KOEGEN EDWARDS LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: Lisa Roberts

FROM: Michael F. Connelly

DATE: September 18, 2012

RE: Issues Concerning Recordings of Executive Sessions

I. Summary

Two concerns are raised by the possibility of recording executive sessions. The first is its impact on the candor and willingness to have free and open discussions between attorney and client, or concerning a topic necessarily kept private; and the second is the possibility that communications occurring during these sessions, that are assumed to be confidential, may be disclosed anyway pursuant to either the Public Records Act, chapter 42.56 RCW, or in discovery during litigation. Both concerns are significant and discussed in detail below.

II. Necessity for Free and Open Discussions

There are few exceptions to the Open Public Meeting Act (the "OPMA"). Because of the strong public policy[1] that underscores the act and subsequent court decisions and legislative changes that continue to reemphasis its importance, executive sessions currently protect only

1. The purpose of the OPMA is clearly stated in the legislative declaration in RCW 42.30.010:

> The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.
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> The people of this state do not yield their sovereignty to the agencies which 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 retain control over the instruments they have created.

In enacting the OPMA, the legislature used "some of the strongest language we have seen in any legislation." *Cathcart v. Anderson*, 85 Wn.2d 102, 107, 530 P.2d 313 (1975) (review denied). *See also Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 482, 611 P.2d 396 (1980). The purpose of the OPMA is to "permit the public to observe all steps in the making of governmental decisions." *Cathcart v. Anderson*, 85 Wn.2d 102, 530 P.2d 313 (1975) (review denied). Additionally, it is stated in RCW 42.30.910 the "purposes of this chapter . . . shall be liberally construed." RCW 42.30.910. Case law provides an equally strong reading and interpretation of the OPMA. *Clark v. City of Lakewood*, 259 F.3d 996, 1012-13 (9th Cir. 2001) (stating "The purpose of the OPMA is to ensure that public bodies make decisions openly."). *West v. State, Washington Assn' of County Officials*, 162 Wn. App. 120, 131 (Division II 2011) (stating the "legislature enacted the OPMA as part of a nationwide effort to make government affairs more accessible and transparent."). In enacting the OPMA, the legislature intended to ensure "government accountability to the public." *West v. State, Washington Assn' of County Officials*, 162 Wn. App. 120, 131 (Division II 2011).

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communications and documents where disclosure could expose a municipality to unnecessary risk or harm. The exceptions are specific, limited and necessary.[2]

At the time the OPMA was adopted, the state of Washington and other similarly situated states such as Illinois and California recognized that it was not always a good idea "to allow the public to be privy to every single aspect of the business of government," particularly because some details "should not be open to perusal of everyone," and thus exceptions to statutes such as the OPMA exist.[3]

The particular enumerated reasons for holding an executive session include seeking "to balance the public policy against secrecy and government affairs" while not inhibiting "full and robust discussions of issues relating to permissible subjects for consideration in executive sessions." *See In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586, 30 P.3d 474,476 (2001). *See also* 2008 House Bill No. 3292, § 2.[4]

One permitted reason for holding an executive session is to protect attorney-client privilege and/or an attorneys work product that is disclosed in such a session. The Court has held that a city council did not violate the OPMA by holding an executive session to maintain attorney-client privilege where allowance of public knowledge of the discussion may cause adverse legal or financial consequences to the council. In *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586, the Court stated:

> The Legislature sought to balance the public policy against secrecy and governmental affairs and the attorney-client privilege. In our jurisprudence, the attorney/client privilege has its foundation in the United States Constitution. Its constitutional foundation is found in the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel and the due process clause of the Fourteenth Amendment. *These rights can only be protected if there is candor and free and open discussion* between client and counsel."
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> (Emphasis added.)

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2. These exceptions include but are not limited to: (1) considering matters affecting national security, (2) receiving and evaluating complaints or charges brought against a public officer or employee, (3) evaluating the qualifications of an applicant for public employment, and (4) discussing with legal counsel matters relating to agency enforcement actions, litigation, or potential litigation. RCW 42.03.110(1)(a)-(o).

3. Wash. AGO 1985 No. 4, see also 34 A.L.R. 5th 591 (1995).

4. 2008 House Bill No. 3292, § 2, states "The purpose of this act is to encourage governing bodies to strictly comply with the rules governing executive sessions and promote the public interest by creating greater governmental accountability in the use of executive sessions. However, it is not the purpose of this act to inhibit full and robust discussions of issues relating to permissible subjects for consideration in executive sessions." Available at http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/3292.HBA%2008.pdf.

Discussion of this privilege and the necessity for confidentiality is also found in the legislative record. Specifically concerning 2007 House Bill No. 1384, testimony against the clarification of "potential litigation"[5] contained the following:

> 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.

Another permitted reason for holding an executive session is to discuss the qualifications of an applicant for public employment. *See* RCW 42.30.110(1)(g). The Court of Appeals in *Port Townsend Pub. Co. Inc. v. Brown*, 18 Wn. App. 80, 84, 567 P.2d 664, 666-67 (Division II 1977) held that the main motivation behind executive sessions for the purposes of discussing potential employment as one of governmental efficiency. The Court stated:

> The main motivation . . . appears to be a feeling that government will operate far more efficiently if it is permitted to organize and staff itself in private. It is unrealistic to expect officials to be candid about prospective personnel in public because any criticism can take on an unintended personal tone. The interested citizen's "need to know" here is not so critical. He will have ample opportunity to judge the performance of his public officials, as long as he has adequate access to their official proceedings and actions.

The Court held that a board of county commissioners was allowed meet in a closed session to discuss implementing a program under the federally-funded Comprehensive Employment and Training Act (CETA)).[6]

III. Potential Recording of Executive Sessions/Public Record Issues

There has been legislation proposed that would provide an exemption under the Public Records Act for audio or video recordings of executive sessions.[7]

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5. House Bill Report No. 1384. Available at http://apps.leg.wa.gov/documents/billdocs/2001-02/Pdf/Bill%20Reports/House/1384.HBR.pdf. A substitute bill was presented to the House to clarify "potential litigation" in regards to holding an executive session; the Bill stated the executive session would not be exempt simply because an attorney is present or consulted. *See also* RCW 42.30.110(i).

6. The legislature changed the statute under which the *Port Townsend* case was brought shortly after, but not necessarily in direct response to, the holding by the Court of Appeals. The statute, which allowed executive sessions for "matters affecting . . . the appointment, employment, or dismissal of a public . . . employee" no longer exists. *See Port Townsend Pub. Co. Inc. v. Brown*, 18 Wn. App. 80, 84, 567 P.2d 664, 666 (Division II 1977). *See also* Wash. AGO 1985 No. 4 (stating "Thereafter, however, although not necessarily as a reaction to [the *Port Townsend*] ruling, certain language of the statute was amended."

7. 2012 House Bill No. 6109. Current status as of April 11, 2011, is: by resolution, reintroduced and retained in present status. *See* http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/House/6109%20HBA%20SGTA%2012.pdf. *See also* http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6109.pdf. In the Senate vote on February 13, 2012, the Bill passed 39 to 9. No roll call or voting records are available for the House counterpart bill (House Bill 2406) as of September 12, 2012.

This proposed legislation may require "a governing body holding an executive session" under chapter 42.30 RCW to make an audio recoding of the executive session and retain such recording for a period of two years. *See* 2008 House Bill No. 3292, §2 (3)(a). While allowing this to occur, the proposed legislation purported to offer slight relief, in an effort to maintain a level of candor and free discussion, by stating that while the recordings would be considered public records, they would not be subject to public inspection and/or copying unless authorized by either the governing body, or through a court order. 2008 House Bill No. 3292, §(3)(a). The party challenging the executive session's lawfulness would bear the burden of proof. 2008 House Bill No. 3292, §(3)(b)(i). If the Court does review these recordings, it would do so in camera, without divulging the contents to the challenger, and determines whether compliance with chapter 42.30 RCW was met. 2008 House Bill No. 3292 §(3)(b)(ii)-(iii). *See also* 2008 House Bill No. 3292, pages 2-3.[8]

To adopt, now, a policy requiring such a recording at a local level, prior to passage of any legislation protecting that practice, would expose this record to public record requests without the express disclaimer, that is, if one of the express and limited exceptions to the Public Records Act did not apply, the record in part or in whole would have to be produced.

Even if the above-discussed statutes were to be passed, the protections offered are limited. It would allow disclosure of such a recording if, ". . . authorized by either the governing body, or through a court order." It is unclear what the basis for the court order would be if not simply an application of the Public Records Act.

IV. Rules of Discovery

The rules of discovery in litigation require disclosure of any matter, not privileged, relevant to the subject matter of the pending action. Inadmissible information is also discoverable if it is reasonably calculated to lead to discovery of admissible evidence. CR 26(b)(1).

The limitations on discovery include privileged matters unless the privilege is deemed waived. For example, filing a lawsuit against a former attorney can be considered a waiver of the privilege. *Pappas v. Halloway*, 114 Wn.2d 198 (1990); use of the privileged materials in the decision making process can also be considered a waiver. See *Mission Springs Inc. v. City of Spokane*, 134 Wn.2d 947 (1998); and the filing of a personal injury lawsuit can be considered a waiver of the privilege. RCW 5.60.060(4)(b).

Attorney work product can also be protected in certain circumstances, but not all. See CR 26(b)(4); See also *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716 (2007). This limitation can be bypassed based upon a showing of necessity, disclosure of materials to certain witnesses or the filing of a lawsuit as discussed above.

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8. *Available at* http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/3292.HBA%2008.pdf.

V. Conclusion

Once recording of executive sessions is required by either local ordinance or state statute, two consequences could result. First, it will be impossible to predict, given the vagaries of public records and discovery laws, whether or not the recording would be available to the public in any given circumstance. The second is that the frank and candid conversations currently allowed between legislators and counsel and between members of a legislative body itself would likely be reduced or limited. Legal advice may further be removed from the council as a body in its entirety if there is no assurance of confidentiality. Attorneys may not deem their own professional requirements of confidentiality achievable.