

HOUSE BILL REPORT

HB 1384

As Reported by House Committee On: State Government

Title: An act relating to clarifying the circumstances under which the governing body of a public agency may hold an executive session to discuss litigation.

Brief Description: Clarifying the circumstances under which the governing body of a public agency may hold an executive session to discuss litigation.

Sponsors: Representatives Romero, McMorris, Simpson, Conway, Miloscia, Haigh, D. Schmidt, Clements, Delvin, Hunt, Lambert, Benson and Schindler.

Brief History:

Committee Activity:

State Government: 2/5/01, 2/23/01 [DPS].

Brief Summary of Substitute Bill

- Clarifies the definition of "potential litigation" for purposes of the Open Public Meetings Act.
- Allows the State Auditor to provide information, technical assistance, and training on the provisions of the Open Public Meetings Act.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives McMorris, Republican Co-Chair; Romero, Democratic Co-Chair; Miloscia, Democratic Vice Chair; Schindler, Republican Vice Chair; Haigh, Lambert, McDermott and D. Schmidt.

Staff: Jim Morishima (786-7191).

Background:

Under the Open Public Meetings Act (OPMA), a public body may not hold a meeting at which the official business of the body is transacted unless the meeting is open to the public. Unless there is an emergency, the public must be given advance notice of all

meetings. Citizens may bring court actions to challenge the validity of past meetings, or to enjoin future violations of the act. Actions taken at a meeting in violation of the OPMA are void. A public official knowingly attending a meeting in violation of the OPMA can be subject to a civil penalty.

Public bodies may hold executive sessions out of the public eye for certain enumerated purposes. One of these purposes is to discuss with legal counsel litigation or potential litigation to which the body is likely to become a party, when knowledge of the discussion is likely to result in adverse legal or financial consequences.

Summary of Substitute Bill:

A public body may not hold an executive session under the "potential litigation" exception simply because an attorney is present or is consulted on a matter. "Potential litigation" is defined to mean matters protected by the attorney client privilege concerning:

- Litigation that has been specifically threatened;
- Litigation that the public body reasonably believes may be commenced by or against the body; or
- Litigation or legal risks of a proposed action or current practice that the public body has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence.

The State Auditor may provide information, technical assistance, and training on the provisions of the OPMA.

Substitute Bill Compared to Original Bill:

The substitute clarifies that "potential litigation" means matters protected by the attorney client privilege. The substitute expands the definition of potential litigation to include litigation or legal risks of a proposed action or current practice that the public body has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence. The substitute removes the requirement that the public body list the reasons why it believes litigation is likely, and removes the requirement that minutes be taken of the executive session. The substitute makes the requirement that the State Auditor provide information, technical assistance, and training permissive instead of mandatory.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Original bill) There is a variety of confusion with respect to when public bodies may go into executive session to discuss potential litigation. Under the current law, the term "potential litigation" is too broad and allows public bodies to enter into executive sessions in situations where their discussions should be public. This bill would narrow the definition of potential litigation and allows the auditor to provide training and technical assistance to public bodies. The requirement that minutes must be kept is extremely important and not that onerous on the public bodies.

Testimony Against: (Original bill) It is extremely important for public bodies to be able to hold executive sessions about potential litigation. Holding such discussions in public would provide a blue print for parties wishing to sue, and may result in encouraging more litigation. The requirement that minutes be kept of the executive session may vitiate the attorney client privilege and prevent full and frank discussions about the issues. The abuses of the potential litigation exception have been exaggerated.

Testified: (In support of original bill) Shawn Newman, Citizens for Leaders with Ethics and Accountability Now; Brian Sontag, State Auditor's Office; Gerald Rowland, Sr., Modern Firearm Hunters of Washington; Elaine Rose, Office of the Attorney General; Rowland Thompson, Allied Daily Newspapers; Becky Bogard, Washington State Association of Broadcasters; Greg Overstreet, Building Industry Association of Washington; Chuck Savage, Common Cause of Washington State; Diana Kramer, Washington Newspaper Publishers Association; Jane Meyer, Mercer Island Reporter; and Vickie Kilgore, The Daily Olympian.

(Opposed original bill) Wayne Blair, citizen; Bardell Miller, Snohomish County Public Utilities District; Bill Vogler, Washington State Association of Counties; Diane Oberquel, Thurston County Commissioner; Pat Bosmans, city of Sumner; Tom McBride, Washington Association of Prosecuting Attorneys; Dave Arbaugh, city of Richland; Lorraine Wilson, Washington State School Director's Association; and Linda Strout, Port of Seattle.