Firehouse Lawyer

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Inside This Issue

Open Public Meetings and Open Records:

I decided this month to write about a seminar I attended, in the never-ending effort of Continuing Legal Education or "CLE". (Lawyers in Washington are required by the State Bar Association to amass 15 credits annually, including two ethics credits. This is really a rather modest goal.) The seminar was noteworthy for several reasons. First, the presenters were mostly (not entirely) advocates of more open government, such as attorneys specializing in litigating open meetings and records cases, or advisors of such plaintiffs and/or the media. An editor of the Tacoma News Tribune, David Zeeck, was also a presenter. Second, there have been a few new developments in these areas of the law in the past year or so, and that was sure to be discussed. Third, as a representative of local governments, I find it useful to see what the "other side" is thinking about…and I learned that we are actually on the same side—in favor of good government.

CAN YOU REQUIRE RECORDS REQUESTS TO BE WRITTEN?

My philosophy on CLE seminars is that they are worthwhile if you, as a student, come away with one or two bits of new knowledge or information, such as a new case or statute you did not know about before. One example of that in this seminar was that one presenter pointed out that the Open Records Act—RCW 42.17.250 et seq.—does not actually allow you to *require* requests to be in writing or on a particular form. They can be merely verbal. I have always advised clients that they cannot make a requester use the designated form, but are within their rights to require something in writing. After all, as a practical matter the requester should give you a name and address and/or telephone number for various reasons (especially if they want you to get the records to them!). I have to admit, however, that could all be conveyed verbally to the records staff person. So if a requester insists on not putting anything in writing, just smile and courteously try to get the basic information you will need.

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WHETHER OR NOT TO CREATE A RECORDS INDEX:

Another interesting discussion centered around the statutory requirement to create an index of agency records. See RCW 42.17.260. All agencies are supposed to create and maintain an index to the records and provide the index upon request. However, the statute says that an agency, upon entry of an order, may dispense with this requirement if it finds that the requirement is unduly burdensome. I have done a few of these orders, in resolution form, for Boards of Commissioners of Fire Districts. Although this option may seem appealing to districts, especially when facing the seemingly daunting task of indexing decades of old records, one presenter maintained it should be done and not excused. In other words, it need not really be that burdensome. First, she pointed out that you could index prospectively only, and leave all existing, or previously created records out of the index. Second, it seems that the index need not be that detailed. It only needs to be a sort of "table of contents" or list of the types of records that are maintained by the district. Probably it would be helpful if it indicated where, how or by whom such records are maintained. Frankly, it strikes me that such a list or index would be a handy tool for the District Secretary, records custodian and other district staff!

PENALTIES FOR WITHOLDING RECORDS:

Another discussion centered around the penalties that courts have been levying against agencies that wrongfully withhold records. Apparently, there have been a few Superior Court judges who have decided such issues. The statute authorizes penalties of up to $100 per day, for each day that the requester was wrongfully denied the right to inspect or copy a record. At $100 per day for a long period, with a lot of records, that could conceivably add up to a hefty penalty! Imagine what it could have been in the Monorail case, where the requester asked for all of their records of every type. But the results so far indicate that judges are more inclined to levy a typical penalty of $5 per day (at the low end of the scale). Even if the agency acted in good faith, there is supposed to be a penalty.

STATUTE REQUIRES GIVING "FULLEST ASSISTANCE":

Some discussion ensued about the meaning of the statutory language requiring agencies give their "fullest assistance" to requesters. *See Doe I v. Washington State Patrol,* 80 Wn. App. 296, 303 (1996). The statute

does say that, but it is difficult to really give meaning to that language without some fact patterns in which courts decide if fullest assistance was afforded. Suffice it to say that undue delay or foot dragging, in searching for or producing records, will not be tolerated if the agency turns out to be wrong about an exemption or redaction, and make it easy for a court to conclude that "fullest assistance" was not given.

ARE DISCUSSIONS BETWEEN TWO GOVERNING BODY MEMBERS VIOLATIVE OF THE OPMA, WHEN TWO IS LESS THAN A QUORUM?

The only other "surprise" issue that I noticed during this one day seminar relates to the Open Public Meetings Act part of the curriculum. It relates to discussions between members of governing bodies, when less than a quorum is involved. This topic would only be of interest to fire districts with five-member boards or others wherein two commissioners is less than a quorum, but this is becoming quite common, at least in Western Washington. Most attorneys for local agencies have always believed that there is no open meetings violation when less than a quorum discusses agency business, without following the notice and other requirements of the law. Indeed, some local governments have committees that deal with agency issues in a preliminary fashion, so that the issue is fully "vetted" and ready when it comes before the full board. Often, these committee meetings are not considered to be subject to the OPMA, and therefore are held in closed session or without notice to the public or the media. Less formally, two members of a five-member (or more) board commonly speak with each other off the record or privately. Municipal attorneys have often advised that this does not violate the OPMA.

However, it was interesting to note that at least some of the attorneys at this seminar (advocates for the media and open government activists) argued strongly that this interpretation is not supported by the statute or any case. The OPMA does not say "quorum" when it discusses the definition of a "meeting", for example. A meeting subject to the Act means and includes any discussion of agency business by and between members of the governing body, whether or not any "final action" occurs. Therefore, they contend, when two or more members conduct agency business by talking to each other about an agency matter, that is basically a meeting, whether a quorum exists or not.

Neither this writer nor the majority of municipal lawyers agree with that interpretation, but I felt my readers should at least know this interpretation exists. Moreover, some of the attorneys implied that the issue is important enough that, given the right case, they intend to litigate the question so a court can provide a definitive answer.

HB 1758 AMENDS PARTS OF RCW 42.17:

The seminar materials also include a discussion of HB 1758, the 2005 Public Disclosure Act bill. One important section of this law makes it clear that agencies cannot reject records requests on the grounds that a request is overbroad, thus essentially reversing the *Hangartner* decision rendered recently by an appellate court. Agencies can deal with records requests on an installment basis under this law, breaking up very large requests into several component parts. If a requester does not pick up the first batch of records, this law allows you to stop assembling the later batches. You can charge a 10% deposit on the estimated copying costs. Section 3 of the law requires you to designate and publicly identify a public records officer. We recommend that the District Secretary be so designated because (1) by law you already have to appoint one of those and (2) it is customarily one of their duties, since by statute the Board minutes are the Secretary's responsibility already. The Attorney General is charged with developing some model guidelines for public agencies to provide records, but these "best practices" will be merely advisory. Enforcement actions against

counties may be brought in any adjoining county, and the deadline for filing such actions is reduced from 5 years to one year.

CONCLUSION:

That concludes my summary of a good seminar. I should mention that a new deskbook on these topics is being produced by Lexis-Nexis. It will have 22 chapters, and will include health care records, which need a whole separate analysis than open public records.

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AGENT FOR SERVICE OF CLAIMS:

As I mentioned in a recent newsletter, often client questions lead to good newsletter topics. The other day a chief called and said apparently they never complied with the change in RCW 4.96.020, which was amended in 2001. As amended, that statute *requires* all local government agencies, such as fire districts, to appoint an agent to receive claims for damages. The identity and the address of the agent, where he or she may be reached during the district's normal business hours are public records and shall be recorded with the county auditor. We have developed a model resolution and recommend that the governing body name the District Secretary, providing a name and address in the resolution. We think a name is needed, as the statute provides for "identity" of the agent.

The Fire Chief said apparently a claim was received by a receptionist, left on the District Secretary's desk and then just inadvertently filed without processing. I suppose this could occur no matter what resolutions you adopt, but they were lucky that it was just the administrative claim. When a lawsuit was eventually filed, apparently that "claim for damages" was duly served and came to the attention of the Chief and Board, so no default judgment could be obtained. This fact pattern just reminds me that compliance with RCW 4.96.020 is absolutely essential, and also a Policy on Incoming Mail is not a bad idea either. If you are curious about either one of these, give me a call.

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