The Firehouse Lawyer

Volume 13, Number 5

May 2015

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Inside this Issue

Facebook, Social Media and the Open Public Meetings Act: Like it or Not

Under the Open Public Meetings Act, "meetings" are defined broadly as all "meetings at which action is taken"; and "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." *See* RCW 42.30.010. Query: Can a governing body have a "meeting" on social media, and if so, has the governing body had a meeting "open to the public" in satisfaction of the Open Public Meetings Act? As a disclaimer, we will not discuss First Amendment considerations in this context. Consider the following hypothetical exchange on Facebook in the Blackacre Fire District:

- Freddie the Firefighter: This fire district needs to figure out how to balance the books! 10 likes.
- Craig the Commissioner: Freddie, I understand that you are angry about our current financial situation and available work. 4 likes.
- Freddie: It has nothing to do with money. I am the best fire fighter in this district and you know that, and I am under-appreciated! 10 Likes.

- Fire District (as the group administrator): As laws change, so do the policies that the fire department adopts. Unfortunately, we had to make some cuts to our budget, so people are angry about receiving less money. 5 Likes (two from Craig and Christy the Commissioners).

- Freddie: To say I am angry about the money I earn ducks the issue. I am angry about a rural fire district paying for built-for-Seattle fire engines! 7 Likes.

- Christy the Commissioner: Freddie, please use your chain of command when addressing matters you are unhappy about. 5 Likes (one from Craig the Commissioner)

Now, let us assume that Blackacre has a three-member board. It would be hard to argue that the two fire commissioners above—having established a quorum because Blackacre has a three-member board—had a "deliberation" or "discussion", and therefore a "meeting", because they only addressed Freddie, not each other (aside from the "likes"). But this is a slippery slope. If the commissioners had actually engaged one another, this could have been deemed a "discussion." Even if there had been a meeting, the fire commissioners might argue that they fulfilled the intent of the OPMA that all meetings be open and public. But this would ignore the notice requirements set forth in the OPMA. Recall that under RCW 42.30.070, the governing body of a public agency must provide the time for holding regular meetings. Also see the notice requirements for special meetings at RCW 42.30.080.

Therefore, if fire commissioners have a meeting on Facebook, they have essentially violated the OPMA, despite any argument that they fulfilled the intent of this law. For that reason, your district should have a clear policy on when a fire commissioner may comment on social media. Perhaps—at least—a "less-than-a-quorum" rule should be included in your social media policies to avoid OPMA concerns.

Of course, if only one commissioner posted a comment, that could hardly be considered a "meeting."

"Transitory Records": Don't Let the Name Fool You

Let us pretend that a promotional interview is taking place at a fire district. An assistant chief (AC) takes his own notes, on a sticky pad, during the interview, and he does not share them with anyone. Quite likely, the notes are writings used by the AC to conduct government business, and are consequently public records under RCW 42.56, the Washington Public Records Act. But we will not address whether these notes are exempt.[1] Instead, we ask the following question: How long do these notes have to be retained under Washington law, and can they be destroyed at some point? Are these "transitory records"? Of course, records that are even tangentially related to a pending records request may not be destroyed, despite their being scheduled for destruction. *See* RCW 42.56.100.

The question about these notes may be answered—or left looming, by reference to the Common Records Retention Schedule ("CORE 2014"), promulgated by the Washington Secretary of State and the State Archivist. From the outset, we must note that the records

[1] Note that recently, Division 2 of the Washington Court of Appeals decided *Belenski v. Jefferson County*, No, 45756 -3 –II (2015), and held, as a matter of first impression, that a request for copies of electronic records for which a public agency does not generate a "backup" is not a request for "identifiable records" under the PRA.

retention schedule for a particular type of communication depends on the person who made that communication. Much ado has been made of the words "transitory records" as they appear in CORE 2014.

Under CORE 2014, public records that (1) "only document information of temporary, short-term value"; (2) are not needed as evidence of a "business transaction" and (3) are not covered by a more specific records retention series are called "transitory records." See CORE 2014; page 151. These types of records need only be retained "until no longer needed for agency business," then they may be destroyed without being transferred to the State Archivist. *Id.* ("*Id.*" is a reference to the previous citation; as a side note, "idem" is the Latin word for "the same"). "Transitory records" include miscellaneous memoranda "which do not relate to the functional responsibility of the agency."[2] *Id.* These also include "informal notes" that do not relate to "significant basic steps" in producing another record, such as an employee evaluation file. *Id.*

Speaking of which, employee interview evaluation files (Evals) are potentially a "more specific records series" that would prevent the hypothetical notes from being deemed a "transitory record." Of course, that would depend on whether there was a policy of including all notes taken by employers conducting interviews in evaluation files. If these notes were required to be placed in the Eval, then that would become part of the Eval, thus placing these notes under that schedule. Evals have a retention period of three years. See CORE 2014; page 135. Furthermore, these records are "non-archival" and "non-essential", meaning that these records need not be transferred to the Washington State Archivist at the end of their three-year retention period. See *Id.*; See Also CORE 2014; page 1.

[2] CORE 2014 can be located at http://www.sos.wa.gov/_assets/archives/RecordsManagement/CORE%203.1.pdf

But if the notes did not become a part of the Eval, then we must look to another retention schedule. Because the person taking the notes was an assistant chief, we look to another "more specific records series" that covers communications to and from governing, executive, and advisory employees. See CORE 2014; page 6.

Under CORE 2014, the records of these kinds of communications must be retained for two years after the communication was received or provided, whichever is later. *Id.* These records are "Archival", meaning that at the end of the two-year retention period, the records must be transferred to the Washington State Archivist. See *Id;* See Also CORE 2014; page 1. In other words, do not destroy these records after two years. These communications include "communications to, from, and/or on behalf of the agency's governing bodies, elected official(s)/executive management, and advisory bodies, that are made or received in connection with the transaction of public business, and that are not covered by a more specific records series." See CORE 2014; page 6. We take this to mean communications to and from fire commissioners, and fire chiefs and immediate subordinates, such as assistant chiefs and district secretaries, when talking about matters relevant to the fire district. Consequently, this most likely applies to the assistant chief in this scenario. But did he make a "communication"?

These communications may be made via "email…Web sites/forms/pages, social networking posts and comments, etc." However, the AC in this hypothetical has not shared the notes with anyone: his notes are not necessarily a "communication." Without question, the notes were taken in the "transaction of public business"—the interview process for public

employees. If the district had a policy that "any shorthand notes taken during interviews" be shared with his superior, the notes of the AC would have been communicated to someone else, and therefore would have been subject to this retention period. Perhaps Washington courts have given us some guidance.

Washington courts have found that personal notes are not "public records…because they are generally created solely for the individual's convenience or to refresh the writer's memory, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer's sole discretion." *Yacobellis v. City of Bellingham*, 55 Wn.App. 706, 712 (1989). Perhaps writing a note on a sticky pad is done as a convenience, and other documents, such as scoring sheets, are the final objective evidence of the AC's findings during the interview process that would no doubt fall outside the definition of a "transitory record." Thus far, in our analysis of CORE 2014, we do not see that notes taken by an AC on a sticky pad, solely for their personal convenience, that are not shared with others, somehow fall under any other records retention schedule than that for "transitory records."

The Tortoise and the Hare: A Note on the Doctrine of "Exhaustion"

We thought it would be relevant to discuss an age-old doctrine in administrative law and labor arbitration—that of "exhaustion" of one's administrative remedies, such as the grievance process, prior to seeking arbitration or intervention from the courts. Essentially, exhaustion is a jurisdictional bar to arbitrators hearing complaints made at lower levels. Exhaustion prevents a "leap frog" over formalized administrative procedures directly to the courts or an arbitrator. This doctrine applies when "(1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought." *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 808 (2000).

This is why disputes are often resolved or administered by contract, preventing the parties from immediately resorting to the courts for relief. Two of the many principles behind this doctrine are that courts and arbitrators should defer to the agency with expertise in addressing particular disputes that arise within that agency, and let agencies develop factual records to resolve their own disputes. *See Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20 (1990). This doctrine may be ignored where the exhaustion of administrative remedies would be futile. *Id.* at 31. The complaining party has the burden of demonstrating that futility. *Id.* Factual circumstances rarely result in a finding of futility. *Id.* With that being said, we are exhausted. See you next time.

Case Note: The Washington Supreme Court, in *Davis v. Cox*, No. 90233-0, has declared the Anti-SLAPP statute, RCW 4.24.525, unconstitutional! More on this in June (maybe).