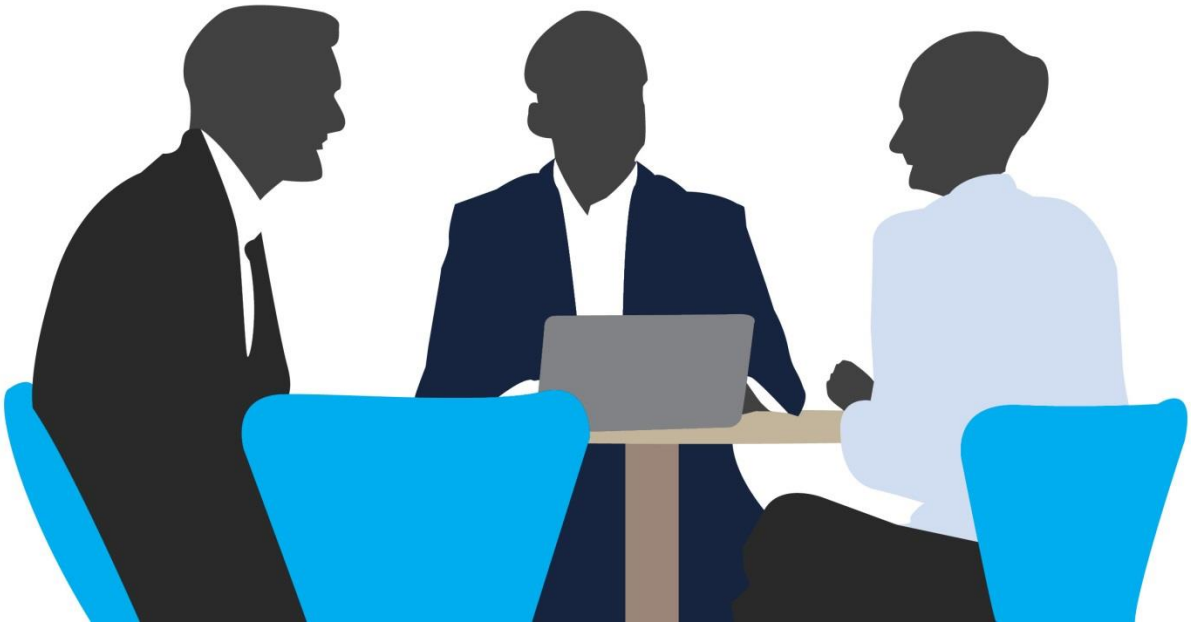
WASHINGTON STATE

Open Public Meetings Act Guidance

On Frequently Asked Questions About Processes to Fill Vacant Positions By Public Agency Governing Boards*

**And Some Suggested Practice Tips*

June 1, 2016



Message from Attorney General Bob Ferguson

Greetings.

Transparency in government is a cornerstone of democracy, ensuring the people's right to know. The Attorney General's Office is an important resource for the public and for government entities on the state's Sunshine Laws: the Public Records Act (PRA) and the Open Public Meetings Act (OPMA). My office recently successfully requested legislation to increase the OPMA's penalties so they maintain the deterrent effect consistent with the original intent of the law. The passage of that bill, SB 6171, means that OPMA penalties are increased from $100 to $500 for a first knowing violation by a governing body member, and to $1,000 for a subsequent knowing violation.

When problems arise involving these laws, they are often the result of a lack of knowledge. In an effort to increase awareness, my office provides resources on our Open Government web page. The web page includes links to the Open Government Trainings, the *Open Government Resource Manual*, and other useful information. In addition, Open Government Assistant Attorney General Nancy Krier provides information, technical assistance, and training. Ms. Krier prepared the enclosed document, "Open Public Meetings Act Guidance on Frequently Asked Questions about Processes to Fill Vacant Positions by Public Agency Governing Boards", also available on our Open Government Training web page.

The guidance is intended to assist board and commission members in complying with the OPMA when filling vacant top positions at their public agencies. The guidance also offers the public a better understanding of their rights under the law.

While the FAQ guidance does not bind any agency or person, we hope it will be a useful resource for agencies, the public, and members of the media alike. Our goal is to assist in providing a better comprehension of the OPMA, reducing risks of possible violations and penalties.

Thank you for your interest in open government. I hope you find this guidance informative.

Bob Ferguson
Washington State Attorney General

If you have questions or comments, please contact Nancy Krier, the Assistant Attorney General for Open Government at nancyk1@atg.wa.gov.

Open Public Meetings Act Guidance

On Frequently Asked Questions About Processes to Fill Vacant Positions By Public Agency Governing Boards*

**And Some Suggested Practice Tips*

June 1, 2016

This Frequently Asked Questions (FAQ) guidance is provided for local and state boards, commissions, councils and other public agencies subject to the Washington State Open Public Meetings Act (OPMA) at RCW 42.30 which appoint or hire persons for their agencies. Examples include filling a vacancy on a board or hiring an executive for the agency.

This FAQ is provided by the Assistant Attorney General for Open Government ("Ombuds") in the Office of the Attorney General. RCW 42.30.210.

This FAQ describes general OPMA principles and requirements, gives guidance on some questions, and provides suggested practice tips. This FAQ addresses the OPMA only. A public agency board may be subject to other laws that may also govern its meetings and/or procedures to fill vacancies.

This FAQ provides guidance but it is not legal advice or a legal opinion. This FAQ is not an Attorney General Opinion (AGO) and expresses some views only of the Ombuds. This FAQ does not bind any public agency or any person.

Public agencies should consult with their attorneys if they need legal advice on the FAQ topics or on other search processes or requirements to fill a vacant position.

This FAQ refers to laws and court decisions in effect at the time this FAQ was prepared (see date above). Later enacted laws or later court decisions may impact the guidance. Citations to referenced court decisions are at the end of this FAQ. Some questions in the FAQ have not been squarely addressed by the courts or the Legislature; in those cases, suggested answers are provided based on the current OPMA statutory language or other case law as of the date of this document.

For ease of reference, the term "board" will be used throughout this FAQ to refer to multimember public agency governing bodies subject to the OPMA.

TIPS

The "practice tips" at the end of several questions are only suggestions. They are non-binding and non-exclusive and there may other options that could be considered. Given the wide variety of public agencies subject to the OPMA, some agency practices may vary in some details, and some of the tips may not work for all agencies.

Index

Index to FAQ Topics

1. What is an <u>overview</u> of the Open Public Meetings Act principles and legal requirements?

<u>Here is a summary</u>. This FAQ takes into account the following OPMA principles and requirements.

- **Purpose.** The OPMA is codified at RCW 42.30. The purpose of the OPMA is to permit the public to "observe all steps" in the making of governmental decisions by a public agency board. *Cathcart v. Andersen*. The OPMA "employs some of the strongest language used in any legislation." *Id.* The OPMA is to be "liberally construed" to effect its purpose. RCW 42.30.910.

- **Governing Body**. The OPMA applies to "governing bodies" which are defined as "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." RCW 42.30.020(2).

- **Quorum.** The OPMA applies to meetings of a quorum (typically a majority) of the governing body of a board transacting agency business, requiring those meetings to be open to the public unless the law authorizes closure. RCW 42.30. *In re Recall of Beasley*; *Wood v. Battle Ground School District; Citizens Alliance for Property Rights Legal Fund v. San Juan County*.

- **Members' Physical Presence Not Required.** The OPMA does not require the contemporaneous physical presence of board members in order to constitute a meeting. *Wood v. Battle Ground School District.*

- **Meeting.** For a gathering to be considered a "meeting," its purpose must be to discuss or act on matters in which the attendees have a common interest relating to the official business of the governing body. *Citizens Alliance for Property Rights Legal Fund v. San Juan County.* A "meeting" of a governing body occurs when a majority of its members gathers with the collective intent to transact the agency's business. *Id.*

- **Action; Final Action.** A meeting of a quorum where "action" occurs is subject to the OPMA and must be open to the public, unless the OPMA permits closure. "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. RCW 42.30.020(3). "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance. *Id.*

- **Executive Sessions**. A board can meet in an executive session closed to the public only for the purposes "explicitly specified" in the OPMA. *Miller v. City of Tacoma*.

Executive session authority is "narrowly interpreted." *Id.* "Action" that goes beyond the scope of what is permitted in executive session violates the OPMA. *Id.*

- **Violations.** Board actions that violate the OPMA can result in litigation, as well as a possible court determination that a board decision made outside the OPMA's requirements is null and void. And, a court may impose penalties against members for knowing violations. RCW 42.30.060; RCW 42.30.120; RCW 42.30.130.

2. A board will be designing the search process for the board to fill a vacancy either on the board or at the agency. Must the board discuss that process in an open public meeting?

Yes. When a quorum of a board meets to take agency action, that meeting must be held in public unless the OPMA authorizes a session closed to the public. If the board reserves to itself the authority to make those search process decisions, or a law requires that only the board can make those decisions, those search process board discussions and decisions must be conducted in a meeting open to the public. An executive session closed to the public is not authorized for discussions of search processes for the board to fill a vacancy.

Examples. The types of search process discussions and decisions by a board quorum could include, for example: whether to adopt and the adoption of a policy or procedure governing the search process, whether to use a search firm (consultants), the role of the board in the search, the role of agency staff in assisting in the search, the role of a search firm, the timeline for the process, approval of the position description, procedures to submit applications, methods to determine finalists (including whether to appoint a committee to assist the board and the committee's role), interview procedures, agreed-to questions that will be asked of applicants, procedures to notify applicants of selection/rejection, and other search process discussions and decisions of the board.

Committees. If a board delegates to a committee of the board the authority to design the search process on behalf of the board, the committee would also be subject to the OPMA. If the board reserves to itself the design of the search process, but seeks only input or advice from a committee it creates, the committee would not be subject to the OPMA. *Citizens Alliance for Property Rights Legal Fund v. San Juan County.* See Question # 6.

Staff/Search Firms. A board can also direct its staff or its search firm to design the process, without those staff or firm activities being subject to the OPMA. "When a governing body directs its staff to develop a plan of action and the staff creates a committee to develop the plan, the staff, not the governing body has created the committee. That is the nature of organizations: the governing body decides on policy and orders the staff to implement the policy, and the staff complies." *Citizens Alliance for Property Rights Legal Fund v. San Juan County.* See also Question # 3.

TIPS

Practice tips:

- *A board should plan its search process with the OPMA's requirements in mind.*
- *For example, a board should keep in mind the OPMA's public notice provisions for regular and special meetings when developing its meeting agendas to discuss the search process and applicant evaluations and selections. RCW 42.30.077; RCW 42.30.080.*
- *It may be useful for a board to consider adopting a policy on how it wants to conduct searches when vacancies occur, particularly if vacancies are frequent. A board can then refer to or update that policy as needed and when vacancies occur.*
- *It may also be useful for a board to consider whether some of the search process steps can be handled by board staff such as a human resources department staff, contracts staff or a search firm. Those steps might include, for example, designing a search process, the contract award process for a search firm, posting or advertising the vacancy notice, accepting and processing applications, ensuring applications are complete and meet the minimum qualifications, scheduling interviews, doing background or reference checks, and the like.*

3. A board wants to hire a <u>search firm</u> to assist it in the process to fill a vacancy. Can the board review proposals or bids from potential firms in an executive session, and/or select a search firm in executive session?

<u>No</u>. The OPMA has no provision permitting boards to meet in a closed executive session to review proposals or bids from search firms (consultants), or to select a search firm in executive session.

No Executive Sessions to Review Bids. The Supreme Court has held that unless an action is "explicitly specified" in the OPMA's executive session provisions, a board cannot conduct that action in an executive session. *Miller v. City of Tacoma*. "Action" includes but is not limited to reviews and evaluations. RCW 42.30.020(3). "Action" such as review and evaluation of requests for proposals or bids from personnel search firms are not authorized in RCW 42.30.110(1)(d).

Executive Session for Negotiations on Contract Performance. The OPMA provides an executive session can be held "to review *negotiations* on the *performance* of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs[.]" RCW 42.30.110(1)(d). (Emphasis added.) No court cases discussing this section have been located. However, based on the statutory language, this executive session provision at RCW 42.30.110(1)(d) assumes a contract is already in place and the board is reviewing negotiations on the existing contract's "performance." The legislative history of this provision confirms that reading. Thus, this

executive session provision is limited in scope and does not authorize an executive session for a board to review proposals or bids from search firms seeking to enter into a contract with the board/agency.

No Executive Sessions for "Personnel Matters." The OPMA does not authorize a board to hold an executive session for discussions related to "personnel matters" generally. See Question # 4.

Executive Session for Pending or Potential Litigation. If a board believes there is "pending" or "potential litigation" concerning "legal risks" of its proposed action with respect to a search firm selection when public discussion of the legal risks "is likely to result in an adverse financial or legal consequence" to the board, the board may go into executive session with its legal counsel. RCW 42.30.110(1)(i). See that statute for more information.

Independent Review of Bid Documents. The Supreme Court has held that when board members act "independently and individually" to examine bid documents, no OPMA violation occurs. *Equitable Shipyards v. State.*

Summary. If a board is evaluating proposals and bids when selecting a search firm contractor, its discussions of a quorum and decision by a quorum must be conducted in a meeting open to the public. This would include, for example, in-person presentations by bidders to the board. Board members can, however, independently and individually review bid documents in advance of a meeting, so long as a quorum does not discuss those documents outside of a public meeting.

TIPS

Practice tips:

- *A board may be subject to bid procedures in various laws. Therefore, it may be useful for board staff to work with the agency's attorneys to review those laws in advance of a search if the board will be participating in the search firm contracting decisions.*
- *It may also be useful for the board to consider a process where staff review the bids and either retain the firm, or recommend to the board which firm to retain.*
- *In designing search processes, boards may also wish to consider whether the bid documents would be subject to public disclosure, and whether other laws govern bid procedures. See Equitable Shipyards v. State; RCW 42.56.*
- *It may also be useful for the board to provide a copy of this FAQ to its staff, attorneys, or other persons assisting it in its search and its search firm contracting procedures.*

4. Can a board meet in executive session to review the qualifications of applicants for a vacant position? If yes, what can that discussion include?

Yes. RCW 42.30.110(1)(g) and (h) provide that a board can go into executive session:

> (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 of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;
>
> (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[.]
>
> (Emphasis added.)

Limited Purpose. Importantly, these executive sessions are limited to evaluating the qualifications of an applicant. The evaluations can include discussions of the worth, quality and significance of the applicants' qualifications, and individual members can express their opinions on such matters. *Miller v. City of Tacoma.*

The executive session provision at (1)(g) applies to a board filling non-elective appointed committee positions as well as board employment positions. *Miller v. City of Tacoma*.

Interviews. Interviews can also be conducted in an executive session except for applicants seeking appointment to a vacant elective office such as a school board, city council, county council, or other elective office. Applicant interviews to fill a vacancy in an elective office must be conducted in an open public meeting.

No Executive Session for "Personnel Matters." While some executive session provisions of RCW 42.30.110 such as the two cited above at (1)(g) and (1)(h) involve discussion of agency personnel under defined circumstances, the OPMA does not authorize a board to go into executive session to discuss "personnel matters" generally. Unless an action is "explicitly specified" in the OPMA's executive session provisions, a board cannot conduct that action in an executive session. *Miller v. City of Tacoma*.

No Votes in Executive Session. Board members cannot vote on applicants in executive session, even informally. RCW 42.30.060(2). Balloting is not an evaluation. *Miller v. City of Tacoma*. Balloting includes identifying a consensus. *Id.* Balloting includes conducting a non-binding "straw vote" or informal "poll" to narrow the list of applicants, ranking finalists, or selecting a final applicant. *Id.* (Madsen, dissent).

TIPS

Practice tips:

- *As part of designing its search process (see Question # 1), a board should inform applicants as to when there will be any discussions of applicants in an open public meeting.*
- *In preparing meeting agendas, a board may wish to consider adding "possible action" or similar language after the executive session item on the agenda if the board anticipates action may occur in the open part of the meeting after the executive session.*

5. Is a board required to prepare <u>minutes</u> of the <u>executive session</u> discussion where members discuss applicants' qualifications?

<u>No</u>. RCW 42.32.030.

6. A board wants to appoint a <u>committee</u> to assist it in the search process, such as to review applications and recommend which applicants should be interviewed by the board. Is that committee also subject to the OPMA?

<u>Maybe</u>. The answer depends upon the <u>role of the committee</u>.

Committees. The OPMA applies to "governing bodies" which are defined as "the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, *or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment."* (Emphasis added.) A committee "acts on behalf of" a governing body when it exercises actual or de facto <u>decisionmaking authority</u> for the governing body, as contrasted with simply providing advice or information to the governing body. *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, citing Attorney General Opinion (AGO) 1986 No. 16.

If the <u>committee of the board</u> is subject to the OPMA, it must also follow all OPMA procedures for meeting notices, executive sessions, minutes, and all other OPMA requirements.

Staff/Search Firm. A board can also direct its staff or its search firm to take action without those staff or firm activities, or a committee appointed by staff, becoming subject to the OPMA. *Citizens Alliance for Property Rights Legal Fund v. San Juan County.*

TIPS

Practice tips:

- *If a board decides it wants to use a committee as part of its search process, it should define the committee's role, and what authority, if any, is delegated by the board to the committee, and what authority is reserved to the board. (See Question # 1).*
- *If the committee serves in an advisory capacity only, that is, it is providing only advice or recommendations that do not bind the board, the board should make that committee role clear.*
  - *For example, say a board appoints a committee to screen applicants and make recommendations on who the board should interview. However, the board retains authority to decide which, if any, of those or other applicants it will interview regardless of the committee's recommendations or advice and the board does not otherwise delegate any decisionmaking authority to the committee. In that situation, the committee is not subject to the OPMA.*
- *Even if a committee is not subject to the OPMA, a board could choose as a policy matter to make some or all of the committee's meetings public.*

7. Can individual board members or individual search committee members review application materials without convening a public meeting?

Yes. Individual members can individually and independently review applications for the position outside a public meeting. *Equitable Shipyards v. State.* However, a quorum cannot discuss those applications outside of a public meeting.

TIPS

Practice tip:

- *Members should also be reminded that application materials may be confidential (see Question # 14), and if so cannot be discussed with persons outside the search process.*

8. Can a board receive the search committee's or the search firm's views of the qualifications of the applicants in executive session?

Yes. The board must confine its discussion, however, to the evaluation of qualifications of applicants. RCW 42.30.110(1)(g) and (h). And, if the committee is subject to the OPMA (depending on its role), it will have decided its recommendations in a public meeting. See Question # 4.

9. Can board members fill out "evaluation forms" when independently reviewing applications?

Yes; however caution is advised.

Individual Members' Review. Individual members can individually and independently review applications outside a public meeting, and independently fill out evaluation forms assessing the applications if an agency is using such forms. *Equitable Shipyards v. State.*

Quorum Discussion. However, a quorum cannot discuss those completed forms outside of a public meeting. That is, if a quorum wants to discuss these forms it must do so in the public part of the meeting, or in a public meeting's executive session if members want to discuss applicants' qualifications that are described in the completed forms. A quorum should not submit completed forms to another board member, a search firm, or staff assisting it in its search in the event that step might be viewed as voting or polling a quorum of the board outside a meeting with an intent by the governing body to collectively decide a matter. See Question # 10. The function of the forms should be confined to assisting the individual member only in his or her review of the applications.

TIPS

Practice tips:

- *A board should decide if it needs or wants to use an applicant evaluation form. See Question # 1.*
- *If a board is considering using a form, it may wish to design the form as a template only for discussion (such as listing the preferred qualifications of the vacant position) rather than a form the board members fill out.*

- *A board should also consider records laws if using evaluation forms. For example, the evaluation forms may have retention requirements under RCW 40.14, and could be the subject of a public records request under RCW 42.56.*

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10. Can a board conduct or authorize the conducting of an informal "poll" of a quorum outside a public meeting to get board members' feedback on applicants, determine the finalists, or determine a preferred final candidate? For example, board members would be polled by email, text, phone, or through in-person contacts. This polling could be by another board member, search firm, board staff member, or other person acting on behalf of the board.

Likely no. There is no court decision precisely on point in this state where a court has found that a board conducted an unauthorized poll in violation of the OPMA. However, the language of the OPMA and other court rulings indicate our courts could find that polling activity violates the OPMA, depending on the facts. Here is more information.

Action and Final Action. The broad definition of agency "action" includes discussions of agency business among a quorum; the OPMA is to be "liberally construed." RCW 42.30.020(3); RCW 42.30.910. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance. RCW 42.30.020(3).

Balloting. Secret ballots (voting outside the public eye) are not permitted. RCW 42.30.060(2).

Case Summaries. The Supreme Court held that the purpose of the OPMA is to permit the public to "observe all steps" in the making of governmental decisions by a board. *Cathcart v. Andersen.*

In *Wood v. Battle Ground School District*, the Court of Appeals found that an exchange of emails discussing agency business where a quorum of a board participates can violate the OPMA. In *Wood* the court also held that the OPMA does not require the contemporaneous physical presence of board members in order to constitute a meeting.

In *Miller v. City of Tacoma* the Supreme Court held that informal balloting of a quorum outside the public eye (in that case, in an executive session) violated the OPMA.

In *Eugster v. City of Spokane* (2002) the Court of Appeals described that when the facts show members are "polled" outside of a meeting and have knowledge they are acting in concert with others, that activity may lead to a conclusion that the members knowingly violated the OPMA.

In *Citizens Alliance for Property Rights Legal Fund v. San Juan County* the Supreme Court held that if communications among a quorum show a "collective intent" to meet to

transact the governing body's official business, then a meeting subject to the OPMA has occurred.

Under these authorities, a process of polling of a quorum of a board in order to learn a quorum's views of the applicants or to see how a quorum may vote on an applicant --- whether polling is done by a board member, search firm, board staff member, or other person acting on behalf of the board --- might result in a complaint that the board has in effect taken "action" or "final action" (voted, or reached a consensus) outside the OPMA. This risk is presented if the board members know a quorum is being polled on agency business. If the complaint is upheld by a court, there can be legal consequences. See Question # 15.

TIPS

Practice tips:

- *Board members, board staff, and search firms should exercise caution in contacting board members outside an open meeting to discuss applicants, and should not contact a quorum to get their views, votes, informal votes, straw votes, or consensus.*
- *Board members, staff and search firms should also be mindful that any emails, text messages, phone records, letters or other public records prepared, owned, used or retained by or on behalf of the board (agency) or a board member and which relate to the board's search process may be subject to a request for public disclosure under the Public Records Act at RCW 42.56, and may have records retention requirements under RCW 40.14.*

11. Can a board <u>decide</u> to <u>narrow the applicants</u> to several finalists or a finalist in <u>executive session</u>?

<u>No, if "narrow the applicants" means a quorum ranks several applicants who will proceed to the next step in the selection process and eliminates other applicants from consideration.</u> See Questions # 4 and # 10. Balloting on applicants, including on informal proposals ("action") as well as "final actions" (a vote or development of a consensus), and straw votes, are not permitted in executive session. *Miller v. City of Tacoma*. Secret ballots are prohibited under the OPMA. RCW 42.30.060(2); *Miller v. City of Tacoma*. In other words, selecting the finalists in an executive session is not permitted.

TIPS

Practice tips:

- *At a public meeting, a board should decide in advance of its search what process it will use to focus on applicants who it may want to interview and appoint or hire. See Question # 1.*

- *For example, it would be appropriate for a board to:*
  - *Be clear in its announcement of the vacancy that it will not consider applicants who do not meet defined minimum qualifications or who submit their applications past the deadline. The board could then have a search firm, agency staff, or a search committee member explain to those applicants that pursuant to board procedures, their applications will not be provided to the board.*
  - *Permit a search firm, committee member or staff to recommend in executive session which applicants the board should move to the next step or interview as part of the process of evaluating applicants, so long as that information is advisory only and does not bind the board.*
  - *Permit a search firm, committee or staff to forward full application packets to the board only for applicants who exceed the minimum qualifications or after a preliminary interview (with the firm or committee or staff), so long as the board reserves to itself the ability to consider any applicants meeting the minimum qualifications, and reserves to itself the authority to review <u>any</u> and all applications if it so chooses.*
  - *Permit its members to express their views on an applicant or applicants in executive session, so long as they do not vote or take a straw vote that selects semi-finalists or finalists and simultaneously eliminates any applicants from consideration.*

12. Can a board use <u>designations</u> such as "Candidate A, Candidate B, Candidate C" when meeting in public to discuss the applicants or to narrow the applicants to a list of finalists, or designate a finalist, if the board is not using their names?

<u>There is no court decision precisely on this issue. The answer may depend on the position being filled. Here is some suggested guidance.</u>

Elected positions. As discussed in Question # 14, most parts of applications for appointment to a vacant *<u>elected</u>* position should probably be disclosed, including names of applicants. Those elected positions are filled in the first instance by the voters, who during a campaign are entitled to receive information about candidates who *seek* to serve them in an elected position. See RCW 29A.24 (declarations of candidacy); RCW 42.17A (campaign finance disclosures). Board interviews to fill a vacant elected position must be conducted in public, so those applicants' names become public at that point by law. RCW 42.30.110(1)(h). In effect, their applications and interviews to fill a vacant elected position are the functional equivalent of a campaign. Presumably, those applicants will want (and in fact, may need) public knowledge of and support for their application (candidacy). And, of course, final actions appointing someone to the vacancy must be conducted in public. Therefore, using a "Candidate A, Candidate B, Candidate C" or similar designation in the board's public discussions to fill vacant elected positions serves no public policy purpose and is not advised.

Non-elected Positions. Board decisions to fill a vacant *non-elected* position, which is often an employment position (such as a director or administrator employed by the board), may present different considerations for some boards or some vacant positions. In those situations, some applicants may indicate a need to retain some measure of confidentiality through some parts of the search process in order to not jeopardize their current employment. (And, as discussed in Question # 14, those employment applications are exempt from public disclosure under the Public Records Act).

Therefore, on the one hand, for non-elected positions, there is a view that a board could consider using a "Candidate A, Candidate B, Candidate C" or similar designation in the board's public discussions to narrow the applicants, or to discuss a possible apparent finalist, so long as the successful candidate is publicly chosen and identified (see next paragraph).[1] On the other hand, there is a point of view that such a designation may be considered a form of an unauthorized secret ballot.[2] Some agencies, as a matter of historical practice, make finalists' names publicly known through search procedures such as a "meet the candidates" forum. There is no appellate court decision precisely on this point. A board should carefully consider its procedures, and consult with its legal counsel if it has questions about its process.

Final Action. Lastly, "final action" hiring a person to fill a vacancy and setting his/her salary must be taken in public. RCW 42.30.110(1)(g). So, if a board had been using a "Candidate A, Candidate B, Candidate C" or similar designation in earlier stages of the search process, in a public meeting it must disclose the name of the person the board chooses to hire.

[1] As noted, no State appellate OPMA decision has been located addressing the Candidate A, B, C board discussion option. There have been differing views about the practice over the years. For example, in 1995, a King County Superior Court considered arguments in an OPMA case where it was acknowledged that the names of the applicants would not be disclosed. Counsel for the Plaintiff *Seattle Times* described in oral argument that an assigned letter for candidates could be used in the board's public discussion of applicants. *Seattle Times v. University of Washington et al*., Case No. 95-2-04364-0; see also "Judge: Interviews for UW President Can Be in Private – Certain Aspects of Search Must Be Open, *Seattle Times*" (March 3, 1995) (confirming Plaintiff's position that applicants' names could be withheld). With respect to a different view, the Municipal Research and Services Center (MRSC) in a 2012 Q & A for hospital districts described that in its opinion assigning numbers to candidates is not permitted by the OPMA. See "Ask MRSC – Hospital District Edition" (2012).

[2] RCW 42.30.060(2) provides, "No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot." "Secret ballot" is not defined in the OPMA. RCW 42.30.060(2) was added to the OPMA in 1989. Chap. 42, Laws of 1989. Prior to that amendment, a formal Attorney General's Opinion described a secret ballot as an "anonymous" vote. AGO 1971 No. 33. In *Eugster v. City of Spokane* (2005), the Court of Appeals found no violation of the OPMA's secret ballot restriction when the identity of the board members supporting or rejecting a procedure was made known in a public meeting and there was no attempt to hide the identity of board members. In *Miller v. Tacoma*, the Court of Appeals held that secret balloting in violation of the OPMA occurred when a consensus was reached on a candidate in an executive session closed to the public.

The OPMA does not specify any level of detail in a board's discussion nor in a board action, such as the detail needed in the language in a motion. In the Candidate A, B, C scenario, the board's discussion and action would occur in an open public meeting and the identity of the voting board members would be publicly known, so they are not anonymous. And, any "final action" (the vote of a quorum to hire a specific candidate and set his/her salary) would also occur in a public meeting, meaning that applicant's name would be publicly disclosed during that meeting even if it had not been released earlier. RCW 42.30.110(1)(g).

TIPS

Practice tips:

- *A board should decide its search process up front (see Question # 1), including the finalist process, and how and when the final selection will be announced.*
- *A board should also let applicants know what that process will involve with respect to any public discussion of the names of applicants or finalists, or disclosure of any records concerning applicants or finalists.*
    - *Elected Positions. When filling vacancies in elected positions, boards should also consider that (1) interviews must be conducted in public (so if a board is choosing to have a "meet the finalists" opportunity for the public, it could do that before or after those interviews), and (2) there are limitations in RCW 42.17A.555 on the use of public resources if the applicants have also filed or announced as candidates for elective office. A board should contact the Public Disclosure Commission if it has questions about use of public resources with respect to applicants who are also candidates seeking election to office.*
    - *Non-Elected Positions. For non-elected positions, there may be options to consider, depending upon the position to be filled, historical or community practice, or other factors. For example:*
        - *A board could choose to inform all applicants that the board may make applicants' or finalists' names or other applicant information public during its discussions.*
        - *As another option, a board could also choose to hold a "meet the finalists" session at an open meeting and/or provide the public other opportunities to meet the finalists.*
        - *Or, a board could choose to ask finalists to provide a one-paragraph summary of their qualifications, which will be the document made public at some point during the process rather than an entire application.*
        - *Or, there may be other options as well.*
- *If a board may take action to hire an applicant after an executive session, it may wish to consider adding a "possible action" agenda item after an executive session agenda item where applicants are evaluated. For special meeting procedures and final actions, see RCW 42.30.080.*
- *As noted, there may be other options as well. The process used among boards may vary.*

13. If a board decides in an open meeting that "Candidate A" is the apparent best applicant for the appointed (non-elective) position, can it authorize negotiations and contacts with that applicant by a board representative to discuss a salary, start date, or other conditions of employment set by the board?

Yes. Presumably, in the advertised job description the board likely would have already publicly provided information such as the salary range, benefits, other conditions of

employment, and perhaps a preferred start date. Perhaps some of those items are outside of the board's control and are set by law or rules (such as benefits like sick or vacation leave, eligibility for retirement systems, and similar matters) and that information is thus publicly known or publicly available through other means. And, in advance of the search, the board would have already publicly discussed the process of negotiations with an apparent best applicant (finalist). See Question # 1.

Contact Person. If the board has reserved to itself the approval of certain conditions of employment with the preferred apparent finalist (or perhaps even finalists), such as salary, start date, or similar matters, the board could authorize a person to discuss those details preliminarily with that finalist or finalists and have the board representative report back to the board on those preliminary discussions. For example, that person could perhaps be an individual board member, or a board staff member, a board attorney, or a search firm, or other non-board member. Because those details relate to the qualifications of the applicant (that is, they concern whether this applicant is qualified to accept a proposed salary, and whether this applicant is qualified to start on the date necessary), the board could receive additional information concerning an applicant's ability to meet the conditions of employment and include such information in its discussions in executive session under RCW 42.30.110(1)(g).

No Votes in Executive Session. However, a board cannot vote on the conditions of employment in executive session. RCW 42.30.110(1)(g) ("When a governing body elects to take final action hiring, setting the salary of an individual employee … that action shall be taken in a meeting open to the public"). See also *Miller v. City of Tacoma*.

14. Is a board required to release copies of applications and materials submitted with an application for a vacant position upon a request?

It depends. That release is governed by other laws. The OPMA does not govern access to a board's application materials. Therefore, that question is outside the scope of this FAQ. Here is some general information.

Public Records Act. In short answer, this question involves a different law, the Public Records Act (PRA) at RCW 42.56. The PRA provides access to public records of an agency, upon request. The PRA provides an exemption from disclosure for "all applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant[.]" RCW 42.56.250(2). In addition, certain other specific information in personnel files is exempt. See also RCW 42.56.250(3) and RCW 42.56.230(3). These provisions would be pertinent to requests for *non-elected positions*.

Also, RCW 42.56.230(3) exempts "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." (Emphasis added.) However, the appointment process to fill a vacancy for an *elected position* can be viewed as the "functional equivalent" of a campaign. The person appointed to fill a vacant elective

position is considered an elected official. Public disclosure of an application to fill an elected position therefore presents different and weightier public policy considerations as compared to disclosure of an application for a typical public employee position. As a result, many parts of the information in application forms to fill a vacant elected position on a board should generally be released.

TIPS

Practice tips:

- *A board should consider the Public Records Act (PRA) at RCW 42.56 when designing its application form. For example, for elected position vacancies, perhaps the application form could place all exempt information on the last page (such as Social Security Numbers, if needed) enabling quicker disclosure of the remaining pages in response to a PRA request.*
- *Also, a board should direct requests for records to its Public Records Officer, and review PRA questions with its legal counsel.*

15. Are there <u>legal consequences</u> if a board does not comply with the OPMA in the search process to fill a vacancy?

<u>Yes</u>. A court action can be filed. RCW 42.30.120; RCW 42.30.130. A board action taken with a secret vote can be declared null and void. RCW 42.30.060(2). A court will assess each board member who knowingly violates the OPMA a $100 penalty ("Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him or her, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars.") RCW 42.30.120(1). The prevailing party suing the board shall be awarded reasonable costs and attorneys' fees. RCW 42.30.120(2).

Penalty Amendments. Effective June 9, 2016, the Legislature increased the penalty amount in RCW 42.30.120 for the first knowing violation to $500, with the penalty for a subsequent knowing violation set at $1,000. SB 6171 (Chap. 58, Laws of 2016).

Retrace Steps. If a board violates the OPMA and its action is determined to be null and void, it must retrace its steps by taking the action in accordance with the OPMA, which usually means re-discussing and re-voting on the matter in an open meeting. *Henry v. Town of Oakville*; *Feature Realty v. City of Spokane.*

16. Are there <u>other laws or procedures</u> outside the OPMA that may govern a board's search process?

<u>Maybe. It depends upon the board</u>. For example, see the Municipal Research and Services Center's article, "The Open Public Meetings Act and Filling Elective Office Vacancies in a City" (Oct. 31, 2012), referencing RCW 42.12.070 which also governs the filling of vacant city elective offices. A board should also consult with its human resources staff, and its attorney, to determine if any other procedures apply.

17. What if a board has <u>questions</u> about a search process to fill a vacant position under the OPMA? Who should it contact?

<u>A board should first contact its attorney</u>. Other sources of general information about the OPMA include the Municipal Research and Services Center (MRSC) (local governments), the Washington State Attorney General's Office Assistant Attorney General for Open Government ("Ombuds"), and others. The Ombuds website is here. As noted in Question # 16, a board may also want to consult with its human resources staff.

18. What are the <u>citations</u> to the referenced appellate court decisions?

<u>They are</u> (in alphabetical order):

Cathcart v. Andersen, 85 Wn.2d 102, 530 P.2d 313 (1975)
Citizens Alliance for Property Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 359 P.3d 753 (2015)
Equitable Shipyards, Inc. v. State of Wash., 93 Wn.2d 465, 611 P.2d 396 (1980)
Eugster v. City of Spokane, 110 Wn. App. 212, 39 P.3d 380 (2002) (see also later decision at *Eugster v. City of Spokane*, 128 Wn. App. 1, 114 P.3d 1200 (2005))
Feature Realty v. City of Spokane, 331 F.3d 1082 (9th Cir. 2003)
Henry v. Town of Oakville, 30 Wn. App. 240, 633 P.2d 892 (1981)
In re Recall of Beasley, 128 Wn.2d 419, 908 P.2d 878 (1996)
Miller v. City of Tacoma, 138 Wn.2d 318, 979 P.2d 429 (1999)
Spokane Research & Defense Fund v. City of Spokane, 99 Wn. App. 452, 994 P.2d 267 (2000)
Wood v. Battle Ground School District, 107 Wn. App. 550, 27 P.3d 1208 (2001)

- Copies of the decisions are available on the Washington State Judicial Opinions website here.