

MEMORANDUM (REVISED)

Date: September 25, 2017
To: Chehalis Basin Board
From: Chrissy Bailey, Project Manager, Department of Ecology
Re: Follow up to August 3 meeting regarding Board responsibilities and procedures/decision making discussion (for October 5, 2017 Board meeting)

Introduction

At the July 7th meeting of the Chehalis Basin Board (Board), Assistant Attorney Generals (AAGs) from the Ecology Division provided training to the Board regarding their responsibilities under the Public Records Act (PRA) and Open Public Meetings Act (OPMA). Questions were raised at and immediately following the meeting, which the AAGs agreed to research further and provide answers to. Responses to those questions were provided in a draft memorandum to the Board at its August 3, 2017 meeting.

Following the August meeting, Board members requested clarification of some of the AAG's responses and raised an additional question related to conflicts of interest and the application of State ethics law to the work of Board members. Questions and clarified responses are provided below. The responses in this memorandum should be considered to supersede responses to the same questions in Part I of the July 24, 2017 memorandum, where applicable. Changes to the Board Handbook reflected in Part II of the July memorandum have been incorporated into the most recent version of the Board Handbook (September 25, 2017) so are not included in this revised memo.

Please note: The information provided below does not constitute legal advice and is intended only as general guidance. If a Board member has specific questions concerning his or her unique circumstances, please contact the Attorney General's Office to obtain legal advice and recommendations for proceeding.

Follow up related to PRA and OPMA training

The Ecology AAGs have provided answers to the following questions raised by the Board and following Board meetings. Questions are listed first, followed by the answer. Answers are in *italics*.

1. Under the Open Public Meetings Act, individual members of the Board may be deemed personally liable and incur civil penalties for attending a meeting with knowledge of the fact that the meeting is in violation of the OPMA. Would the AG represent individual members of the Board in such a lawsuit?

While the analysis will depend upon the facts of each case, it is extremely unlikely the AG would represent individual members of the Board in this type of lawsuit. Individuals are subject to civil penalties only when those individuals knowingly attend a meeting that is in violation of the OPMA. RCW 42.30.120. Depending on the circumstances, the AG may represent individuals in a suit where

the individuals did not have the knowledge that the meeting is in violation of the OPMA. In such instance, the individuals should not be subject to civil penalties.

2. Which, if any, of the Board members may designate an alternate to be present at and/or vote at a Board meeting?

Based upon the language of RCW 43.21A.731(2)(b), the ex officio non-voting members are the only individuals who “may designate a representative of their respective agencies to serve on the board in their behalf.” This same provision for designation of representatives, including the manner of designation, does not appear in the statute relative to the voting members. See RCW 43.21A.731(2)(a).

The relevant provision states, “The governor shall invite the Confederated Tribes of the Chehalis Tribes of the Chehalis Reservation and the Quinault Indian Nation to each designate a voting member of the board . . .” (Emphasis added). The statute notes the voting members of the board, including tribal representatives, “must be appointed for terms of four years . . .” per RCW 43.21A.731(2)(a), and does not offer language contemplating designation of an alternate for any voting member of the board.

3. Can we provide consultants working on elements of the Chehalis Basin Strategy more specific guidance about whether and how the Public Records Act applies to them? For example, what to keep and how long to keep it.

Consultants working on a state-led process or project will be required to comply with the Public Records Act, RCW 42.56. It may be a good idea to enter into an agency agreement with the consultants to clearly establish who will store the public records, who will respond to any public records requests, etc. The consultants may wish to designate one employee to manage the records, such that this person will be the “central repository” for all public records relative to the state-led process or project. The consultants will ultimately have the same retention requirements as public employees relative to any work performed on this state-led process or project.

Retention requirements will vary based upon the contents of the record. The retention requirement for consultants will mirror the applicable requirement for public employees. Each agency is entitled to develop its own retention schedule and have it approved by the Secretary of State. The Secretary of State also develops a statewide schedule, which applies to all agencies. Ecology’s Jason Howell is currently working to determine whether new retention schedules will be developed, which would be specific to the work of the Office of Chehalis Basin, or whether OCB can simply rely upon existing retention schedules.

While the default retention requirement under state law is six years, the agency’s unique retention requirement differs based upon the contents of each record. For example, please note the various retention requirements on pages 27-32, as a sampling:

[https://www.sos.wa.gov/_assets/archives/RecordsManagement/Department-of-Ecology-Records-Retention-Schedule-v.1.3-\(December-2016\).pdf](https://www.sos.wa.gov/_assets/archives/RecordsManagement/Department-of-Ecology-Records-Retention-Schedule-v.1.3-(December-2016).pdf)

4. How are conflicts of interest handled under state ethics law?

The statute provides, “No member may have a direct financial interest in the actions of the board.” RCW 43.21A.731(2)(a). Additionally, state officers and/or state employees are required to comply with the provisions set forth in RCW 42.52, the Ethics in Public Service Act.

Several Board members hold professional positions in jurisdictions or with entities where a conflict of interest may sometimes exist between carrying out the work as a Chehalis Basin Board member and carrying out the work in one’s other role. For example, the Washington State Executive Ethics Board has evaluated situations where a state employee also serves as an elected official to a local jurisdiction. The Ethics Board considered that such a person may be placed in a position where his or her loyalties are divided between obligations to the local jurisdiction and to the state. The Executive Ethics Board determined a person in this situation may prevent conflicts of interest by: (1) disclosing the conflict; (2) recusing himself or herself from discussion regarding the specific transaction; (3) recusing himself or herself from voting on the specific transaction; and (4) refraining from attempting to influence other Board members regarding discussion and voting relative to the specific transaction. See Washington Executive Ethics Board Advisory Opinions 99-07; 98-04; 96-09A. In this example provided, the individual should take these four steps relative to any issue that could create a conflict with his or her duties on behalf of the Chehalis Basin Board.

RCW 42.52.030 and RCW 42.52.040 address financial interests in transactions and assisting in transactions. To deal with these concerns, in Advisory Opinion No. 96-09A, the Executive Ethics Board set forth sample Model Rules, which mirror the four steps noted above.