From: Sarah Blossom [blossoms49@hotmail.com]
Sent: Tuesday, July 02, 2013 2:13 PM
To: Christine Brown
Subject: FW: OPMA Applies to Committees NOW?
Attachments: PUBLIC RECORDS -- OPEN PUBLIC MEETINGS ACT -- CORPORATIONS -- SMALL BUSINESS EXPORT FINANCE ASSISTANCE CENTER.html; ATT00001

From: islandsvcs@aol.com
Subject: Fwd: OPMA Applies to Committees NOW?
Date: Wed, 22 May 2013 21:52:49 -0700
To: blossoms49@hotmail.com

Sarah, The UAC was previously told we were not subject to the open public meeting act based on the following logic:

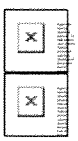
The Open Public Meetings Act

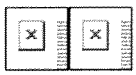
How it Applies to Washington Cities, Counties, and Special Purpose Districts
May 2008

EXCERPT - Under this definition, the subagency must be created by some legislative act of the governing body, such as an ordinance or resolution. A group established by a mayor to advise him or her could not, for example, be a subagency, because a mayor does not act legislatively. However, a legislative act alone does not create a subagency. According to the attorney general's office, a board or a commission or other body is not a subagency governed by the Act unless it possesses some aspect of policy or rulemaking authority. In other words, its "advice," while not binding upon the agency with which it relates . . . , must nevertheless be legally a necessary antecedent to that agency's action. If a board or commission (or whatever it may be termed) established by legislative action is merely advisory and its advice is not necessary for the city, county, or district to act, the Act generally does not apply to it.

The AG's office has performed as exhaustive review of thsi subject which I have included for your additional information. ATTACHED

--Forwarded Message Attachment--





Ken Eikenberry | 1981-1992 | Attorney General of Washington

PUBLIC RECORDS -- OPEN PUBLIC MEETINGS ACT -- CORPORATIONS -- SMALL BUSINESS EXPORT FINANCE ASSISTANCE CENTER

1. The Open Public Meetings Act and public records provisions of the Public Disclosure Act apply to state agencies. An organization or entity is a state agency for these purposes if it is the functional equivalent of a state agency.
2. A four-part analysis is used to determine if an organization or entity is the functional equivalent of a state agency: (1) whether the organization performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the organization was created by the government.
3. The Small Business Export Finance Assistance Center is not the functional equivalent of a state agency under this four-part analysis. Therefore, the Center is not subject to the Open Public Meetings Act or the public records provisions of the Public Disclosure Act.

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February 13, 1991

The Honorable Ray Moore
Washington State Senate
431 John A. Cherberg Building
Mail Stop: AS-32
Olympia, Washington 98504

Cite as: AGO 1991 No. 5

Dear Senator Moore:

By letter previously acknowledged, you requested our opinion on the following paraphrased question:

Is the Small Business Export Finance Assistance Center ("EAC" or "Center") subject to the Open Public Meetings Act (Chapter 42.30 RCW) and the open public records provisions of the Public Disclosure Act (Chapter 42.17 RCW)?

[[Orig. Op. Page 2]]

For the reasons stated below, we believe the EAC is not subject to the Open Public Meetings Act nor is it subject to the public records provisions of the Public Disclosure Act.

BACKGROUND

The EAC was first authorized in 1983 under chapter 43.210 RCW as the Export Assistance Center. Subsequent amendments in 1985 created its present structure. The Center is a nonprofit corporation authorized to be formed under chapter 24.03 RCW. RCW 43.210.020. The purpose of the Center is to assist small and medium-sized businesses in accessing export markets for their goods. This is accomplished by providing information about export opportunities and assisting in financing export transactions. RCW 43.210.020(1)-(3).

RCW 43.210.030 requires that the Center be "governed and managed" by seventeen directors appointed by the governor and confirmed by the Senate. The directors serve staggered six-year terms, and are to represent various geographic areas of the state, as well as financial institutions, a port district, and organized labor.

The Center has all the powers of any nonprofit corporation. However, the legislation authorizing the Center identifies both specific and general activities in which the Center may engage in exercise of these powers. RCW 43.210.040 (1), (3), (4). It may not use state funds to make or guarantee loans, nor is the state liable for any Center debts. RCW 43.210.040(2).

The Center is also eligible for state contracts, up to two years in duration, for export assistance services. Under any such contract, it must report to the state its efforts to obtain nonstate funding. RCW 43.210.050. The Center is not subject to appropriation control of the Legislature; any funds it may generate from provision of services or which it may receive from other sources are not deposited in the state General Fund.

The Center has no rulemaking authority under chapter 34.05 RCW to implement the provisions of chapter 43.210 RCW. Such authority resides in the state Department of Trade and Economic Development (DTED). RCW 43.210.060. DTED has not adopted any rules in this area. Directors and other employees of the Center are not employees of the state.

The Center is subject to sunset legislation. Unless extended by subsequent legislative enactment, the Center "and its powers and duties" terminate on June 30, 1991. RCW 43.131.326.

The legislative history surrounding the creation of the EAC indicates that due to the constitutional prohibition on the [[Orig. Op. Page 3]] lending of state credit, the Legislature was concerned about the Center's status as a part of state government. In inquiry on the Senate floor, Senator Vognild stated, "I think every effort was made in the bill to make sure that the state was not involved." Senate Journal, 48th Legislature, 1st Ex. Sess. (1983) at 1442. He later noted that "as a matter of fact the bill was drawn, we feel, very carefully and very tight to make sure the state is not liable for any of the center's operations." Id. at 1805.

ANALYSIS

The Open Public Meetings Act requires that meetings of "public agencies" be open to the public. RCW 42.30.030. The Public Disclosure Act requires each "agency" to make its nonexempt agency records available for public inspection. RCW 42.17.260. As pertinent to your questions, these acts define "public agency" and "state agency" respectively as follows:

Open Public Meetings Act:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution or other state agency which is created by or pursuant to statute, other than courts and the legislature.

RCW 42.30.020(1)(a).

Public Disclosure Act:

"Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency.

RCW 42.17.020(1).

We have found no reported decisions in this state construing either of these two statutory definitions. On its face, the Center has not been denominated a state board, committee, department, educational institution, office, division, bureau, or agency. We note, however, that the provisions of both the Open Public Meetings Act and the Public Disclosure Act are to be liberally construed. RCW 42.30.910, 42.17.945. Moreover, in other situations, the Washington court has stated that the meaning of the term "agency" depends on its context. Accordingly, even though the State Bar Association is declared by the Legislature to be an "agency of the state," this does not mean all laws referring to "state agencies" are applicable to it. Graham v. State Bar Assoc., 86 Wn.2d 624, 548 P.2d 310 (1976).

[[Orig. Op. Page 4]]

Similarly, the issue of whether a particular organization constitutes an "agency" for purposes of public disclosure laws has been addressed in other jurisdictions on a case-by-case basis, under a "functional equivalency" test. That is, if the organization is the functional equivalent of a state agency, then public disclosure laws will apply. We believe this approach is acceptable and is generally consistent with both theGraham rationale, and the liberal construction policies enunciated in the Open Public Meetings Act and the Public Disclosure Act.

An application of the functional equivalency test took place in Board of Trustees v. Freedom of Information Comm'n, 436 A.2d 266 (Conn. 1980) in which a school, established by special corporate charter, was found to be a state agency for purposes of public disclosure laws. In analyzing whether the school was a state agency, the court adopted a functional equivalency test, comprised of four criteria, each of which had to be satisfied in order for the entity to be characterized as a state agency for purposes of public discloser laws:

(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.

436 A.2d at 270-271. In applying the test, the court found that the school was primarily funded by the town's tax revenues; the school's teachers were eligible for state retirement; and public funding was available for the school's building projects. On these facts, the school was held to be a state agency covered by the public disclosure laws.

In Hallas v. Freedom of Information Comm'n, 557 A.2d 568 (Conn. App.), petition for certif. denied, 561 A.2d 945 (1989), the Connecticut Court of Appeals applied the third element of the analysis. The court ruled that a city's outside bond counsel was not under specific governmental regulation and was not therefore the "functional equivalent" of an agency. 557 A.2d at 571.

It should be obvious that many private corporations perform traditional governmental functions, are subject to governmental regulations, yet are not public agencies for purposes of public records laws. Perlongo v. Iron River Coop. TV Antenna Corp., 332 N.W. 2d 502 (Mich. App. 1983) (utility company is not a "public body" for purposes of state Freedom of Information Act and Open Public Meetings Act, even though it was regulated by city ordinance and some board members were city officials). Accordingly, the functional equivalency analysis must not be applied blindly, but with due regard to all facts and circumstances.

[[Orig. Op. Page 5]]

The federal courts have adopted an analysis similar to the "functional equivalency test" in analyzing organizations subject to the Freedom of Information Act (FOIA).1/

The courts have acknowledged that "any general definition [of the term agency] can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of the government done . . . . The unavoidable fact is that each new arrangement must be examined anew and in its own context." Public Citizen Health Research Group v. Department of Health, Education and Welfare, 668 F.2d 537, 542 (D.C. Cir. 1981) (citing Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238, 245-46, (D.C. Cir. 1974), cert. denied, 421 U.S. 963, 44 L. Ed. 2d 450, 95 S. Ct. 1951 (1975)).

Thus, even though the American National Red Cross is in one context declared an "instrumentality of the United States," it is not an "agency" under the FOIA.2/

Irwin Mem. Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051 (9th Cir. 1981). In Irwin, the court noted that Red Cross employees were not federal employees (a majority were volunteers); no U.S. funds were appropriated to the Red Cross; the Red Cross entered into government contracts for specific purposes, relying primarily on private donations and blood service revenues; federal supervision existed, but was not pervasive--eight of fifty governors were appointed by the President; and while the Red Cross used federal buildings, and reported to and was audited by the federal government, its primary purpose was not allegiance to the government, but to the public at large. 640 F.2d at 1056-58.

[[Orig. Op. Page 6]]

On these facts, the Red Cross was not subject to substantial federal control or supervision and was not therefore an "agency" for purposes of the FOIA. Id. at 1057-58.

In another case, the "Defense Nuclear Facilities Safety Board" was held not to be an agency under the FOIA because its role was advisory only. Energy Research Found. v. Defense Nuclear Facilities, 734 F. Supp. 27 (D.D.C. 1990). To the same effect is CIBA-Geigy Corp. v. Mathews, 428 F. Supp. 523 (S.D.N.Y. 1977), in which doctor recipients of federal grants for a diabetes program did not perform a "regular federal function;" were not under daily federal supervision, only audit; and had no

authority to make decisions for the FDA. 428 F. Supp. at 528. See also Forsham v. Harris, 445 U.S. 169, 63 L. Ed. 2d 293, 100 S. Ct. 978 (1980) (a privately controlled organization receiving federal grants was not an agency absent extensive, detailed day-to-day federal supervision).

On the other hand, inRocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976), the Federal Home Loan Mortgage Corporation (FHLMC) was held to be an "agency" for purposes of the FOIA. The FHLMC was chartered under federal law; its board was comprised of federal officers; its operations were tightly controlled by statute; it was treated by Congress as an agency; and its employees were federal employees. 539 F.2d at 176. Based on these factors, the court reasoned that the FHLMC was subject to substantial federal control over its day-to-day operations, qualifying it as an "agency." Id. at 177.

Based on our reading of the case law in this area, we adopt the four-part functional equivalency test articulated by the Connecticut Court, as reflected (in whole or in part) in the federal decisions. Applying each of the four criteria as they apply to the EAC, we conclude that the Center should not be considered an agency for purposes of the Open Public Meetings Act or the public records provisions of the Public Disclosure Act.

It appears that the EAC meets the first test, for it "performs a governmental function" (provision of assistance to businesses which would likely be unable to afford or qualify for assistance from the private sector). The EAC also meets the fourth test, for it is "created by the state." The second and third tests, "government funding" and the "extent of government involvement," require additional analysis.

It is clear that the Center is not funded by the state's general fund. Moreover, its only access to state funds is under contract to perform specific services for DTED. RCW 43.210.050. Otherwise, the Center must obtain operating capital from any fees it may charge for its services, or through private contributions. In this respect the Center is more similar to the Red Cross [[Orig. Op. Page 7]] (found not to be an "agency") inIrwin Memorial Blood Bank, 640 F.2d 1051, than to the school (found to be an "agency") inBoard of Trustees v. Freedom of Info. Comm'n., 436 A.2 266.

With respect to the "governmental involvement" factor, it is true that the Center's board is appointed by the Governor; it is subject to sunset legislation; and DTED has rulemaking authority to "carry out the purposes" of chapter 43.210 RCW.

However, it does not follow from these indicia of governmental involvement that there is substantial day-to-day state direction of the Center's activities. Indeed, other than availing itself of the state contract, the Center is not directly answerable to any state agency or legislative or executive personnel. While it is true that DTED has rulemaking authority vis a vis the Center, this authority has not been exercised, and does not appear to contemplate day-to-day supervision of Center activities in any event. Moreover, while the board members are appointees of the Governor, this does not imply state involvement in the Center's day-to-day activities.

The Center makes no decisions for any state agency, and much of its activity is of an advisory nature. With respect to the sunset legislation, we note that temporary legislation or repealers are not uncommon, and can relate to governmental agencies as well as other entities. The fact that chapter 43.210 RCW will not exist if not reenacted in mid-1991, does not mean the state engages in day-to-day control of Center activities. It is, therefore, unlike the Federal Home Loan Mortgage Corporation, which was held to be a federal agency inRocap v. Indiek, 539 F.2 174, and is much more akin to the organizations not found to be agencies in Energy Research Found. v. Defense Nuclear Facilities, 734 F. Supp. 27, andCIBA-Geigy Corp. v. Mathews, 428 F. Supp. 523.

On the basis of this analysis, we conclude that the Center is not a state agency for purposes of the two statutes identified in your letter. In reaching our conclusion, we are mindful of our 1983 opinion regarding the Washington State Convention and Trade Center ("Convention Center"), AGO 1983 No. 27, in which we concluded that the Convention Center was a state agency for purposes of the state civil service law, chapter 41.06 RCW. The Convention Center, like the EAC, is a nonprofit corporation whose directors are governor-appointed. However, it is subject to legislative appropriation control, the project involved was substantially paid for by state excise taxes and state general obligation bonds, and the Legislature has expressly declared the Convention Center to be an instrumentality of the state. AGO 1983 No. 27 at 3. These features distinguish the Convention Center from the EAC.

[[Orig. Op. Page 8]]

We have also considered the decisions in Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wn.2d 523, 520 P.2d 162 (1974), andState Housing Fin. Comm'n v. O'Brien, 100 Wn.2d 491, 671 P.2d 247 (1983). InAetna Life Ins. Co., in the context of a constitutional challenge to the Washington Life and Disability Insurance Guarantee Association, the court characterized the Association as a "private, nonprofit association," not a "public body." 83 Wn.2d at 540. The Association was established by statute; all insurance companies operating in the state were required to be members; the board included the State Insurance Commissioner who could approve the appointment of other board members; and the Association was subject to the Commissioner's supervision. There was far more state involvement inAetna than with the EAC. RCW 48.32A.040.

In theState Housing Fin. Comm'n case, the Housing Finance Commission ("Commission") was created by the Legislature as a "public body corporate and politic," an "instrumentality of the state exercising essential government functions," which "acts . . . on behalf of the state" when it issued mortgage bonds. RCW 43.180.040. The Commission is funded by legislative appropriations, and its employees are state employees. The court construed the Commission to be a state agency for purposes of determining whether it unconstitutionally lent state credit to private entities. See e.g., 100 Wn.2d at 494-95.

We believe the features of the EAC to be substantially different than the Commission. There is no legislative characterization of the Center as a state instrumentality, nor is the Center subject to appropriation control by the Legislature. Indeed, the state is notrequired to contract with the Center if it should desire not to. There is no statutory requirement that the Center report any of its activities to the state other than as a condition of such a contract, should one exist. Even then, the reporting required is limited.

We conclude that the Legislature kept the state out of the Center's operation to a degree sufficient to render the Open Public Meetings Act and the public records provisions of the Public Disclosure Act inapplicable.

Our opinion is based on the EAC as it was structured as a result of amending legislation in 1985. Any changes in that structure would require additional analysis to determine whether such changes would lead to a different conclusion regarding the applicability of the Open Public Meetings Act and the Public Disclosure Act.

[[Orig. Op. Page 9]]

We trust the foregoing will be of assistance to you.

Very truly yours,
KENNETH O. EIKENBERRY
Attorney General
DONALD T. TROTTER
Assistant Attorney General

*** **FOOTNOTES** ***

1/5 U.S.C. § 552. The Connecticut Court based its four-part test upon the "major and discrete" criteria employed by the federal courts in FOIA cases involving the definition of "agency." Board of Trustees v. Freedom of Information Comm'n, 436 A.2d at 270-1.

2/Under 5 U.S.C. Section 552(e), the FOIA defines an agency to include a "government controlled corporation." This definition was added in 1974 for the purpose of including entities "which perform governmental functions and control information of interest to the public." Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d at 1053, (citing H.R. Rep. No. 93-876, 93rd Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6267, 6274). The FOIA definitions of "agency" reflect a liberal construction of that term and based on the liberal construction policy under state law, we believe the federal cases constitute persuasive authority in this area.

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[ ] 

When asked about this previously by Eric when he 1st joined the committee you responded as follows.
ATTACHED

From: Sarah Blossom [mailto:blossoms49@hotmail.com]
Sent: Monday, October 22, 2012 9:16 AM
To: Eric Turloff
Subject: RE: Open Public Meeting Acts - UAC

The UAC has discussed this but it may have been before you were on the committee. According to Will the OPMA does not apply to the UAC. I can check again if you'd like.

Sarah

From: eric@turloff.com
To: dward@intermap.com; debbilester@yahoo.com; smbonkowski@yahoo.com; blossoms49@hotmail.com
CC: islandsvcs@aol.com
Subject: Open Public Meeting Acts - UAC
Date: Mon, 22 Oct 2012 08:24:39 -0700
As the size our group shrinks we become concerned about the Open Public Meeting Act.

Does it apply to the UAC?

The UAC as a Committee is given a great deal of material by staff which requires careful analysis and review. We traditionally perform individual review and later meet as "interested individual members of the committee" or "subcommittees" to discuss our individual impressions and/or concerns and to develop a list of questions so that we can focus on those questions as a group rather than individually when we meet formally. We hold these informal study sessions to discuss our individual understandings and to inform each other of our individual perspectives and conclusions so that when we meet with staff we can be as informed as possible and in effort to avoid redunadancy and to make efficient and constructive use of our time when we meet with staff. Without these side discussion I expect our meetings with staff would be very cumbersome, time consuming (over several meetings) and yield very few logical conclusions.

I am confused by the comments made this evening concerning committees being subject to the Open Public Meetings Act given what I had been told in the past, the excerpts and your prior communications, and my

review of the rules concerning the same. Should I be concerned? Do we need to discontinue any side meetings until we get another opinion? I will sincerely regret such if that is required because we just received the year end financial information for the City utilities and I hoped to meet with several members in the week ahead to go thru the information provided, compare and contrast with budgets and financial projections made for the optimized utility, in effort to inform our discussion with staff on June 10. The UAC is made up of a diverse group of individuals which varying degrees of experience with utilities and in reviewing financial statement. Meeting as a group to discuss the information being provided is a valuable component of our ability to understand the information being presented so I would sincerely regret if all such discussions had to be in a formal setting, especially since not all members can accomodate supplementary meetings.

Can you offer any advice or instruction? I can just anticipate the ethics violation claims that could come out of this communication if it is later determined, after the fact, that we should never have met outside the public forum, so please be careful how you handle this query. But you need to remember we were told by Will that we were not subject to the OPMA and since that matched what we had researched induvidually we complied at the time with what we were told was the rule.

Arlene Buetow
UAC Chair