Washington State
House of Representatives
Office of Program Research

BILL ANALYSIS

State Government & Tribal Affairs Committee

HB 2141

Brief Description: Concerning governing body membership under the open public meetings act.

Sponsors: Representative B. Sullivan.

Brief Summary of Bill

- Clarifies the definition of "meeting" under the Open Public Meetings Act (OPMA) to specifically include meetings by telephone and electronics methods.
- Provides that the OPMA applies to members-elect from the time of their election.

Hearing Date: 2/27/07

Staff: Colleen Kerr (786-7168).

Background:

Open Public Meetings Act
Washington's Open Public Meetings Act (OPMA) was enacted 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 in 1972.

Washington's OPMA states that: ""[m]eeting" means meetings at which "action" is taken." It also states: ""Action" means the transaction of official business of a public agency by a governing body…" The OPMA requires a meeting to have notice to be valid. Pursuant to the OPMA, governing bodies must adopt a schedule of regular meetings and provide notice for each special meeting; emergency meetings do not require notice, but must meet the statutory definition. If the required notice for a meeting has not been given, the action taken is null and void as if it had never occurred.

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.

Telephone and Electronic Communications under the OPMA

Telephone communications and email communications are not addressed in the OPMA. The Attorney General's Public Records & Open Meetings Deskbook from 1998 states: "It is generally agreed that an agency may conduct its meetings where one of the members of the governing body attends by telephone and a speaker phone is available at the official location of the meeting so as to afford the public the opportunity to hear the member's input. This should only occur when a member is unable to travel to the meeting site and would not include "telephone trees" where the members repeatedly call each other to form a majority decision." The Deskbook is silent on email or electronic meetings.

Other states have provisions in statute that either define meetings of a governing body to include telephone and electronic communication or that allow meetings by any means provided there is opportunity for interaction. These states include California, Iowa, Kansas, and Tennessee.

Members-elect under the OPMA

Washington's OPMA is also silent regarding its applicability to members-elect of governing bodies. In relevant part, the OPMA only defines "governing body", stating: ""Governing body" means the multimember board, commission, committee, council, or other policy or rulemaking body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony of public comment."

Both California's Brown Act and Florida's Sunshine Act hold members-elect to the requirements of their respective open public meetings acts. At the time of enactment, however, neither statute addressed members-elect. These laws were changed via different methods. In California, the California Legislature amended the Brown Act in 1994 to make it applicable to members-elect. Prior to that law coming into effect, a case was filed challenging whether the Brown Act as it stood did apply to members-elect. A California court held that the California Legislature's amendment of the Brown Act to expressly apply its provisions to members-elect indicated intent to change existing law, meaning that the Brown Act in its original form, where it was silent as to its applicability to members-elect, did not apply to members-elect in the instant case. *Sutter Bay Assocs. v. County of Sutter*, 58 Cal. App. 4th 860.

In Florida, the applicability of the Sunshine Law to members-elect is the result of now well-established case law that stems from a 1973 case where a Florida court held to do otherwise would frustrate the legislative intent of the Sunshine Law. *Hough v. Stembridge*, 278 So.2d 288 (1973). This holding was in keeping with Florida's long-standing commitment to open government legislation that dates back to the enactment of its first Public Records Law in 1909. The Florida Legislature has not since addressed the issue.

Current Case Law

The issue of what constitutes a meeting and whether the OPMA applies to members-elect was the subject of a 2001 Court of Appeals, Division II case. In *Wood v. Battle Ground School District, 107 Wn. App. 550* (2001), the Court stated: "the exchange of emails can constitute a 'meeting'", citing the OPMA's broad definition of "meeting" and the law's mandate to liberally construe this statute in favor of coverage. According to this ruling, the OPMA can apply, depending on the circumstances, to e-mail communications between a majority of the members of a governing body if a majority of the members "collectively intend to meet [by e-mail] to transact the governing body's official business" and they "communicate about issues that may or will come before the [governing body] for a vote."

The *Wood* Court went on to point out that such a meeting would nevertheless violate the OPMA because the meeting would lack notice and any action would be null and void; the OPMA is not violated, however, when the members of a governing body merely receive information by e-mail about upcoming issues. The ruling did not go to telephone calls, though it did cite the Attorney General's Deskbook regarding telephone trees.

The *Wood* case also addressed the issue of members-elect. The *Wood* Court held that the OPMA does not apply to members-elect of a governing body because they have no authority to transact the official business of the public agency. It is the analysis supporting the ruling that is worth noting: it cited to both California and Florida, pointing out that both the Sunshine Act and the Brown Act now apply to members-elect, although they did not at their inception, and singled out the California pattern of enactment. Essentially, the *Wood* Court used the rationale of the California court to find that the OPMA does not apply to members-elect and explicitly left the matter to the Legislature: "Wood contends that applying the OPMA to members-elect is consonant with the legislative purpose. We do not disagree but we concur with the California court that it is 'for the Legislature, not the judiciary, to determine a basic legislative question such as whether [members-elect are] covered.'"

Summary of Bill:

As applied to the Open Public Meetings Act, a meeting may be in person, by telephone, or by electronic means provided there is the opportunity for members of the governing body to hear, deliberate, or take action on the business or affairs of the agency or governing body. Electronic or telephone meetings are subject to existing notice requirements.

Any person who has been elected to serve as a member of a governing body is subject to the requirements of this chapter from the time of election.

Appropriation: None.

Fiscal Note: Not requested.

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