



**Port of Port Townsend
Public Workshop
Wednesday, December 13, 2023, 9:30 AM**

To be held in person at the Point Hudson Pavilion Building, 355 Hudson Street, Port Townsend
and also online

Via <https://zoom.us/> – or call (253) 215-8782, use Webinar ID: 862 6904 3651, Password: 911887

AGENDA

- A. WPPA, Governance and Management Guide – Chapter 10 Transparency and Ethics
- B. Commission Roundtable
- C. 100th Year Planning
- D. Public Comment

This workshop is open to Commissioners, Management, other Port staff, Consultants and the public. It is not the opportunity to give public testimony, but if Commissioners request input from individuals in the audience, those people may speak. The principal purpose of the workshop is to allow Port staff and the Board of Commissioners to communicate with each other and/or Consultants, answer Commission questions, and get the Commission's opinions and input regarding the subject topic(s).



WASHINGTON PUBLIC PORTS ASSOCIATION

Port Governance and Management Guide

A comprehensive, practical handbook to assist port commissioners and senior staff as they govern, manage, and operate Washington State's public ports.

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10. TRANSPARENCY AND ETHICS

“Liberty flourishes, not when government is weak,
but when government is accountable.”

—David Brin

TRANSPARENCY AND ETHICS

Transparency derives from the medieval Latin for “to show light through;” more specifically, the Latin roots trans—across, beyond, and through—and parere—to come in sight or appear. In today’s terminology, transparency implies that a decision or action is easily seen, recognized, and detected.

Ethics derives from the Greek word ethos, or “way of living,” and the Latin for “customs.” Philosophically, ethics defines what is good for both the individual and for society. It establishes the duties and actions that individuals and institutions owe themselves and one another. Further, it guides decision making for a public institution such as a port.

This chapter explores several topics that contribute to transparency and strong ethics in Washington’s public ports.

Transparency and ethics are woven into every aspect of governing and managing today’s ports. They are manifested in every port action and require constant vigilance from elected officials and port staff. Many circumstances require a particularly heavy emphasis on transparency and ethics.

Although the appearance of fairness in port commission decisions does not fall under the traditional Appearance of Fairness doctrine that Washington courts have applied to land use and property rights decisions, appearance still matters in these settings. Whether that appearance is connected to a real or perceived conflict, it is important, and it may impact the foundational trust the public has in a port. Ports often make difficult decisions and take controversial actions. The depth of the public’s confidence in a port’s integrity is critical to that port’s effectiveness in serving the community.

When combined with a deep respect for transparency, organizational alignment, a well-developed culture, good decisions, and respectful and efficient commission meetings enhance a port’s standing in the community—which can be thought of as a port’s “political bank account.” When a community trusts its port commission and staff, it is more likely to support—or at least not oppose—port initiatives and decisions. Conversely, poorly run or disrespectful commission meetings, sloppy work, and lacking transparency erode community trust. Resulting distrust of a port makes community opposition to its priorities and vision more likely.

This chapter addresses issues important to developing and maintaining an ethical port culture, including specific aspects of port meetings and public records.

PORT ETHICS AND CONFLICTS OF INTEREST

Conflicts of Interest: Prohibited Use of Public Office

Appearances matter. Experience shows that the best practice is for port staff and commissioners to disclose even perceived conflicts of interest.

RCW 42.23 prohibits municipal officers from using their position to obtain special privileges or exemptions, or being “beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer.” There are limited exceptions to these prohibitions, and merely disclosing the interest or not participating in a discussion or vote on a contract does not cure a violation of the law. The term municipal officers includes all elected and appointed officials, deputies, and assistants, of all municipal and quasi-municipal jurisdictions, including ports, and essentially refers to port commissioners and management staff.

Individual ports can also adopt internal ethics policies that may be more restrictive than the state law while clarifying its application to all port employees. Care should be taken when adopting substantive ethical requirements or processes that go beyond state law and apply to elected officials.

The penalties for violating RCW 42.23 are significant. Violations may induce financial civil penalties up to \$500, possible forfeiture of office, and voiding of contracts and other governance actions taken in violation of the statute.

In addition to the fundamental prohibition of being “beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, the law specifically prohibits municipal officers from taking four types of actions (RCW 42.23.070):

1. Using their position to secure special privileges or exemptions for themselves or others.
2. Giving, receiving, or agreeing to receive, directly or indirectly, any compensation, gift, reward, or gratuity from a source other than the employing municipality, for a matter connected with or related to the officer’s services as such an officer.
3. Accepting employment or engaging in business or professional activity that they might reasonably expect would require or induce them by reason of their official position to disclose confidential information acquired in their official position.
4. Disclosing or otherwise using for their personal gain or benefit confidential information gained by reason of their position.

A contract interest is defined by the statutes and prohibits a direct or indirect interest in a contract at the time the contract is made, by or under the supervision of an elected or

appointed municipal officer. A contract includes any kind of agreement involving sales, leases, or property purchases. There is no exemption for a municipal officer to disclose a contract interest or recuse themselves except in the case of a “remote interest” as defined in RCW 42.23.040.

A remote interest provides an exemption as long as the party with the remote interest discloses that interest and recuses themselves from participating in the decision. This should be included in the official written record of the port. For example, a contract with a nonprofit corporation of which a port commissioner is a non-salaried officer would not be considered a conflict. However, the fact that the interest is there must be noted in the port commission’s minutes.

There is an exemption in the statute for a port official leasing from the port, including marina moorage or tie-down fees at the airport, provided there is a court-supervised process to set the value and affirm the lease amount is correct. In practice, many port officers keep boats in port marinas or aircraft in port hangars and have not followed a court-supervised process. Instead, these ports rely on the rate setting process that sets a common rate for all users. This approach has been neither tested by the courts nor addressed by the State Auditor’s Office. Careful consideration should be used when addressing this issue.

Elected officials should use caution in holding two elected offices simultaneously. This is allowed as long as the offices are not incompatible. However, negative perception is always possible, which can erode a port’s public credibility.

Ports should consider adopting internal ethics policies which further define potential conflicts of interest, real or perceived. Those policies should address a number of potential conflict areas so that the commission, management team, and staff have a clear understanding of the geography of ethical behavior, and it is not left up to the individual to discern what can be complex laws and definitions. For example: Is it appropriate for an employee to bid on surplus port equipment at an auction, whether or not that employee participated in the surplus decision?

It should be noted that elected port commissioners are considered port employees for purposes of many state and federal laws, such as those outlawing sexual harassment or creating a hostile work environment. Therefore, port commissioners should receive the same training as port staff on these matters.

Although this is not a legal requirement, ports should pay Labor and Industry premiums on the compensation (not expenses) paid to port commissioners. These premiums are low, and they provide worker’s compensation coverage for any port commissioner injured while on port business. This provides coverage for the commissioner and helps protect the port from lawsuit for injuries or death sustained by a commissioner while on port business.

Port commissioners generally seek legal advice on questions of potential conflicts. It is a best practice to raise any issues in a commission meeting and either reiterate the attorney's advice or, if the attorney is present, ask the attorney to restate the advice. Even if a commissioner's participation in an action would not be a statutory conflict of interest, they should recuse themselves on the record when there is even a hint of a conflict, to preserve the appearance of fairness.

Nepotism

Nepotism is defined as showing favoritism to relatives of those in a decision-making position, such as a port commissioner or manager. This could be in terms of employment or contracts for goods and services with the port. The term has roots in papal history dating back to the 1400s—in early Italian, it is a variant of the word *nepote*, meaning “nephew.”

If a relative relies upon a port officer for support, RCW 42.23 would apply to the port's employment of that relative because the port officer would be “indirectly beneficially interested” in said employment. Other than that narrow application, Washington State law does not specifically address nepotism, except in some labor related laws and administrative codes that prohibit discrimination based on marital status. It is common for local governments to adopt their own set of standards that address nepotism in a code of ethics. This comes from an abundance of concern for the appearance of fairness.

Giving and Receiving Gifts

The issue of gifts is of great ethical concern and involves the acceptance of gifts given to a port, its staff, or its commission, as well as a ports' ability to gift public resources to others.

Port commissioners and appointed staff at all levels should be very cautious in accepting gifts from third parties such as tenants, consultants, or contractors. There are two types of gifts that a port or its commission or employees may be offered.

The first is a gift to the port, such as donated land or equipment. RCW 53.08.110 provides the statutory authority for port districts to receive gifts of “real and personal property.” However, the statute provides only for the port commission's authority to accept gifts. Unless the authority to accept gifts on behalf of the port has been delegated, accepting a gift to the port requires commission action.

From the donor's perspective, a gift to a port carries the benefits of a federal tax donation. The IRS allows a taxpayer to donate to qualified organizations, which includes port authorities as political subdivisions of the state. The gift must be used to support a substantial government function and can include, for example, the difference in value of land that is offered to the port at less than market value. In these cases, the port may be required to certify or document the transaction. Ports should be cautious when certifying the value of a donation for tax purposes. While ports are considered an eligible government under the internal revenue code, there is

defined guidance from the IRS on establishing value.

The second type of potentially acceptable gifts are those of nominal value that are offered to port commissioners or any port employee, such as meals, tickets to sporting events, or the like. RCW 42.23 states that “no municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer’s services as such an officer unless otherwise provided for by law.” The term municipal officer is defined to include both elected and appointed officers, as well as their deputies and assistants.

Interestingly, the state has provided an interpretation of the law that accepting nominal gifts, defined as anything valued less than \$50, does not violate the equivalent statute applicable to state employees. However, this exception only applies to state officers and employees, leaving acceptance of gifts of nominal value ambiguous for port officers and employees. For that reason, ports should address this issue in their internal code of ethics. In general, gifts for municipal employees are considered of nominal value if they are valued less than \$25.

During the holiday season, port consultants, contractors, customers, and tenants may deliver gift baskets of food or alcohol to the port. These gift baskets can be returned, donated to a charity, provided as a door prize at an employee meeting, or put into the employee lunchroom for all to share. These practical approaches avoid direct gifting to an individual commissioner or employee. The same practical approach can be used throughout the year for tickets to sporting events or concerts, so long as the value is nominal. Again, a port ethics policy is needed here to define acceptable conduct.

Ports can pay for employee events that recognize employee performance or longevity, accomplishments of the port, or to provide training for employees. A port can cover the total cost of such an event, excluding alcohol. Ports can also provide nominal gifts such as plaques or port logo hats or jackets to employees to celebrate longevity or accomplishments. Once again, ports should consider adopting a policy that further defines their internal events practices, including the definition of “nominal value.”

Gifts of Public Funds

In addition to accepting gifts, there are specific restrictions on ports’ gifting public funds and resources to other parties. The Gift of Public Funds Doctrine refers to a broad set of prohibitions contained in the Washington State Constitution:

ARTICLE 8, SECTION 7: CREDIT NOT TO BE LOANED. “No county, city, town, or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm...”

The purpose of these constitutional prohibitions is to ensure that no state or local municipal resources, including port resources, are used to benefit private interests in which the public interest is not primarily served.

While this seems straightforward in prohibiting a port from lending money, giving gifts, or lending port credit to a private party, the reality is complicated, particularly for such things as joint venture efforts. To clarify these situations, there is a three-step analysis that can be applied:

Question #1: Are the funds being expended to carry out a fundamental purpose of the port as captured in the statutes defining the authorities of ports? If so, there is no gift of public funds—ancillary benefits are not prohibited.

Question #2: If the answer to Question #1 is “no,” did the port have a donative intent?

Question #3: Did the port receive an adequate return in value for the transfer of resources?

Ports are encouraged to be cautious in this regard and consult their legal counsel in advance of any such consideration, no matter how small or insignificant.

Promotional Hosting

Promotional hosting has been included in this chapter as it raises questions of ethics in how it is utilized by ports. Pursuant to RCW 53.36.120-150, ports are uniquely authorized to spend public resources on promotional hosting to promote industrial development or trade within their district. It should be noted that the term industrial, when applied to today’s economy, includes commercial development as well.

Promotional hosting expenditures include customary meals, refreshments, lodging, and transportation in connection with business meetings, social gatherings, and/or ceremonies honoring events or persons. It may also include expenditures on entertainment and souvenirs of nominal value. Ports are the only local government with this authority. Such actions are not considered a gift of public funds, but there are statutory limits in RCW 53.36.130.

Limitations on promotional hosting expenditures

PORT'S GROSS OPERATING REVENUES, EXCLUSIVE OF PROPERTY TAXES	PROMOTIONAL HOSTING EXPENDITURE LIMIT PER PORT FISCAL YEAR
\$250,000 or less	\$2,500
\$250,000 to \$2.5 million	1% of gross operating revenues
\$2.5 million to \$5 million	\$25,000, plus 0.5% of operating revenues in excess of \$2.5 million
Over \$5 million	\$37,500, plus 0.25% of operating revenues in excess of \$5 million

Ports must adopt a promotional hosting policy to further define the specifics of their promotional hosting activities and to prohibit commissioners from unilaterally making such expenditures without the majority formal approval of the sitting commission. The promotional hosting expenses of a port are carefully reviewed and scrutinized in annual audits.

Disclosing Information

Local government officials are prohibited from disclosing information gained by reason of their official position. This is of note when considering the availability of information obtained during an executive session. By nature, executive sessions are meetings in which confidential information is discussed. RCW 42.23.070 prohibits municipal officers from disclosing “confidential information gained by reason of the officer’s position.” Therefore, it is a violation of RCW 42.23.070 to disclose information gained in an executive session—such disclosure is prohibited even if there is no personal gain to the discloser. Importantly, RCW 42.23.050 provides that violation may be grounds for forfeiture of office.

Nondisclosure Agreements

Nondisclosure or confidentiality agreements have increased as port customers, potential tenants, and other businesses want to hold discussions or negotiations with a port while keeping certain documents confidential. For example, it is now common for a large prospective commercial or industrial tenant to demand such an agreement as a condition of beginning even preliminary discussions about available sites with a port.

Agreements are normally approved by the port’s commission in an open public meeting. This presents a challenge when a business seeks a confidentiality agreement that extends to the mere fact that the business is talking to the port. In addition, the Public Records Act mandates that virtually any document received by a port is a public record, and its status as a public record cannot be changed by agreement. This means that any documents provided to the port district become public records, even with confidentiality and nondisclosure agreements. Ports should consult with their legal counsel on how they will respond to such requests from the private sector.

With the increased popularity of nondisclosure or confidentiality agreements, ports should consider giving their executive director the authority to execute these agreements. However, the port should have a form agreement already developed by legal counsel that is compliant with the Open Public Meetings Act and the Public Records Act.

Campaigning

There is a strict prohibition on the use of a port’s public facilities to support or oppose a ballot measure or a candidate for office. Facilities is broadly defined to include office space, warehouses, stationary, postage, equipment, vehicles, publications, port mailing lists, and most notably, port employees during work hours. The original prohibition was part of Initiative 276,

adopted by voters in 1972. The Washington Public Disclosure Commission (PDC) was also created in 1972 to help interpret the laws that emerged from Initiative 276.

Simply stated, elected or appointed personnel of a port cannot work on a political campaign or otherwise support or oppose a measure or candidate during work hours or use a port's facilities (RCW42.17A.555).

The law does not prohibit elected officials or appointed port staff from expressing their own personal views, as long as that expression does not involve the use of port facilities or is made while they are clearly on the clock. Practical advice includes:

- State statutes prohibit the use of public facilities by an elected official or any government employee to support or oppose candidates or ballot measures. This includes the use of employees of the port during working hours and the use of public property such as stationery, postage, equipment, vehicles, office space, client or tenant lists, or agency documents not made available to the public.
- Campaign signs cannot be placed on port property; however, campaign signs may be placed on port-owned property that is leased by a tenant (leasehold property). The regulation of any sign on leasehold property should be addressed in lease documents.
- Port commissioners running for office should be cautious about using images, photos, or videos taken from the port's website or social media files.
- Elected officials such as port commissioners may provide a link from their campaign website to the port's website; however, there needs to be a clear break between the two sites, requiring leaving one site and entering another.
- The Washington Administrative Code explains that RCW 41.17A.555 does not prevent an agency from "(a.) making its facilities available on a nondiscriminatory, equal access basis for political uses or (b.) making an objective and fair presentation of facts relevant to a ballot proposition" if such action "is part of the normal and regular conduct of the office or agency." The Public Disclosure Commission (PDC) has also held that the use of agency meeting facilities is permitted when the facility is merely a "neutral forum" where the activity is taking place, and the public agency in charge of the facility is not actively endorsing or supporting the activity that is occurring.
- Port commissioners and staff can wear campaign pins or buttons if there is a port policy in place that allows the same. Port-issued uniforms cannot be worn by port employees assisting in a campaign or to support or oppose a ballot proposition.

As with most laws, there are exceptions:

- » Like all elected legislative bodies, the port commission may vote on a motion to support or oppose a ballot proposition, if and only if they have properly issued notice that the meeting will take up the issue, and members of the port commission or the public are given equal time to express any opposing view.
- » Port commissioners may make public statements in support or opposition to a ballot at an open press conference.

- » Ports can prepare and present an objective and neutral analysis of the impacts of a particular ballot proposition; specifically, how it might impact the port's operations, income, or projects. Ports should err on the side of objectivity and fairness.

The Guidelines for Local Government Agencies in Election Campaigns (Public Disclosure Law Re: Use of Public Facilities in Campaigns) are available from the PDC.

Holding Dual Offices

While not specifically addressed in Washington statutes, there is a long-standing common-law doctrine that emanated from the Washington Supreme Court in the 1950s that no one should hold two incompatible public offices at one time. Like the gifting of public resources test, there is a two-step process to define a potential incompatibility:

Question #1: Does an individual simultaneously hold more than one public office?

Question #2: If so, are the public offices incompatible with one another?

A public office was further defined by the courts as one in which the position (a.) must be created by the state constitution, state legislature, or a local government body, (b.) must possess as a part of its duties a portion of the power of the governmental body which created it, to be used for public benefit, (c.) the powers and duties of the position must be outlined and defined by the governmental body which created it, (d.) the position's duties must be performed independent of a superior power other than the law, and (e.) the position must not be temporary. In short, this applies to port commissioners, and it can be reasonably assumed to include senior management and administrative personnel.

To determine if the offices are incompatible, one would have to be subordinate to the other, i.e., being a port staff member as well as a port commissioner, or performing both offices' duties and loyalty to different organizations would have to give rise to inconsistent and conflicting loyalties to the public served by each agency (i.e., being both a port commissioner and the mayor of a city within the port district). On the other hand, a person being both a school board member and a fire district commissioner is an example of holding dual, yet compatible offices. The problem for port commissioners is that the powers of port districts are so broad that they can impact nearly all other governments within the port district.

There are no specific penalties or fines for violation of this doctrine, but courts can and have ordered individuals to vacate one or more of the incompatible public offices at issue.

Commissioner Compensation

Like promotional hosting, commissioner compensation has been included in this chapter as it often raises questions of ethics in how elected commissioners set and apply their own compensation and benefits. The issue of commissioner compensation is very complicated, and ports are advised to consult with their legal counsel to clarify the applicability of state law, which has recently been amended and is subject to future change.

RCW 53.12.260 sets port commissioners’ per diem and monthly compensation. It provides that each port commissioner is entitled to \$90 for each day or portion of a day that they are in actual attendance of official meetings or in the performance of other duties of the port. The statute is a bit confusing because that number has risen since 2007, has been adjusted for inflation every five years by Washington’s Office of Financial Management (OFM), and is now set at \$128 dollars per month. Further, the maximum annual number of per diem events for ports with gross operating revenue below \$25 million dollars is 96. The maximum annual number of per diem events for ports with gross operating revenue at or above \$25 million is 120.

The statute defines a per diem event as time spent “(a.) in actual attendance at official meetings of the port district commission, or (b.) in performance of other official services or duties on behalf of the district.” Port commissions should adopt a policy defining other official services or duties. For example, if a commissioner chooses, but is not required to attend a county council meeting, is that a per diem event?

In addition, port commissioners are entitled to monthly compensation based on the size of the port, measured as gross operating revenues. These amounts are shown in the table below.

GROSS OPERATING REVENUES OF THE PORT	MONTHLY COMMISSIONER COMPENSATION
More than \$25 million	\$500/month
\$1–25 million	\$200/month

Like per diem, these monthly compensation amounts have been adjusted for inflation every five years since 2007 by OFM. They are now set at \$713 and \$285, respectively.

Note that the 2020 amendment to RCW 53.12.260 has resulted in some confusion. The clear reading of the statute as amended in 2020 sets the numbers at \$90/\$200 and \$500, respectively, but OFM has instead opted to focus on the intent behind the 2020 amendment. So far there have been no court challenges, but ports should consult with their legal counsel when setting per diem and compensation amounts. In any event, the next adjustment is possible on January 1, 2024, then once every five years thereafter.

Despite the very involved structure set forth in sections 1 (per diem) and 2 (monthly

compensation) of section 3, RCW 53.12.260 allows the port commission to override the amounts in sections 1 and 2 and set a different number. However, as established in Washington's constitution, the compensation of an individual commissioner cannot be reduced or increased during that commissioner's term of office. This prohibition does not apply to the automatic adjustments in sections 1 (per diem) and 2 (monthly compensation) in the statute. Therefore, if a commission elects to raise the per diem rate, extend the number of eligible days, or increase the monthly compensation, such an increase will only take effect as to each commissioner after the next election. The same rule applies for reductions. The effect of the constitutional limitation is that if the commission enacts a change in compensation, commissioners will not be paid differently until all the commission positions have gone through an election.

RCW 53.12.265 allows port commissioners to waive all or a portion of their salary. Salaries of port commissioners are not eligible for the state Public Employees' Retirement System (PERS) unless they were enrolled prior to May 1, 1976.

RCW 53.08.170 provides that any port providing insurance benefits to its employees "may provide health and accident insurance, life insurance with coverage not to exceed that provided district employees, and business-related travel, liability, and errors and omissions insurance, for its commissioners, which insurance shall not be considered to be compensation."

Whistleblower Protection

Through RCW 42.41, the Washington State Legislature has determined that, when not prohibited by law, local government employees should be encouraged to disclose improper governmental actions of elected and appointed officials. The statute requires that local governments adopt and post a policy regarding the right to report alleged improper governmental action, which can substitute for the statutory requirements if the policy meets the intent of the law.

The identity of a reporting employee is to be kept confidential unless they authorize disclosure. The agency or individuals cannot take retaliatory action against an employee making a report.

Federal whistleblower programs are administered by the Occupational Safety and Health Administration.

Travel and Expense Reimbursement

Port employees and commissioners frequently expend funds for personal travel and other miscellaneous expenses in the normal course of their activities with the port. RCW 53.08.175 provides the authorization for commissioners and staff to be reimbursed for appropriate expenses if properly documented. These can be expenses incurred within or outside of the port's political boundaries. Ports can issue port credit cards for such purposes. RCW 53.08.176 requires that ports adopt, by resolution, a set of policies with specific direction on the form of

verification and documentation of expenses for reimbursement. If per diem rates are used in lieu of actual reimbursement, then the federal per diem rates established by the U.S. General Services Administration must not be exceeded.

As a practical matter, port policies on expenses and travel should include clear guidance and expectations on things such as hotel room choice, meal choices, treatment of spousal expenses, and the like.

As noted in this chapter, ports are uniquely authorized to expend funds for promotional hosting purposes. Since these are frequently part and parcel of travel and event expenses, port policies addressing travel should include clear guidance on promotional hosting expenses.

Code of Ethics for Public Employees

Municipal governments, such as ports, can develop and adopt a code of ethics for employees. These locally adopted codes supplement Washington State law without conflicting with it. In general, they provide additional clarity and can address ethical issues not covered by state law. Ports should act carefully when considering a code of ethics or adopting ethical standards for elected port commissioners.

Loss of Port Funds

Ports do not often lose or lose track of port funds, whether the loss is known or suspected. However, if anomalies are discovered when processing reimbursements or paying things such as expense vouchers, the port should follow these steps:

- ✓ **Contact the port auditor.** Each port is required to have a commission-appointed port auditor; usually, this is the chief financial officer. This person has a dual role: as port auditor, they report to the port commission, and as CFO, they report to the executive director. The port auditor will be the person who leads the actions for these situations.
- ✓ **The port auditor should contact the port attorney.** Like the port auditor, the port attorney is appointed by and reports directly to the port commission. The port attorney can provide guidance to the port auditor.
- ✓ **Provide notice to the executive director.** The executive director or port manager should be notified. Keep in mind that at this point, the situation may not yet rise to the level of a known or suspected loss of public funds.
- ✓ **Port auditors should investigate.** Not all anomalies prove to be a known or suspected loss of public funds. Sometimes a set of fresh eyes can help resolve the issue, or what looks like a loss may in fact be a failure to follow procedures or be otherwise explainable. The port auditor may ask for additional investigation, additional analysis, or additional details.
- ✓ **Notify the commissioners.** At some point, no later than when the port auditor has determined that there is a known or suspected loss of public funds, the commission should be notified, and authorization obtained to make the report to the State Auditor's Office (SAO) in compliance with RCW 43.09.185.

- ✓ **File a report with the SAO consistent with RCW 43.09.185.** This statute requires an immediate report to the SAO of any “known or suspected loss of public funds.” Note there is not a minimum value—the statute indicates all losses. The report can be made online via the SAO’s website or by calling the port’s SAO contact.
- ✓ **Report the situation to the port’s insurance carrier.** Most ports have insurance that will cover the loss. In addition, a loss may result in employee discipline or termination. Some employment insurance policies include a waiver of a deductible for employee claims for wrongful termination, if the insurance company is notified before the personnel action is taken.
- ✓ **Consider remedial actions.** If there is a problem—either an actual loss or an anomaly that gets resolved—consider changing policies or procedures to fix the issue. Where there is a loss, the best practice is to adopt a fix as soon as possible. Experience shows the SAO’s office appreciates proactive action to fix a system or procedure.

The SAO will conduct a review and determine whether the loss was a mistake. If a determination is made that funds were taken unlawfully, the SAO may refer the issue to local law enforcement. If a port declines to pursue an action to recover lost funds, the SAO may refer the matter to the State Attorney General’s Office, which can itself begin an action in the name of the port. If the SAO issues a report, it is a public record.

PUBLIC MEETINGS

The Open Public Meetings Act (OPMA) was passed in 1971, requiring meetings be open to the public from gavel to gavel (RCW42.30). The intent of OPMA is to ensure the public is informed about decisions being made by their elected representatives. Per RCW42.30.030, any time a quorum of elected officials from the same governing body meet, they are subject to OPMA and the meeting must be open to the public. This applies even if they are participating remotely by phone or in a digital meeting format.

OPMA requirements apply to retreats, committee meetings of the commission, workshops, and study sessions. An email exchange in which a majority of the commission are discussing port matters is considered a public meeting. One on one briefings by staff to individual commissioners are not subject to OPMA.

Discussing port matters is considered action by the commission. Action includes taking public testimony, deliberations of any kind, discussions about topics, reviews of port issues, and evaluations. OPMA is applicable whether or not any final action is taken. Final action is a collective positive or negative decision or vote by a majority of the commission or a committee of the commission. These final actions are typically taken by adopting a motion or resolution. Final action must be taken in public even if the deliberations occurred in a legal executive session. Secret ballots are not permitted.

Commissioners often travel to and from meetings together and occasionally, there is a majority present. Discussing port matters during these times would be considered action and is prohibited. OPMA does not apply to organizations that are not required to follow OPMA, such as the WPPA. If more than one (or 3 out of 5) of a port's commissioners plan to attend a WPPA meeting, the meeting is considered and advertised as a special meeting or study session. A majority of commissioners cannot meet during a WPPA event to discuss port issues unless that meeting is properly advertised and open to the public.

There are three basic types of commission meetings:

I. Regular Meeting: Regular meetings are those that occur on a set periodic schedule which is established by motion or resolution. This schedule should be on file and posted on the port's website and social media (if applicable) at the beginning of each fiscal year. Agendas are now required to be developed and posted online at least 24 hours in advance of the start of a meeting, unless the port does not have a website or employs less than ten full-time employees (RCW 42.30.077). Agendas can be modified at the start of a meeting. If an item surfaces without being on the agenda and action is taken, it is still a valid action.

Regular meetings can be constructed as work-study sessions in which no formal action will be taken. The benefit of work-study sessions is that a particular topic can be discussed in extensive detail without the pressure of having to make a decision at that time. Work-study sessions tend to be more conversational in nature, which allows for a thorough exchange of ideas and resolutions to questions and concerns about the topic.

II. Special Meetings: A special meeting is any meeting that is not a regular meeting. They can be called by the presiding officer or a majority of the members of the commission. Written notice must be given at least 24 hours in advance of the special meeting. Notice must be given to each member of the governing body unless they have waived this requirement in advance—for example, if they know they will be at a hard-to-reach vacation destination. Notices of special meetings must also be given to each newspaper of general circulation, radio, and TV station having a notice request on file, and they must be prominently displayed at the main entrance of the port's principal location and at the meeting site, if different than the principal location. Like for regular meetings, the announcement and agenda of topics to be discussed must be posted on the port's website, unless the port doesn't have one or employs less than ten full-time employees. Actions at special meetings are limited to what is on the agenda, and each commissioner must receive notice of a special meeting. This can present a problem when a commissioner is away on vacation and not reachable. RCW42.30.080 allows a commissioner to sign a written waiver of notice, which is a good practice before traveling to somewhere where notice would be difficult to provide.

III. Emergency Meetings: Ports can call special emergency meetings to deal with true emergencies. An emergency meeting would be considered a variation of a special meeting. An emergency exists when there is an immediate threat that involves potential injury or death

to persons, or significant damage to real property assets. Further, an emergency necessitates time considerations that make normal noticing impractical and likely to increase the chance of additional injury or damage. These emergency meetings often run concurrently with the notice of an emergency issued by the port's executive director, as reflected in the delegation of powers. Within the construct of commission meetings, there can be special sessions to address specific matters:

Executive (Closed) Sessions: Executive sessions are either special meetings or part of a regular meeting. The topics that can be considered must be specifically allowed by OPMA, including:

- Buying or selling real estate when public knowledge would likely adversely affect the price from the agency's perspective. Recent Washington Supreme Court action held that (a.) discussions of the sale of real estate must be limited to the minimum acceptable price to sell or lease the property, (b.) any general discussion of factors that are the basis for that minimum price must occur in public session, and (c.) after those considerations are discussed in open session, the commission may discuss in executive session how those factors directly impact the minimum price.
- Reviewing negotiations on the performance of publicly bid contracts for which public knowledge would likely increase the agency's costs.
- Reviewing the performance of existing employees.
- Evaluating the qualifications of an applicant for public employment.
- Meeting with legal counsel regarding litigation or potential litigation if (a.) the port's legal counsel is present in person or by phone, (b.) there is litigation or potential litigation that is likely to result in the port or the port's commission becoming a party, and (c.) public discussion of the matter is likely to result in adverse legal or financial consequence to the port (RCW42.30.110).
- Discussing matters of national security.

Notice rules that apply to public meetings also apply to executive sessions. Before the executive session begins, the public meeting is convened and the presiding officer announces (a.) that the board is going into executive session, (b.) the purpose of the session and the reason it is exempt, and (c.) the length of time the session will last. When the session ends, the presiding officer returns the meeting to public session and discloses the nature of the executive session for the record. The presiding officer may then proceed to other agenda items or adjourn the meeting if there is no other business before the board.

Executive sessions should be held sparingly, and ports are advised not to hold one at every regular port commission meeting. It should be obvious to port staff and the public why the commission is going into an executive session and what actions may follow the session. An abundance of caution should be taken to minimize the perception of government operating in secret, while not compromising important matters that are appropriate to be discussed in executive sessions.

Public Hearings: Public hearings are very formal in nature and are intended for receiving public testimony on specific issues. Public hearings are conducted as special meetings and noticed as special meetings or as part of regular meetings. In either case, there are special notice provisions for public hearings that specify the exact time and location for a particular topic on the agenda to receive public comment. For example, a regular meeting can be adjourned at a noticed time for a given period to hold a public hearing and take public testimony. Following that set time, the regular meeting can be called back into session. Public hearings are specifically required for certain actions, such as establishing an Industrial Development District, considering the annual budget, or the tax levy. There are statutory and regulatory requirements for both federal and state level decisions on specific topics that require a public hearing.

Meeting protocols for formal public hearings are very structured, as summarized below:

- The hearing chair is very important to a successful hearing. The chair can be the commission president, port staff, or a professional hearing officer. The hearing chair calls the hearing to order and explains the purpose of the hearing and the procedures to be followed. The chair is responsible for conducting the hearing in a fair, evenhanded manner, and should request that all questions and comments be addressed through them.
- A summary description of the hearing topic is given by the chair, a member of the port staff, or a port consultant. All visual aids, such as maps and slides showing specific sites or development proposals must be visible to everyone in the hearing room.
- The chair opens the hearing for public testimony after the introductory briefing. Typically, the chair will ask attendees to sign up if they wish to testify and then call for testimony based on the order of the sign-in sheet.
- In most cases, the hearing will be closed following the public testimony and a decision will not be rendered. Minutes of the hearing must be kept, and voice recordings are very desirable. These records should be kept as part of the decision-making record. There are specific requirements and standards imposed by the Washington State Archivist that should be reviewed during the public hearing planning stage.

Workshops and Retreats

Whether at the port's principal location or offsite and digitally remote, workshops and retreats are considered special meetings unless they occur at the location and time of a regular meeting. All OPMA notice requirements apply to workshops and retreats. The difference for a workshop or retreat is in the structure of the meeting and the physical setup of the meeting space. Physical setup should utilize seating that encourages discussion and suspends the organizational hierarchy so that attendees feel comfortable in sharing their opinions and perspective. Decisions are rarely made at workshops or retreats.

These less-formal meetings provide an excellent opportunity for commissioners and staff to fully discuss issues to a depth not always possible in a formal meeting with a full agenda. This

format often lends itself to using a professional facilitator to move the discussion forward and drive to an outcome. Typical topics for workshops and retreats include strategic plan development, budget discussions of a strategic nature, large and complex project review, and generally, preparatory discussions prior to challenging and significant decisions.

Port Advisory Committees

Port advisory committees such as topic-focused task forces provide an excellent approach to soliciting organized input and recommendations from user groups such as marina customers, tenants, pilots, and the general public. While these committees are invaluable, there must be a clear understanding that their advice and recommendations are just that—advisory. Conflict often arises when the commission does not follow advisory committee or task force recommendations. This creates tension which can be avoided if the role of the appointed group is clarified from the onset.

Port advisory committees that are not formed by a majority of elected commissioners do not need to follow OPMA requirements. However, to maintain the integrity of the advisory process, they may elect to create minutes and follow some reasonable notice standards and meeting protocols.

Meeting Mechanics

RCW 53.12.245 requires that a port commission “by resolution adopt rules governing the transaction of its business.” These resolutions address such things as the duties of the president, vice president, and secretary, how agendas are prepared, and how actions are taken. It is best practice to avoid overly complex procedures, such as adopting Robert’s Rules of Order. Adopting a simple process is preferable, such as having a port staff read a motion, followed by discussion and then a vote.

Agendas and consent agendas are often established by the presiding officer of the commission—the president, in conjunction with the executive director. Ports may adopt policies, bylaws, and/or rules of order that prescribe the port’s preference on agenda determination. If the agenda is not addressed in its entirety, meetings can be formally adjourned to be continued at a specific time and place. Many port commissions include a “consent agenda” as a part of their regular agenda. A consent agenda contains a list of routine and non-controversial items. The entirety of the consent agenda and all its items are approved with one motion, although all commissioners reserve the right to remove an item that needs further discussion. The consent agenda is a time saving process that allows more time for discussion on other more complex or controversial items.

Minutes of public meetings must be promptly recorded and available for public inspection; however, minutes of executive sessions are not required. While there are no prescribed standards for minutes, industry practice is well developed and addresses the most significant

issue: the level of detail. All official actions, such as motions, must be captured verbatim. To ensure accurate capture of official actions, it is recommended that agenda items be accompanied by staff recommendations in the form of the verbatim motion to be considered. This helps to avoid confusion during and after the meeting.

Meeting preparation includes providing background information on each agenda topic to the commission with ample time for review prior to the meeting. In most cases, background information is given by staff to the commission, in a commission packet. Staff recommendations are focused on needed actions and should include:

- Specific action requested (verbatim motion).
- Background.
- Pros and cons.
- Financial implications.
- Consistency with strategic direction, budget and/or the port's Comprehensive Scheme of Harbor Improvements.
- Other considerations.
- The staff recommendation.

Meeting protocols include the organization of the meeting, as reflected in the agenda, and the physical setup of the meeting space. The best meetings include (a.) thoughtful preparation by way of pre-meeting briefings and background material, (b.) careful choreography of the topics, presentations, and expected discussion, and (c.) assigning a spokesperson to each topic for any post-meeting questions.

- Apart from statutorily required public hearings, it should be noted that ports are not obligated to include public input at their regular meetings. However, in the public's best interest, virtually all ports include opportunities for public testimony at their regular meetings. That opportunity can be provided at the beginning of a meeting before any action on the agenda is taken, during the time a particular action is under consideration, or at the end of the meeting. There is no right or wrong in this regard, but it is common sense to schedule public input at the beginning of a meeting before any action is taken. This can help minimize disruption to the commission's deliberations.
- Room setups traditionally include a real or perceived separation of space between the commission, the staff, and the public. Audio or video equipment is often positioned to be visible by all in attendance. Work-study sessions tend to be less formal, and room setup for these types of sessions should encourage an exchange of ideas in more of a roundtable layout, in which staff and the commission are encouraged to freely participate in the discussion.
- Disruptive attendees at a meeting can be removed by law enforcement. If the meeting is highly disrupted, the commission can terminate and reconvene the meeting. In any case, nondisruptive attendees and the news media may remain.

First Meeting of the Year Checklist

At the first meeting of the new fiscal year, commissioners could consider the following checklist:

- ✓ Set the time and place of commission meetings for the next year, including work-study sessions.
- ✓ Appoint the officers of the commission. This would include not only officers but also representatives to other organizations such as local chambers of commerce, WPPA, and the local council of governments.
- ✓ Consider affirming the appointment of the port auditor and the port attorney.
- ✓ Consider any revisions to the commission's resolution governing the transaction of its business.
- ✓ Consider any revisions to the port's Delegation of Powers Resolution.

Resolutions

As discussed in Chapter I, commission time is a very limited resource. Ports may find it useful to periodically track the amount of time spent on differing types of actions or topics, such as awarding construction bids, approving leases, or setting policy and strategic direction. Tracking the time commissioners must spend in meetings over a set period may be informative to a port in updating its delegation of powers or amending its meeting protocols to help it run more efficiently.

PUBLIC RECORDS

Public Records Act

The Washington State Public Records Act (PRA) (RCW 42.56) traces its roots to a 1972 citizen initiative that created Washington's Public Disclosure Commission (PDC) to provide transparency in campaign funding and expenditures. That initiative has since been superseded by the PRA.

The PRA requires that all public records maintained by state and local agencies, including ports, be made available to all members of the public, with some exemptions. Violations of the PRA can be expensive, including the award of claimant's attorney's fees and financial penalties of up to \$100 for each day the violation exists.

The public policy basis for the PRA is foundational to good government. The statute reads:

“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” RCW 42.56.030.

To manage the port’s public records requests, each port must appoint a Public Records Officer (PRO); this can be an employee or an official of another agency. The duties of the PRO include serving as the point of contact for members of the public that request public records, and overseeing compliance with the statute. The public must be able to readily identify a port’s PRO from a posting on the port’s website, at its place of business, or in its publications.

Public records that can be requested are defined to include “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” In today’s world, this includes not only traditional written records, but also photos, maps, videos, voicemails, webpage and social media content, emails, and text messages. While there are exemptions, this is a broad definition intended to be all-inclusive. There is a carve out for records that are held by volunteers to the port who (a.) do not serve in an administrative capacity, (b.) have not been appointed by the port to a port board, commission, or internship, and (c.) do not have a supervisory role or have been delegated any port authority.

“Any writing” includes emails, regardless of from where they are sent. As a result, port employees and commissioners are advised to use a port email account that is subject to disclosure, rather than a personal email account. This practice separates port business from personal emails that do not involve port business.

In addition to appointing a PRO, ports are required to adopt and publish policies that capture their rules of procedure regarding the PRA, consistent with Washington statutes. This policy should (a.) specifically address the treatment and retention of records—emails specifically, (b.) include a fee schedule for creating records copies, and (c.) specify a minimum number of hours per week for records inspection (at least 30 hours/week).

The Office of the Secretary of State provides detailed information on archiving public records.

Withholding Public Records and Documents

While the PRA mandates that all documents and records held by a local government must be

made available to the public, there are narrow exemptions. There are certain public records or documents that can be withheld in whole or part from disclosure. Documents that can be withheld pursuant to Washington statutes can still be released, pending port commission approval. This area of the law is extremely complicated. The release or withholding of specific documents must be evaluated carefully, and the decision must be made on a case-by-case basis. There is, for example, certain personal information such as social security numbers or credit card numbers that cannot be released.

An interesting trend is for governments to adopt an open records policy. That is to say, all the government's records are available electronically for anyone to see, except records deemed to be exempt from disclosure. Requestors are then directed to the website to access most records.

Ports are encouraged to consult with legal counsel when addressing public records requests, and especially when determining which records may be exempt from disclosure.

TRAINING REQUIRED BY LAW

Washington State law requires that new members of governing bodies, including port commissions, receive training on both OPMA and PRA. Further, the law requires commissioners to receive refresher training on these issues at least every four years. This training can be online, in person, or through other acceptable means, and it should be documented for the record. Washington State provides many resources for this purpose, and WPPA periodically provides the training.

Beyond state requirements, OPMA and PRA training are beneficial for commissioners for many reasons, including the fact that violations can result in actions against the individual and the port. According to RCW 42.30.205 and 42.56.152, violations of OPMA can result in a \$100 civil penalty against individuals, a reward of legal costs to the party seeking the remedy, and the action taken at the meeting in violation becoming null and void.

GLOSSARY OF TRANSPARENCY AND ETHICS TERMS

Action: All transactions of a governing body's business, including receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final action.

Ethics: The principles of conduct governing an individual or a group.

Executive Session: Closed session of a port commission as part of a regular or special meeting. Discussion is limited to specific topics authorized by statute. No action can be taken.

Final Action: 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, regarding a motion, proposal,

resolution, order, or ordinance.

Governing Body: The multimember board, commission, committee, council, or other policy 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.

Meeting: All meetings of a quorum of a city council, board of county commissioners, or other governing body (including certain kinds of committees) gathering with the collective intent of transacting the governing body's business.

Public Agency: Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington.

Public Record: Any writing that is prepared, owned, used, or retained by any state or local government agency, and which contains information that relates to the conduct of government or the performance of any governmental or proprietary function.

Regular Meeting: A recurring meeting held pursuant to a schedule fixed by resolution.

Special Meeting: All meetings other than regular meetings.

Writing: Includes not only traditional written records, but also photostats, photographs, and every other means of recording any form of communication or representation, including letters, words, pictures, sounds, symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic and punched cards, discs, drums, diskettes, sound recordings, and other documents, including existing data compilations from which information may be obtained or translated.

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