

HOUSE BILL REPORT

HB 3292

As Reported by House Committee On:
State Government & Tribal Affairs

Title: An act relating to executive session recordings.

Brief Description: Recording executive sessions under the open public meetings act.

Sponsors: Representatives Kessler, DeBolt, Miloscia, Upthegrove, Kelley and Hurst; by request of Attorney General and State Auditor.

Brief History:

Committee Activity:

State Government & Tribal Affairs: 2/4/08, 2/7/08 [DP].

Brief Summary of Bill

- Requires the audio recording of all executive sessions conducted by a governing body under the Open Public Meetings Act.

HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

Majority Report: Do pass. Signed by 5 members: Representatives Hunt, Chair; Chandler, Ranking Minority Member; Kretz, Miloscia and Ormsby.

Minority Report: Do not pass. Signed by 2 members: Representatives Appleton, Vice Chair; Armstrong, Assistant Ranking Minority Member.

Staff: Colleen Kerr (786-7168).

Background:

The Open Public Meetings Act

The Legislature enacted Washington's Open Public Meetings Act (OPMA) in 1971. The OPMA is modeled on California's Brown Act of 1953 and Florida's Government-in-the-Sunshine Law, or Sunshine Act, of 1967. Open government laws are often referred to as sunshine laws in reference to a quote from Justice Brandies who said, "Sunlight is said to be the best of disinfectants." Indeed, Washington's Public Disclosure Act, now the Public Records Act, was sometimes called the Sunshine Law at the time of enactment.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Executive Sessions

"Executive session" is not expressly defined in the OPMA, but according to the Attorney General's Deskbook, the term is commonly understood to mean that part of a regular or special meeting of the governing body that is closed to the public. A governing body may hold an executive session only for purposes specified in statute and only during a regular or special meeting. Washington courts have held that because an executive session is an exception to the OPMA's overall provisions requiring open meetings, a court will narrowly construe the grounds for an executive session in favor of requiring an open meeting.

Statute requires that the presiding officer of a governing body must publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer. The announcement is to be given to those in attendance at the meeting. The announced purpose of the executive session must be one of the statutorily-identified purposes for which an executive session may be held and the announcement must contain enough detail to identify the purpose.

Executive sessions may be held for the following grounds:

- to consider matters affecting national security;
- to consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;
- to consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;
- to review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;
- to consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;
- to receive and evaluate complaints or charges brought against a public officer or employee;
- to evaluate the qualifications of an applicant for public employment or to review the performance of a public employee;
- to evaluate the qualifications of a candidate for appointment to elective office;
- to discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency;
- to consider, in the case of the state library commission or its advisory bodies, Western Library Network prices, products, equipment, and services, when such discussion would be likely to adversely affect the network's ability to conduct business in a competitive economic climate;

- to consider, in the case of the State Investment Board, financial and commercial information when the information relates to the investment of public trust or retirement funds and when public knowledge regarding the discussion would result in loss to such funds or in private loss to the providers of this information;
- to consider proprietary or confidential non-published information related to the development, acquisition, or implementation of state purchased health care services as provided in statute; and
- to consider, in the case of the life sciences discovery fund authority, the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information.

Summary of Bill:

The OPMA is amended to require audio recording of executive sessions. Such recordings must be verbatim accounts of the entire proceedings and the governing body must retain the recording for a period of two years. Recordings of executive sessions are public records not subject to public inspection and copying under the Public Records Act except by court order or unless authorized by the governing body.

In an action alleging a violation of the OPMA's provisions regarding executive sessions, the challenging party bears the burden of proof. If the challenging party supports its allegations with credible evidence, the court shall review the recording of the executive session in camera. As part of the in camera review, the court may make inquiries of the parties to fully and fairly resolve the issues before the court. The court may not divulge the contents of the recording to the plaintiffs or its counsel.

If after such review the court finds that the executive session was not in compliance with the provisions of the OPMA regarding executive session, it may order disclosure of those portions of the recording that are found to be not in compliance, subject to other exemptions as may exist in law. The remainder of the recording may not be disclosed.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) This is a good government bill that promotes accountability and transparency and goes to the integrity of the state's governing bodies. It is brought to you jointly by the Office of the Attorney General and by the State Auditor (Auditor) with the support of the Governor.

The Open Public Meetings Act (OPMA) came into law as an initiative of the people. It is a sunshine bill to shed light on government and to restore the citizen's trust in their governing bodies. There is a need for this bill. The Auditor has reported over 400 violations of the OPMA in executive session. The real issue, however, is that this is probably an under-reported issue as there is no evidence to substantiate allegations. A party can allege violations of the provisions regarding executive session, but obtaining evidence to support such an allegation is virtually impossible. Recently, the issues and allegations surrounding the Port of Seattle have highlighted this problem. If there had been an audio recording for a court to review in camera, the allegations could have been substantiated or disproved immediately and the situation resolved. Instead, there is still a tremendous amount of mistrust.

(Opposed) Executive sessions are private for very important public policy reasons. They are used to discuss personnel matters that are intensely private. Even the prospect that such discussions could ever become available through misuse or inadvertent release would have a chilling effect on the frank discussion of governing bodies over personnel. Indeed, it would be the individual being discussed that would be the most damaged. They are also used to discuss matters of real estate to protect the public from the risk of price inflation when the state is going to take property through eminent domain. But most importantly, it dilutes the attorney-client privilege. Diluting it in one area, threatens it across the board. This is a fundamental element of the legal system, the private relationship between attorney and client, and it is never appropriate for a judge to be privy to those conversations. In rural areas, this would be especially detrimental in litigations where there is only one judge available. The governing body could be discussing another case that the same judge would be hearing, raising serious ethical questions of conflict of interest. The chilling effect of requiring the audio recording of executive sessions cuts across the board and has broad public policy implications.

Perhaps the violations of the OPMA are more related to education of the members of governing bodies. Smaller bodies and bodies in rural areas do not have access to legal expertise that larger, more sophisticated bodies have. When one considers that there are literally thousands of governing bodies in the state, 400 violations does not seem that extraordinary.

Smaller counties and governing bodies have concerns with regard to the cost. There are no provisions with regard to what is sufficient for an audio recording with regard to quality of the recording. Neither does the bill address how to store and otherwise maintain the audio recordings. For smaller, poorer jurisdictions, a laptop is a luxury. It is not clear then, what type of technology this bill would require and how the governing bodies can meet the standard.

Persons Testifying: (In support) Representative Kessler, prime sponsor; Brian Sonntag, Washington State Auditor; Rob McKenna, Washington State Attorney General; Bill Will, Washington Newspaper Publishers Association; A. D. Knox; Rowland Thompson, Allied Daily Newspapers; Tim Ford, Office of the Attorney General; and Trent England, Evergreen Freedom Foundation.

(Opposed) Richard Munson, Association of Washington Cities; Ken Ahlf; Marc Boldt, Clark County Commissioner; Diane Oberquill, Washington State Association of Counties; Jerry Smeads, City of La Center; Dan Steele, Washington State School Director's Association; and Barbara Mertens, Washington Association of School Administrators.

Persons Signed In To Testify But Not Testifying: None.