

***OVERVIEW OF LEGAL SERVICES AND  
OPEN GOVERNMENT RESPONSIBILITIES  
OF BOARD MEMBERS***



**NEW TRUSTEE ORIENTATION**

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# Legal Services to Colleges

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- By law, Attorney General is the legal adviser to state agencies, boards, commissions, and state officials. AGO represents agencies in court and defends lawsuits.
- AGO is organized into 26 legal divisions.
- Education Division assigns an attorney to each college to act as general counsel.

# AGO --Education Division

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- Advise on interpreting state and federal laws, scope of authority as delegated by the legislature. Defend legally defensible actions
- Risk continuum
- Consistent over time and uniform across the higher education system
- Specialized Divisions –Labor & Personnel & Torts
- Defense and indemnification of state officials named in tort lawsuits

# AAG Interactions with the College

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- Work through chain of command from administrative team, to president, and then the board
- Work with the Board collectively or through the Chair, since individual members do not speak for the whole board
- Role at Board Meetings
- Multi-level hearings—Board in quasi-judicial role

# *OPEN PUBLIC MEETINGS*

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- ◆ Open Public Meetings Act
- ◆ All meetings of the governing body of a public agency shall be open and public (RCW 42.30.030)
- ◆ Requirement to maintain minutes (RCW 42.32.030)

# Legislative Declaration of Purpose – RCW

42.30.010

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- Public agencies of this state exist to aid in the conduct of the people's business. Actions are to be taken openly and deliberations conducted openly
- People do not yield their sovereignty to the agencies which serve them
- People do not give public servants the right to decide what is good for the people to know and what is not good for them to know
- People remain informed so they may retain control over the instruments they have created

# *What is a Governing Body?*

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- ◆ “All meetings of a ***governing body*** of a public agency shall be open and public . . . “
- ◆ Multi-member governing bodies of state and local agencies
- ◆ Subcommittees, if quorum of board
- ◆ Subcommittee, if delegated final decision-making authority, conducting hearings, or taking public testimony

# *What Constitutes a Meeting ?*

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- ◆ “All *meetings* of a governing body of a public agency shall be open and public . . . .”
- ◆ A meeting is a gathering where “action” is taken. Any such meeting must be open.
- ◆ “Action” means “the transaction of the official business of a public agency by a governing body including but not limited to:

# ACTION

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- ◆ **Public testimony**
- ◆ **All deliberations**
- ◆ **Discussions**
- ◆ **Reviews**
- ◆ **Evaluations**
- ◆ **Final action (collective positive or negative decision or final vote by a majority sitting as a body or entity)**

# Travel & Gathering

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- “It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for the purposes other than a regular meeting or special meeting...PROVIDED, That they take no action as defined by this chapter.” RCW 42.30.070

# Emails

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- An exchange of emails among board members can constitute a deliberation or discussion and thus, a “meeting” subject to the Open Public Meetings Act. *Wood v. Battle Ground School District* (2001).
- Phone trees also may constitute a meeting

# ***GIVING NOTICE: REGULAR MEETINGS***

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- ◆ Recurring meetings of the public body.
- ◆ Colleges must adopt regular scheduled meetings by rule (Washington Administrative Code). (State agencies file yearly prior to January 1st with Code Reviser).
- ◆ No agenda requirement.

# ***GIVING NOTICE: SPECIAL MEETINGS***

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- ◆ Written notice must be given to:
  - ◆ Each member of governing body
  - ◆ Each media entity which has requested notice
- ◆ Delivered at least 24 hours in advance
- ◆ Must specify:
  - ◆ Time
  - ◆ Place
  - ◆ Business to be transacted (agenda).
  
  - ◆ Final action limited to agenda items

# ***EXECUTIVE SESSIONS***

*Are authorized for limited, specific topics listed, including:*

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- ◆ Receive and evaluate complaints or charges against a public officer or employee
- ◆ Review performance of an employee
- ◆ Evaluate qualifications of a job applicant
- ◆ Meet with legal counsel relating and potential litigation matters & agency enforcement actions
- ◆ Site selection, acquisition, price of real estate
- ◆ Quasi-judicial actions (exempt)
- ◆ Collective bargaining strategy (exempt)

RCW 42.30.110; 140

# Going into Executive Session

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- “. . . [T]he presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting and the time when the executive session will be concluded.”

(RCW 42.30.110(2))

# Penalties for Violating Open Public Meetings Act

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- Personal civil liability (\$100/penalty)
- Costs and attorneys fees
- Action taken is null and void
- Media attention (of the bad kind)

To: Smith    From: Jones  
BCC: Doe

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Dear Trustee Smith, as we all discussed, the Fingerprinting Program must be preserved despite the recommendation by that crazy Instructional VP. The Board needs to exhibit leadership on this issue and I'd like to see unanimity on the vote at next week's meeting.

*Any problems presented by this email? Is it private?*

# PUBLIC RECORDS -- RCW 42.56

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- Any writing containing information relating to (a) the conduct of government, or (b) the performance of any governmental or proprietary function
- Prepared, owned, used, or retained by any agency
- Writing can be in any media or format

# Public records definition (cont'd)

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- The definition is broad enough to encompass anything you prepare or use for College business
- Includes email messages
- Includes materials you prepare on personal computer, i-phone, i-pad
- Public has right to review and seek copies

# Public Policy Strongly Favors Disclosure

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- The duty to disclose public records is broadly construed. Public policy favors disclosure
- Exemptions are narrowly construed
- Emails between and among Board members are public records and must be disclosed unless a specific exemption applies

# Some Exemptions

## RCW 42.56.230-480

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- Preliminary drafts in which policies are formulated
- Communications protected by the attorney-client privilege
- Student Education Records under federal law (the Family Educational Rights and Privacy Act, 20 U.S.C. Sec. 1232g)
- Test questions, scoring keys, and other examination data used to administer an academic exam
- Trade secrets
- Private information in employee personnel files/application materials

# PUBLIC RECORDS

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- Penalties can range from \$0-\$100 per day per record for improperly withheld records.
- Tip: Assume everything you put in writing even tangentially related to college business may be made public at some point.
- Tip II: Keep all college-related emails in one easily identifiable folder

# Faculty Tenure

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- Governed by statute –RCW 28B.50.850-873 and echoed in collective bargaining agreements
- Tenure = faculty appointment for an indefinite period of time.
- Tenure is a property right that may only be removed for sufficient cause and with due process. Right to a committee hearing with a recommendation to the Board of Trustees for final decision.
- The Board “shall” provide for the award of faculty tenure following a probationary period not to exceed 9 consecutive quarters (excluding summer).

# Probationary Faculty Appointment

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- Tenure track faculty are hired into yearly probationary appointment for 3 years (not to exceed 9 quarters)
- Probationary appointment:
- shall be one of continuing evaluation by a review committee
- may be terminated without cause upon expiration of the term of employment

# Probationary Appointment Renewal/Nonrenewal

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- Notice of a decision to terminate/non-renew a probationary appointment shall be made as soon as possible, but must be given no later than one complete quarter (excluding summer) prior to expiration of the contract.
- For practical purposes, this usually means a decision is made at the last winter quarter (March) Board meeting

# Awarding Tenure

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- The Board *must* give reasonable consideration to recommendations of the tenure review committee.
- *May* take into consideration recommendation of president. (*Smith v. Greene* (1976))
- May award tenure at any time, but must make a decision within 9 quarters.
- Exception: may extend probations for 1-3 quarters with formal recommendation of TRC and written consent of probationer, to complete PIP in progress.

# Removing Tenure

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- Removal only for sufficient cause
- Due process procedures must be observed
- Committee of peers hears evidence supporting dismissal
- Committee and hearing officer make recommendations to the Board of Trustees
- Board makes the final decision (quasi-judicial role)
- Since Board makes the final decision, it cannot be part of the initiation of charges or hearing process

# Tenure Dismissal During Financial Emergency

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- Triggered by Governor or Legislature Reductions
- State Board Declaration
- Local Board Determination that RIF may be necessary due to the financial emergency declared by the State Board
- =Expedited Hearing timelines/Consolidated Hearings/Limited bases for challenge

# Executive Ethics Act

## RCW 42.52

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- Aimed at preventing/mitigating conflicts of interest
- Government officials and employees hold a public trust. Paramount in that trust is the principle that public office may not be used for personal gain or private advantage
- Executive Ethics Board – <http://ethics.wa.gov>

# Ethics Law Overview

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- No activity in conflict with proper discharge of official duties
- May not use official position or state resources to secure special privileges for yourself or others
- May not receive a gift if it could be reasonably expected to influence performance of official duties -- \$50 aggregate limit on unsolicited gifts per year from a single source.
- May not use state resources for political campaigns

# Ethics (cont'd)

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- Ethics violations are personal to the state employee/official, rather than the college.
- The Attorney General's Office is not statutorily authorized to defend an official or employee in actions before the Executive Ethics Board

# RECAP

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- AGO –we're here to assist
- Open Meetings—everything is action
- Public Records—Everything is a public record
- Tenure—The Board gives and the Board takes away. But, follow the process
- Ethics—Be aware of conflicts and make use of the Exec Ethics Bd

# E-MAIL

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- **Compose under the assumption that it will be made publicly available**
- **Don't hit Reply-all to a message sent to multiple board members**
- **If using personal computer, keep Board business in a separate file**

# QUESTIONS?

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- OR, COMMENTS??