

Schedule of Audit Findings and Responses

Timberlands Regional Support Network Wahkiakum County May 11, 2012

1. **Timberlands Regional Support Network approved contracts outside of an open public meeting, which limited the public's ability to participate and is a violation of the Open Public Meetings Act.**

Description of Condition

The Timberlands Regional Support Network has a three-member Board that meets every other month on the second Friday. The Board maintains meeting minutes detailing the Board's discussions and actions.

In between these regularly scheduled meetings, the Network administrator sent emails to all Board members requesting approval of contracts and agreements. More than one Board member approved these contracts and agreements over email. Our audit found 15 instances of improper approvals between October 8, 2010 and March 9, 2012.

We also noted the Network made payments under a contract amendment the Board had not approved.

Cause of Condition

The Network was unaware that approving contracts and agreements over e-mail violated the Open Public Meetings Act and believed it was adequate to reaffirm these contracts in an open public meeting subsequent to their original approval.

The Network Administrator failed to notify the Board of the contract amendment.

Effect of Condition

The public was not afforded the opportunity to hear the Board's discussion on these matters prior to their approval.

The Network paid Thurston County Public Health \$17,400 over the contract rate that had been approved by the Board.

Recommendation

We recommend the Network Board Members not engage in discussion of Network business outside of Board meetings. We further recommend the Board seek training on the requirements of the Open Public Meetings Act.

Network's Response

First: The Finding is factually incorrect. All of the contracts in question were approved at regularly scheduled open meetings of the Governing Board. The public was in attendance at all of those meetings and the public, including the duly appointed advisory board, which is widely representative of all of the TRSN stakeholders, had the opportunity to comment on the advisability of entering into the contracts in question. The public clearly was not "limited . . . the ability to participate" in the contract approval process. The legal issue is whether, the e-mail transmissions between the administrator and the individual governing board members constituted "action" as defined in RCW 42.30.020 (3). As noted in the additional responses below, TRSN maintains that the e-mail communication between the administrator and the individual governing board members did not constitute "action" and that TRSN did not violate the provisions of the Open Public Meetings Act during the audit period.

Second: E-mail communications between the administrative officer of a public agency and individual members of the governing board of that agency do not constitute "action" as defined by RCW 42.30.020(3) and as interpreted by the courts of the State of Washington. The Court of Appeals has determined that the "mere use or passive receipt of e-mail does not automatically constitute a "meeting," for purposes of the Open Public Meetings Act. Wood v. Battle Ground School District, 107 Wn. App. 550 (2001). The determining factor as to whether a "meeting" has occurred is whether "action" was taken. The key consideration in determining whether an "action" occurred as defined in RCW 42.30.020 (3) is whether the governing body deliberated and collectively made a decision. The TRSN process at issue under the proposed Finding did not constitute an "action" because there is no evidence whatsoever to indicate that the Governing Board members ever engaged in any discussion among themselves regarding the contracts at issue. As the Washington State Supreme Court said in Equitable Shipyards, Inc. v. State, 93 Wn.2d 465 (1980), independent and individual examination of documents by commission members prior to open meetings where a contract is awarded do not violate the Open Public Meetings Act. In the process TRSN followed, the communication flowed between individual governing board members and the administrator; there was not communication between the governing board members. The contracts at issue were then approved at regular open meetings. It is also doubtful that the sort of ministerial acts involved in signing funding contracts even required an open public meeting. See Slaughter v. Fire District, 50 Wn. App. 733 (1988) (a fire district's governing body's decision to discharge an employee did not require a public meeting).

Third: To avoid any appearance of improper conduct, TRSN's current administrator and general counsel will be recommending to the Governing that the e-mail process at issue under the proposed finding be discontinued and that the contract process approval be accomplished through duly convened Special Meetings when the need arises between the regular bi-monthly meetings of the Governing Board.

Fourth: The public's right to be involved in the approval of contracts was not impaired and the actions as described in the proposed Finding in no way placed in danger the public assets of TRSN. Therefore, the facts do not meet the criteria for a "Finding."

Auditor's Remarks

We reaffirm our finding. However, we do appreciate the Network's commitment to resolve this finding and thank the Network for its cooperation and assistance during the audit. We will review the corrective action taken during our next regular audit.

Applicable Laws and Regulations

RCW 42.30.20 Definitions, states in part:

(3) -Action means any transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final action. -Final action means a collaborative positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance. . . .

(4) "Meeting" means meetings at which action is taken.

RCW 42.30.30 Meetings declared open and public.

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

RCW 42.30.60 Ordinances, rules, resolutions, etc., adopted at public meetings – Notice – Secret voting prohibited, states in part:

No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void.

RCW 42.30.070 Times and places for meetings--Emergencies—Exception states in part:

The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body

RCW 42.30.110 Executive sessions, states in part:

(1) . . . This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by RPC 1.6 or RCW 5.60.060(2)(a) concerning:

(A) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;

(B) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

(C) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

(2) Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

RCW 42.32.030 Minutes, states in part:

The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.