IN THE SUPREME COURT OF THE STATE OF OREGON

ROB HANDY,
Plaintiff-Appellant, Respondent on Review,

v.

LANE COUNTY, JAY BOZIEVICH, SID LEIKEN and FAYE STEWART,
Defendants-Respondents, Petitioners on Review.

Lane County Circuit Court No. 161213685
CA A153507
SC S063725

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# RESPONDENT'S BRIEF ON THE MERITS

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Petition for review of decision of Court of Appeals on appeal from judgment in the Circuit Court for Lane County, Honorable Richard L. Barron, Judge

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Opinion Filed: November 4, 2015
Author of Opinion: Garrett, Presiding Judge
Concurring Judge(s): Ortega, J., Devore, J.
Dissenting Judge(s): Devore, J.

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Filed May 2016

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## STATUTES

## STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Respondent on Review concurs with the Petitioners' Statement of Historical and Procedural Facts.

## SUMMARY OF ARGUMENT

Petitioners on review mischaracterize the Court of Appeals' holding. The Court of Appeals did not find a violation of the Oregon Public Records Law, nor did it ignore central elements of ORS 192.630(2). The Court of Appeals did not find intent where there is none. The Court neither stated nor implied that communication merely to determine availability for a meeting violates the OPML.

The Court of Appeals Majority decision is inline with the Oregon Attorney General's guidance, as well as caselaw and attorney general guidance from California, Florida, and Washington.

The Petitioners improperly seek legislative action by this court. The legislature has already acted, and the legislative history strongly supports the Court of Appeals Majority decision.

## I. PETITIONERS ON REVIEW MISCHARACTERIZE THE COURT OF APPEALS' HOLDING

The Petitioners on Review consistently misstate the Court of Appeals' holding in this matter, in order to depict its determinations as beyond any permissible interpretation of the Oregon Public Meetings Law (hereinafter OPML)

and hopelessly impractical. At the same time, the Petitioners urge the Supreme Court to engage in an extreme form of judicial legislating in the event the problems they perceive are not remedied by the Legislature itself. A rejection of these arguments is fully warranted.

### A. The Court of Appeals did not find a violation of the Oregon Public Records Law

The Petitioners erroneously allege that the Court of Appeals found that the actions in question "resulted in a violation of the Oregon Public Meetings Law." Petitioners' Merits Br at 2.

In fact, the Court explicitly reserved its opinion as to "the ultimate question of whether defendants violated ORS 192.630(2)." Ct of App Op at 667. As the Court of Appeals correctly noted, the instant case was dismissed on the pleadings, before any opportunity for discovery or briefing on the merits.

### B. The Court of Appeals Did Not Ignore Central Elements of ORS 192.630(2)

The Petitioners allege that the Court ignored the question "whether or not there was a commonly agreed purpose of obtaining a collective commitment or promise." Pet. Br. at 2 at 30.

To the contrary, the Court stressed that defendants "will later be entitled to judgment as a matter of law, if, after discovery, plaintiff cannot show that defendants' private communications had the purpose of "deliberation" or

"decision." Ct of App Op at 667.

### C. The Court of Appeals Did Not Find Intent Where There is None

Petitioners incorrectly assert that the Court of Appeals found intent. Pet Br at 223. The Court did not find intent at all. Instead, it stated that, in the context of review of a special motion to strike under ORS 31.152, and prior to the opportunity for discovery, it could not conclude that the existing record failed to contain facts supporting an inference that three Commissioners deliberated over whether the Thayer letter should be released. Ct of App Op at 667.

The Petitioners also ignore the context of the present briefing in their renunciation of the majority's "'inference' that a decision had already been made." Pet Br at 30. In fact, the majority stated only, and carefully (applying the correct standard of review), that,

> "[v]iewed in the light most generous to plaintiff's theory of liability, [the] facts would support an inference – at this nascent stage of the litigation – that the three commissioners at least 'deliberated,' in a series of telephone calls and emails over the course of several hours, toward the final 'decision' to release the Thayer letter, and perhaps even made that decision." Ct of App Op at 667.

### D. The Court of Appeals Neither Stated Nor Implied that Communication Merely to Determine Availability for a Meeting Violates the OPML

Petitioners incorrectly assert that the Court of Appeals held that communications solely aimed at determining availability for a meeting violate the

Public Meetings Law. Pet Br at 25-26. That allegation was made up of whole cloth. As noted directly *supra*, the Majority unambiguously focused on the allegation that a quorum deliberated towards the final decision (whether or not to release the Thayer letter).

### E. The Petitioners Incorrectly Imply that the Court of Appeals Decision is Out of Line with Current Guidance

Petitioners' brief paints a picture of a Court of Appeals mandate that is a drastic game-changer for public bodies. But the Oregon Attorney General's Public Records and Meeting Manual (last revised 2014) (available at http://www.doj.state.or.us/pdf/public_records_and_meetings_manual.pdf, last visited May 16, 2016) has provided guidance for years defining the OPML broadly so as to provide for public participation where the question is close.

For example, as the Manual notes, "The Public Meetings Law expressly recognizes that meetings may be conducted by telephonic conference calls or 'other electronic communication.'" Manual at 141.

> "Notice and opportunity for public access must be provided when meetings are conducted by electronic means. For nonexecutive session meetings held by telephone or other electronic means of communication, the public must be provided at least one place where its members may 'listen' to the meeting by speakers or other devices. In the alternative, the public may be provided with the access code or other means to attend the meeting using electronic means. ORS 192.670(2); ORS 192.672(1). If electronic access is provided, the technology used must be sufficient to accommodate all attendees, and any costs associated with providing access may not be passed on to the public.

Manual at 141. Specifically,

> communications between and among a quorum of members of a governing body convening on electronically-linked personal computers are subject to the Public Meetings Law if the communications constitute a decision or deliberation toward a decision for which a quorum is required, or the gathering of information on which to deliberate.

Manual at 142.

The Manual also makes clear that the types of decisions encompassed by the "deliberating towards a decision" provision is quote broad. The Manual explains:

> The Public Meetings Law defines a meeting as the convening of any of the "governing bodies" described above "for which a quorum is required in order to make a decision **or to deliberate toward a decision** *on any matter*." ORS 192.610(5) ([italicized] emphasis added).

Manual at 136 (bold emphasis added).

The "Quorum" section of the Manual elaborates:

> Ordinarily, staff meetings are not covered by the Public Meetings Law because no quorum is required. A staff meeting called by a single official is not covered by the Public Meetings Law because the staff do not make decisions for or recommendations to a "public body." If, however, a quorum of a governing body, such as a three-member commission, meets with the body's staff to deliberate on matters of "policy or administration," ORS 192.610(3), or to clarify collegially a decision for staff, the meeting is within the scope of the law. Thus, we have stated: [FN 305 - OP-6292 at 6 (see App O)].
>
> > [G]overning body meetings with administrative staff are subject to the requirement of the Public Meetings Law if a quorum of the members of the governing body convenes to receive information from staff on topics related to particular substantive or administrative matters that a quorum of the governing body will or may be called upon to decide.

Manual at 138.

Page 139 of the Manual provides even further detail on this point:

> The Public Meetings Law applies to all meetings of a quorum of a governing body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. **Even if a meeting is for the sole purpose of gathering information to serve as the basis for a subsequent decision or recommendation by the governing body, the meetings law will apply**. [FN 307 - 38 Op Atty Gen 1471, 1474 (1977) (see App E); *Oregonian Publishing Co.*, 95 Or App at 505-06 (1989) (see App C); OP-6292 (see App O).] This requirement serves the policy expressed at ORS 192.620 that an informed public must be aware not only of the decisions of government, but also of "the information upon which such decisions were made." Hence, except for on-site inspections, discussed below under Statutorily Exempt Public Meetings, information gathering and investigative activities of a governing body are subject to the law. If the requirements of the law would unduly hamper an investigation, the body could direct members to make individual reports to the governing body as discussed above under Quorum Requirements.

Manual at 139 (emph. added).

Further allaying the Petitioners' "sky is falling" characterization of the Court of Appeals opinion, the Attorney General's Manual has made clear that there are many situations which are *not* covered by the OPML – for example, certain staff meetings (Manual at 138-39); training sessions "carefully structured to avoid any discussion of official business" (Manual at 141); and purely social gatherings (Manual at 140, citing *Harris v. Nordquist*, 96 Or App 19, 771 P2d 637 (1989) (social gathering of school board, at which members sometimes discussed "what's going on at the schools," did not violate OPML).

In contrast, a retreat or goal-setting session is "nearly always subject to the Public Meetings Law because the governing body is deliberating toward a decision on official business or gathering information for making a decision." Manual at 140.

## II. THE PETITIONERS IMPROPERLY SEEK LEGISLATIVE ACTION BY THIS COURT

### A. The Petitioners Improperly Urge the Court to Act as a Legislature in Their "Fourth Proposed Rule of Law"

The Petitioners first properly state that the role of defining terms is for the legislature, but then, in the very next sentence, urge the Court to "define 'deliberate' as: "Taking action in the form of a vote, or expressing a final position, on any item of business" within its jurisdiction. Petitioners' Br at 4 and 42.

That suggestion, if adopted by this Court, would flagrantly ignore the Legislature's admonitions in ORS 174.010, and would conveniently nullify the import of the key phrase "deliberating toward a decision" of ORS 192.630(2).

### B. The Petitioners Improperly Seek Legislative Action by the Court in Their Proposed Rule and Definition

Petitioners propose that this Court restrict the operation of ORS 192.630(2) to any "*contemporaneous* gathering of a quorum of a governing body" (Pet Br at 41, emph. added), stating that such would be "true to the intent of the 1973 Oregon Legislature that created the OPML." But to allow the type of purposeful private

deliberation that Respondent/Plaintiff here alleges would be in clear violation of ORS 174.010, and would be contrary to the legislature's explicit purpose that decisions by government bodies "be arrived at openly." Ct of App Op at 661 (citing Or Laws 1973, ch 172 § 1). Confining subsection (2) of ORS 192.630 to only "contemporaneous" gatherings of a quorum would "easily defeat" that legislative objective. *See* Ct of App Op at 662.

The amicus brief submitted by the Oregon Newspaper Publishers' Association presents a viable alternative means of reaching the same conclusion. Either approach supports the Legislature's strong policy directive set forth in ORS 192.620 that emphasizes the central importance of the public's awareness of the deliberations and decisions of their lawmakers, and not only with respect to such actions undertake at "contemporaneous" meetings.

## III. THE LEGISLATIVE HISTORY STRONGLY SUPPORTS THE COURT OF APPEALS MAJORITY DECISION

Petitioners on Review are correct that members of the Legislature's 1973 Joint Special Committee on Professional Responsibility carefully chose the terms they employed in what became ORS 192.630(1) and (2). Pet. Merits Brief at 11-12. Regrettably, however, that is about the only accurately thing Petitioners say about the legislative history of these specific provisions.

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### A. The Court of Appeals Applied Different Definitions of the Words "Meet" and "Meeting"

In particular, it is simply not true that "[t]he members of the JSCPR made a clear decision to adopt the same language in each provision with the intent that both forms of the word 'meeting' were to include both formal and informal meetings." *Id*. at 12. To the contrary, the discussion among members of the JSCPR immediately preceding its final decision to include two subsections, rather than just one, clearly establishes the Committee's intent that ORS 192.630(2) more broadly governs informal private deliberations, while subsection (1) applies to formally convened meetings of a governing body. Tape Recording JSCPR, Senate Bill (SB) 15, Mar. 19, 1973, Tape 3, Side 2.

The Court of Appeals developed the essential background. It noted that the Committee, after considerable discussion, had defined the term "meeting" as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or deliberate towards a decision on any matter." Ct of App Op at 660 (citing Tape Recording JSCPR, SB 15, Mar. 19, 1973, Tape 3, Side 2). Continuing, the Court observed that:

> "The members of the committee, however, were not fully satisfied with how that definition of the term meeting would work in conjunction with the operative section of the bill that required that 'all meetings * * * shall be open to the public.' One of the committee members, Senator Wallace Carson, opined that a definition of the word 'meeting' that included the word 'convening' was problematic because convening implies a formal gathering.

> Tape Recording, JSCPR, Senate Bill (SB) 15, Mar 19, 1973, Tape 3, Side 2. One of the co-chairs, Senator Jack Ripper, replied that the bill could refer instead to 'formal and informal convening' to ensure that the bill would cover situations involving informal gatherings. *Id*.
>
> "At the end of that discussion, Jim Durham, a representative of the attorney general, was asked to discuss an alternative public meeting bill that the Attorney General had proposed. *Id*. Durham explained that the text of the Attorney General's bill provided that no governing body 'shall meet privately for the purpose of discussing or conducting public business.' *Id*. Durham opined that adding that text to the bill being considered by the committee would broaden the bill. *Id*. Ripper suggested that the text be added to the end of the definition of the term 'meeting.' *Id*. Ultimately, however, it was decided that that prohibition would be added as a stand-alone provision of the bill. *Id*. That subsection would become the one at issue here, ORS 192.630(2).

Ct of App Op at 660-61.

The Court of Appeals majority's summary of the principle discussion is accurate, but Respondent offers additional detail to resolve related issues. It was, as the Committee's Minutes establish, Senator Carson who raised the question whether the material that became ORS 192.630(2) was "of significant importance to bring it out" and place it a stand along subsection. Minutes, JSCPR Meeting of Mar. 19, 1973 at p. 3, and Tape Recording JSCPR, SB 15, Mar 19, 1973, Tape 3, Side 2 (at approx. 72:55). Representative Ingalls, the Committee Chairman, agreed, noting "that might be better even yet." He continued (at 73:00):

> "New (2).
>
> "OK, and then what, we cancel both (6) and (7)?

[Senator Carson]:

"No, Mr. Chairman, I think that Senator [inaudible] has a kind a double shot, between . . . . [W]e restore, if I understand Senator Ripper, 'meeting' to mean *convening* a quorum of a governing body, and that restores the formal aspect, and then we make a direct prohibition of the informal.

. . .

[Chairman Ingalls (73:58)]:

"OK, when somebody gets it down over there, on (6) we'll read how?

[Committee Assistant Grattan Kerans]:

"'Meeting' means the convening of a quorum of a governing body for the purpose of making a decision or considering any matter before a governing body.

. . .

[Chairman Ingalls (74:30)]:

"You all got that now? 'Meeting' means the convening of a quorum of a governing body for the purpose of making a decision or considering any matter before a governing body.

"New number (2) reads how?

[Senator Jack Ripper (Co-Chairman) (74:34)]:

"'No quorum of a governing body shall meet privately for the purpose of discussing public business.'

. . . .

[Chairman]:

"OK, read it again, Jack, will you?

[Senator Ripper]:

"'No quorum of a government body shall meet privately for the purpose of discussing or deciding public business.'

[Chairman]:

"Everybody happy?"

. . .

[Chairman Ingalls (Min. 77:23)]:

"Have you got it all Grattan?

. . .

[Kerans (Min. 77:40)]

"OK so we've got: Section 3 (1): 'All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting of the governing body of the public body, except as otherwise provided by this Act.'

. . .

"'(2) No governing body or quorum of members thereof of shall meet privately for the purpose of discussing or conducting public business. . . .'"[1]

Accordingly, while it is clear that the Committee limited the application of the injunctions contained in ORS 192.630 (1) and (2) to members of a governing

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[1] Prior to the Committee's next meeting on SB 15, in amendments written by Legislative Council and Committee Administrator Grattan Kerans, this provision was altered somewhat, to read: "No quorum of a governing body shall meet in private for the purpose of deciding on or considering any matter." Appendix A to Minutes of JSCPR of 3/26/73.

body who act in sufficient numbers to comprise a "quorum," as Judge Devore notes in dissent (Ct of App Op at 688), the Committee understood the injunction requiring open meetings of subsection (1) to apply to "convened" meetings only. In turn, it understood its injunction that a quorum of a government body may not meet in private, per subsection (2), to apply more broadly, namely whenever it can be said that a sufficient number of such members deliberated in private.

Subsection (1), as Senator Carson observed in the last substantive comment on these provisions of the day, applies to formally convened meetings, while subsection (2) applies "to the informal." Tape Recording JSCPR, SB 15, Mar 19, 1973, Tape 3, Side 2 (at, approx. 74:15).

In his dissent, Judge Devore also observed that "the legislature chose not to treat the conversation of any members, who are less than a quorum, as subject to the law," and concluded from this that "the legislature would not have dreamed" that individual conversations in less than a quorum might deliberate and decide a matter. But Judge Devore's conclusion was a non sequitur. The Committee's imagination was indeed fertile enough – and the Committee did specifically dream of such a situation.

Senator Carson, in fact, asked the Committee to consider the "mischief" that could result from the "quorum" restriction of the statute's scope wherein a governing body comprised of ten members might deem its quorum to require the

contemporaneous presence of at least nine. Tape Recording JSCPR, SB 15, Mar 19, 1973, Tape 3, Side 2 (35:50-37:35). In that circumstance, a majority of six might "meet," without being formally convened, presumably, in secret, and there and then deliberate to functionally decide a matter of public business, all without fear of the statute. The subsequent, formally convened meeting would then be for show.

Ultimately, of course, that risk was implicitly accepted by the Committee and the Legislature by its employment of the limiting term "quorum" indirectly in ORS 192.630 (1) (through the applicable definition of "meeting" found in ORS 192.610(5)) and directly in ORS 192.630(2). That risk was accepted, it appears, so that others might be avoided, including, presumably, the hypothesized situation wherein several governing body members might inadvertently violate the law by straying into business talk while on a skiing trip. Minutes, JSCPR Meeting of Feb. 26, 1973 at 8.

The fact that some risk was anticipated in the framing of the Public Meeting Law does not mean that the Legislature was willing to accept every risk that might be conceived of by future governing body members. In particular, there is no reason to think that the Committee, in expanding the scope of its prohibitions against secretive decision-making, would have anticipated that ORS 192.630(2) would not cover a situation such as the instant case – wherein, as alleged, enough

governing body members to constitute a quorum deliberated regarding public business through a set of proximate, serial, secret communications.

In sum, then, a fuller inspection of the legislative record reaffirms the Court of Appeals' conclusion that "ORS 192.630(2) contemplates something more than just a contemporaneous gathering of a quorum," and that "[a] series of discussions may rise to the level of prohibited 'deliberation' or 'decision.'"

### B. Petitioners Misstate Legislative History Regarding the Term "Quorum"

The Petitioners, citing only to the Court of Appeals dissent, in error assert that the term "quorum" is employed in ORS 192.630(2) to "make it clear that there had to be a gathering of a quorum of public officials to violate the statute." Pet Br at 5.

In fact, as discussed directly *infra*, the term "quorum" simply resolves the question of the threshold number of decision makers who must deliberate in private before the statute is even implicated in a particular case. Minutes 34-38 of March 19.

### C. Petitioners Misstate Legislative History Regarding the Term "Meeting"

The Petitioners, citing to no authority, aver: "The members of the JSCPR made a clear decision to adopt the same language in each provision [ORS 192.630 (1) and (2)] with the intent that both forms of the word 'meeting' were to include

both formal and informal meetings." Pet Br at 12.

To the contrary, as further discussed *supra* at 8-15 (Legislative History), the discussion among members of the JSCPR immediately preceding its decision to elevate its material to a separate subsection makes clear that ORS 192.630(2) applies to informal private deliberations while subsection (1) applies to formally convened meetings of a governing public body. Tape Recording JSCPR, SB 15, Mar 19, 1973, Tape 3, Side 2 at Minutes 74-75. Accordingly, the Court of Appeals majority was on firm ground when it noted that "ORS 192.630(2) contemplates something more than just a contemporaneous gathering of a quorum." Ct of App Op at 664. *See also* Attorney General Public Meeting Manual at 140 (noting that a purely social gathering is not subject to the OPML; but a goal-setting retreat is – "It does not matter that the discussion is 'informal' or that no decisions are made; it is still a 'meeting' for purposes of the Public Meetings Law.").

## IV. CASELAW AND ATTORNEY GENERAL GUIDANCE FROM OTHER STATES SUPPORTS THE MAJORITY'S INTERPRETATION

The Majority's opinion is in line with the authority Respondent has been able to locate from other states.

### A. California Caselaw and Attorney General Manual is in Line with the Majority Opinion

With good reason, the Majority cited the seminal California opinion

*Stockton Newspapers, Inc. v. Redevelopment Agency*, 171 Cal App 3d 95, 105 (1985). In that case, the court stated:

> [We decide] whether a series of nonpublic telephone conversations, each between a member of the governing body of a local agency and its attorney, for the commonly agreed purpose of obtaining a collective commitment or promise by a majority of that body concerning public business, constitutes a "meeting" within the purview of the act. We conclude that such a series of telephone contacts does constitute a meeting within the act and, construed liberally as we are enjoined to do (Code Civ. Proc., § 452), that the complaint sufficiently alleges the occurrence of such a meeting and therefore, a violation of the act.

The *Stockton* opinion was cited with approval in the California Attorney General's "Handy Guide to The Bagley-Keene Open Meeting Act 2004":

> **Serial Meetings**
>
> The Act expressly prohibits the use of direct communication, personal intermediaries, or technological devices that are employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body outside of an open meeting. (§ 11122.5(b).) Typically, a serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members. For example, a chain of communications involving contact from member A to member B who then communicates with member C would constitute a serial meeting in the case of a five-person body. Similarly, when a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred. In addition, a serial meeting occurs when intermediaries for board members have a meeting to discuss issues. For example, when a representative of member A meets with representatives of members B and C to discuss an agenda item, the members have conducted a serial meeting through their representatives acting as intermediaries.
>
> In the *Stockton Newspapers* case, the court concluded that a series of

individual telephone calls between the agency attorney and the members of the body constituted a meeting. [FN 3 – *Stockton Newspapers, Inc.* v. *Redevelopment Agency* (1985) 171 Cal. App. 3d 95, 105. *See also*, 65 Ops. Cal. Atty. Gen. 63, 66 (1982); 63 Ops. Cal. Atty. Gen. 820, 828-829 (1980).] In that case, the attorney individually polled the members of the body for their approval on a real estate transaction. The court concluded that even though the meeting was conducted in a serial fashion, it nevertheless was a meeting for the purposes of the Act. An executive officer may receive spontaneous input from board members on the agenda or on any other topic. But problems arise if there are systematic communications through which a quorum of the body acquires information or engages in debate, discussion, lobbying, or any other aspect of the deliberative process, either among themselves or between board members and the staff. Although there are no cases directly on point, if an executive officer receives the same question on substantive matters addressed in an upcoming agenda from a quorum of the body, this office recommends that a memorandum addressing these issues be provided to the body and the public so they will receive the same information. This office has opined that under the Brown Act (the counterpart to the Bagley-Keene Act which is applicable to local government bodies) that a majority of the board members of a local public agency may not e-mail each other to discuss current topics related to the body's jurisdiction even if the e-mails are also sent to the secretary and chairperson of the agency, posted on the agency's Internet website, and made available in printed form at the next public meeting of the board. [FN 4 – 4 Cal. Atty. Gen., Indexed Letter, No. IL 00-906 (February 20, 2001)]. The prohibition applies only to communications employed by a quorum to develop a collective concurrence concerning action to be taken by the body. Conversations that advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications that contribute to the development of a concurrence as to action to be taken by the body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members of state bodies should avoid serial communications of a substantive nature that involve a quorum of the body. In conclusion, serial meeting issues will arise most commonly in connection with rotating staff briefings, telephone calls or e-mail communications among a quorum of board members. In these situations, part of the deliberative process by which information is received and processed, mulled over and discussed, is occurring without participation

> of the public. Just remember, serial-meeting provisions basically mean that what the body can not do as a group it can not do through serial communications by a quorum of its members.

Calif. Manual (available at http://ag.ca.gov/publications/bagleykeene2004_ada.pdf, last visited May 16, 2016) at 5-6.

### B. Florida Caselaw and Attorney General Guidance is in Line with the Majority Opinion

Similarly, the Florida Sunshine manual (available at http://myfloridalegal.com/webfiles.nsf/WF/RMAS-9UPM53/$file/2015SunshineLawManual.pdf, last visited May 16, 2016, at 16-17), states that both private telephone conversations and electronic communications are covered by the Florida public meetings law:

> Private telephone conversations between board members to discuss matters which foreseeably will come before that board for action violate the Sunshine Law. *See State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So 2d 229 (Fla 1st DCA 2004) (private telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law).
>
> . . .
>
> The Sunshine Law requires boards to meet in public; boards may not take action on or engage in private discussions of board business via written correspondence, e-mails, text messages or other electronic communications. *See* AGO 89-39 (members of a public board may not use computers to conduct private discussions among themselves about board business).
>
> Similarly, city commissioners may not use an electronic newsletter to communicate among themselves on issues that foreseeably may come before

> the commission. Inf Op to Syrkus, October 31, 2000. *And see* AGO 09-19 (members of a city board or commission may not engage on the city's Facebook page in an exchange or discussion of matters that foreseeably will come before the board or commission for official action); and Inf Op to Martelli, July 20, 2009 (authority should discuss business at publicly noticed meetings "rather than in a series of letters between authority members"). *Cf* Inf Op to Galaydick, October 19, 1995 (school board members may share laptop computer even though computer's hard drive contains information reflecting ideas of an individual member as long as computer is not being used as a means of communication between members).
>
> Thus, a procedure whereby a board takes official action by circulating a memorandum for each board member to sign whether the board member approves or disapproves of a particular issue, violates the Sunshine Law. Inf Op to Blair, May 29, 1973. *And see Leach-Wells v. City of Bradenton*, 734 So 2d 1168, 1171 (Fla 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members' individual written evaluations; the court held that "the short-listing was formal action that was required to be taken at a public meeting"); and AGO 93-90 (board not authorized to use employee evaluation procedure whereby individual board members send their individual written comments to the board chair for compilation and subsequent private discussion with the employee).

The Manual, like the Oregon Manual, includes reassurances that allay"slippery slope" arguments such as those presented by the Petitioners in the instant case:

> However, a commissioner may send a written report to other commissioners on a subject that will be discussed at a public meeting without violating the Sunshine Law, if prior to the meeting, there is no interaction related to the report among the commissioners and the report, which must be maintained as a public record, is not being used as a substitute for action at a public meeting. AGO 89-23. *And see* AGO 01-20 (e-mail communication of information from one council member to another is a public record but does not constitute a meeting subject to the Sunshine Law when it does not result in the exchange of council members' comments or responses on subjects involving foreseeable action by the council). *Cf* Inf

> Op to Kessler, November 14, 2007 (procedural rule requiring county commissioner to make a written request to commission chair to withdraw an item from the consent agenda does not violate the Sunshine Law).

The Florida Manual provides helpful analysis for parsing out the permissible from the impermissible:

> If, on the other hand, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to s 286.011, FS AGO 90-03. *See also* AGO 96-35 (school board member may prepare and circulate informational memorandum or position paper to other board members; however, use of a memorandum to solicit comments from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law.
>
> In addition, the Attorney General's Office has expressed concern that a process whereby board members distribute their own position papers on the same subject to other members is "problematical" and should be discouraged. *See* AGO 01-21 (city council's discussions and deliberations on matters coming before the council must occur at a duly noticed city council meeting and the circulation of position statements must not be used to circumvent the requirements of the statute). *Accord* AGO 07-35. *And see* AGO 08-07 (city commissioner may post comment regarding city business on blog or message board; however, any subsequent postings by other commissioners on the subject of the initial posting could be construed as a response subject to the Sunshine Law); and Inf Op to Jove, January 22, 2009 (posting of anticipated vote on blog).

### C. Washington Caselaw and Attorney General Guidance is in Line with the Majority Opinion

The Washington Open Public Meetings Act Manual (available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Open_Government_Internet_Manual/Open%20Government

%20Resource%20Manual%20-%20May%202016%20%28Word%29.pdf, last visited May 16, 2016, at 7), provides additional helpful guidance which is in line with the Majority's opinion in the instant case:

> If a majority or more of the members of a governing body discuss city, county, or district business by telephone or e-mail, are they having a meeting subject to the Act?
>
> Since the members of a governing body can discuss city, county, or district business together by telephone or by e-mail so as to be taking "action" within the above definition, the governing body can conduct a meeting subject to the Act even when the members are not in the physical presence of one another. [FN 23 – *Wood v. Battle Ground School Dist.*, 107 Wn App 550, 562-63 (2001)]. This type of meeting could take many forms, such as a conference call among a majority or more of the governing body, a telephone "tree" involving a series of telephone calls, or an exchange of e-mails. Since the public could not, as a practical matter, attend this type of "meeting," it would be held in violation of the Act. [FN 24 – Though, at least one local government in this state has held an online meeting of its governing body, providing notice under the Act and giving the public the opportunity to "attend."]
>
> Given the increasingly prevalent use of e-mail and the nature of that technology, members of city councils, boards of county commissioners, and special district governing bodies must be careful when communicating with each other by e-mail so as not to violate the Act. However, such bodies will not be considered to be holding a meeting if one member emails the other members merely for the purpose of providing relevant information to them. As long as the other members only "passively receive" the information and a discussion regarding that information is not then commenced by e-mail amongst a quorum, there is no Open Public Meetings Act issue. [FN 25 - Id. at 564-65.]

The *Wood* case discussed in the Washington Manual provides additional useful analysis: (107 Wn App at 565-66, 1217-18):

"[I]n light of the OPMA's broad definition of 'meeting' and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a 'meeting.' In doing so, we also recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. [FN 6] Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'

> ["FN 6 – As a California court noted:
>
> "'There is a spectrum of gatherings of agency members that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word "meeting." Requiring all discussion between members to be open and public would preclude normal living and working by officials. On other hand, permitting secrecy unless there is formal convocation of a body invites evasion.'
>
> *"Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal Rptr 480, 487 n 8, 263 Cal App 2d 41 (1968) (quoting Comment, Access to Governmental Information in California, 54 CAL L REV 1650, 1651 (1966)). *See also Regents of Univ. of Calif. v. Superior Court*, 20 Cal 4th 509, 976 P2d 808, 828-29, 85 Cal Rptr 2d 257 (1999) (Brown, J., concurring).]

"The OPMA is not violated if less than a majority of the governing body meet. *See In re Recall of Beasley*, 128 Wash 2d 419, 427, 908 P2d 878 (1996) (citing *In re Recall of Roberts*, 115 Wash 2d 551, 554, 799 P2d 734 (1990)). And the participants must collectively intend to meet to transact the governing body's official business. *See* 1971 Op Atty Gen No 33, at 19 (social function can be a meeting if it is scheduled or designed to discuss official business); *Roberts v. City of Palmdale*, 5 Cal 4th 363, 853 P2d 496, 503, 20 Cal Rptr 2d 330 (1993) (Brown Act applies to collective action, not the passive receipt of e-mail by members absent a concerted plan to engage in collective deliberation). Finally, the governing body members must communicate about issues that may or will come before the Board for a vote; in other words, the members must take "action" as the OPMA defines it.

"Thus, the OPMA is not implicated when members receive

> information about upcoming issues or communicate amongst themselves about matters unrelated to the governing body's business via e-mail. *See*, *e.g.*, RCW 42.30.070 ("It shall not be a violation . . . of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting[.]"); *Equitable Shipyards, Inc. v. State*, 93 Wash 2d 465, 482, 611 P2d 396 (1980) (independent and individual examination of documents by commission members prior to open meeting where contract was awarded did not violate the OPMA)."

Applying these standards, the court held that the plaintiff had established a prima facie case of "meeting" by e-mails, and that there were genuine issues of material fact as to whether the members held a meeting by e-mail.

*See also Eugster v. City of Spokane*, 110 Wash App 212, 224, 39 P3d 380, 385 (2002) (applying the *Wood* court's "broad definition of 'meeting' that encompasse[s] discussions via e-mail" due to the strong public policy and mandate for liberal construction. In *Eugster*, the court noted that the *Wood* court had "differentiated between the passive receipt of information by e-mail, and the active discussion of issues by exchanging e-mails. Although the Council member in *Eugster* had testified that she merely replied the next day that proposed interview schedules were "fine with me," "[e]ven so, under the *Wood* standards and the circumstances here, we cannot say further inquiry is unwarranted."

**CONCLUSION**

The Majority correctly decided that:

"Viewed in the light most generous to plaintiff's theory of liability, [the facts

> alleged] would support an inference – at this nascent stage of the litigation – that the three commissioners at least "deliberated," in a series of telephone calls and emails over the course of several hours, toward the final "decision" to release the Thayer letter, and perhaps even made that decision. If those discussions had that purpose, it is not material that some of the discussions occurred electronically or through Richardson as an intermediary." Ct of App Op at 667.

This Court should uphold the Court of Appeals decision, while taking this opportunity to clarify that a "serial quorum" that deliberates towards a final decision is subject to the Oregon Public Meetings Law.

Dated May 20, 2016.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that I electronically filed the foregoing document with the Appellate Court Administrator through the electronic filing portal.

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