Port Commissioners: Legal Issues in Your Communications

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Thomas H. Tanaka; Senior Port Counsel
Port of Seattle; P.O.Box 1209
Seattle, WA 98006
206-787-3007
Tanaka.t@portseattle.org

General Principles

You, as commissioners of public port authorities, live in glass houses.

General Principles (cont.)

As an official of a port authority, you are subject to all of your state laws regarding open government.

General Principles (cont.)

- Your statements and actions in meetings are recorded and watched by the public and the media.

General Principles (cont.)

- Everything you turn in for reimbursement is public record and subject to scrutiny (and misinterpretation) by anyone.
- Your correspondence with the outside world regarding port business is subject to public disclosure.
- Your financial records are an open book through campaign disclosure laws.

General Principles (cont.)

- What you say as much as what you do has potential consequences, for good or ill.

General Principles (cont.)

General Principles (cont.)

General Principles (cont.)

General Principles (cont.)

General Principles (cont.)

With so much scrutiny, you may be anxious for those opportunities to let your hair down and have some straightforward, unfiltered dialogue.

Maybe email some friends and colleagues

General Principles (cont.)

or have some unfiltered and confidential conversations with your fellow commissioners about important port issues.

General Principles (cont.)

…Unfortunately, it's not quite that easy.

We will cover the following topics:

- The ability to have confidential communications among commissioners and with port staff.
- The legal requirements for disclosure of public documents.

Confidential Communications

Confidentiality among officials is allowed under certain situations and is healthy for the organizations they serve.

Unfortunately, some appointed and elected officials don’t get this.

Confidential Communications (cont.)

The reason some officials don't get it is they can't reconcile the concept of confidentiality with the general notion that the public expects transparency in their government.

Confidential Communications (cont.)

Officials have been known to leak confidential information on the basis that the public has a "right to know" everything about how their government is run.

Confidential Communications (cont.)

While this is a noble sentiment, it is way too simplistic, naïve, and misguided.

Confidential Communications (cont.)

The apparent conflict between the desire to serve the public's right to transparency and a port authority's need for confidentiality can be distinguished as follows:

All commissioners serve as officials for a "thing"—the public port authority.

Confidential Communications (cont.)

The port authority is a legal entity that has rights and liabilities.

The port authority, while a public entity, is not the public.

Confidential Communications (cont.)

Port commissioners have a duty of loyalty to their port.

All port commissioners can best serve the public interest by looking out for the best interests of the public port authority.

The taxpayers and citizens within a port authority's boundary are also members of the public and want their particular port's interest advanced.

Confidential Communications (cont.)

In fairness, the public has some justification to be cynical about what goes on behind closed doors because of instances where public officials have improperly tried to hide wrongful acts behind claims of confidentiality.

Confidential Communications (cont.)

The obvious situation where commissioners can converse with an expectation of legal privacy is in executive sessions.

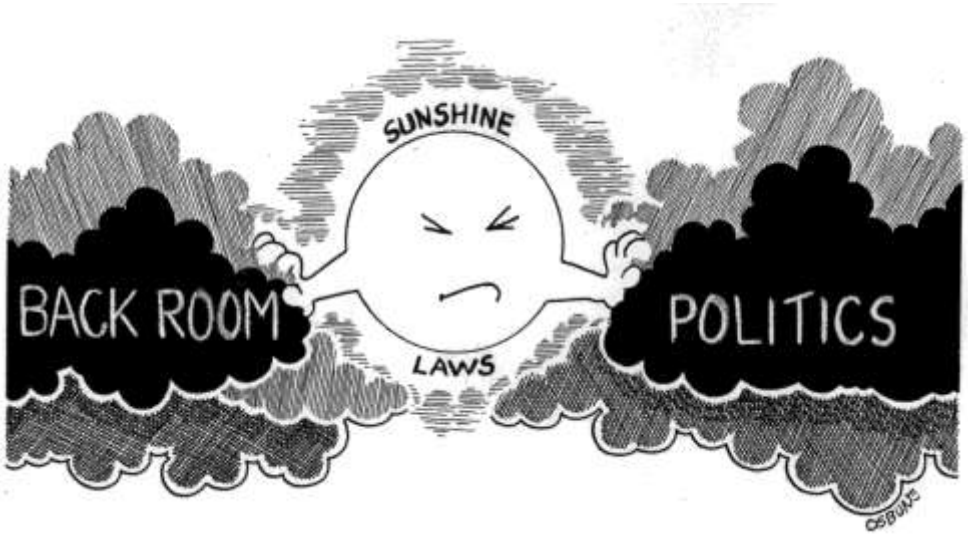
We will take a closer look at executive sessions after we review the legal requirements for open meetings.

Open Meetings Laws

General principle—The only time you as a commissioner can carry out official port business is when you are in a meeting, as defined by your state law, that has been given the appropriate public notice and fulfills the requirements of the law (quorum requirements, voting procedures observed, minutes taken, etc.).

Open Meetings Laws

These laws are referred to by different names depending on the state (Sunshine law, open public meeting law). We'll refer to them as open meeting laws



Open Meetings Laws (cont.)

Open meeting laws usually define what constitutes a “meeting.”

While it may seem obvious to most people, the statute also creates liability for careless public officials because they could violate the open meeting law by inadvertently holding a “meeting” without following the appropriate procedures.

Open Meetings Laws (cont.)

In the following examples, assume there are 5 members on the port commission.

Open Meetings Laws (cont.)

3 members meet to discuss port business while having coffee at a restaurant.

Open Meetings Laws (cont.)

3 members have a conference call on their home phones to discuss port business.

Open Meetings Laws (cont.)

3 members carry on an email exchange regarding port business.

Open Meetings Laws (cont.)

One member has a Facebook account and 2 other members of the commission are “friends.” She posts comments about port business and the other two respond and offer their own comments.

Open Meetings Laws (cont.)

One member has a Twitter account and 2 other commissioners follow the tweets which include comments about port business.

Open Meetings Laws (cont.)

Commissioner Smith has a telephone conversation about port business with Commissioner Jones.

Open Meetings Laws (cont.)

After hanging up, Smith calls Commissioner Brown and has the same conversation. Smith also relays to Brown what Jones said.

Executive Sessions

Almost all states allow public bodies to have closed-door discussions among the officials running the organization. These are called executive sessions. The laws allowing executive sessions are very specific and narrow as to what topics you can discuss.

Executive Sessions (cont.)

Always keep in mind that you can discuss, but you can never take “action” (i.e. vote) in an executive session. Votes and final decisions must be carried out in public.

Executive Sessions (cont.)

So why are confidential executive sessions so important? Let's look at what you can discuss in executive sessions and then imagine trying to carry out business without it.

Executive Sessions (cont.)

- Agreeing on a selling price for land the port owns.

- Purchase price for land the port would like to acquire.

Executive Sessions (cont.)

- Rent to be established for a parcel of port-owned land.

Executive Sessions (cont.)

- Strategy for a collective bargaining negotiation.

Executive Sessions (cont.)

- National security issues.
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- Legal matters (more on that later).

Executive Sessions (cont.)

The interests of the port authority cannot be served if the information from these kinds of executive session discussions becomes public.

The public may be better informed, but having that kind of information become public results in harm to the port and to the citizens served by the port.

Executive Sessions (cont.)

It is also imperative that the specific limitations that are usually described in the state statutes authorizing executive sessions be strictly followed.

Executive Sessions (cont.)

Here are examples from Washington state's executive session laws:

[A port commission may hold an executive session to] consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public.

Executive Sessions (cont.)

[A port commission may hold an executive session to] consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price.

Executive Sessions (cont.)

All parts of the executive session statute must be satisfied, otherwise the topic is not appropriate for executive session.

Be careful about getting sloppy about what is being covered and don't be afraid to ask questions of your legal counsel.

Privileged Communications

There is no privileged communications available to public officials except for those between port commissioners and staff with the port's attorneys.

Privileged Communications (cont.)

By being privileged, the information, if it meets the requirements, may not be divulged under public disclosure or in court.

Privileged Communications (cont.)

The elements for the information to be privileged:

- There must be a communication,
- made between privileged persons (i.e., an attorney and his/her client,

Privileged Communications (cont.)

- made in confidence
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- done for the purpose of seeking, providing, or obtaining legal assistance to the client.

Privileged Communications (cont.)

Every single element of that 4 part test must be met in order for there to be a privileged communication (the communication can be either verbal or in writing).

Privileged Communications (cont.)

Privileged or not?

The port's attorney is cc'd on a memo

The port's attorney sits in on a meeting between the commission and staff.

Privileged Communications (cont.)

The state attorney general is investigating potential criminal activity at the port and you may be a target. You call the attorney to speak about what you know.

You call the attorney and seek legal advice on one of your personal business deals.

Privileged Communications (cont.)

Losing the Privilege

The client “owns” the privilege.
Only the client can decide whether or not to give it up.

In any organization, only the top governing body has the authority to decide whether or not to waive attorney-client privilege, so that means the decision belongs to the port commission.

Privileged Communications (cont.)

Waiver of the privilege can also occur through carelessness:

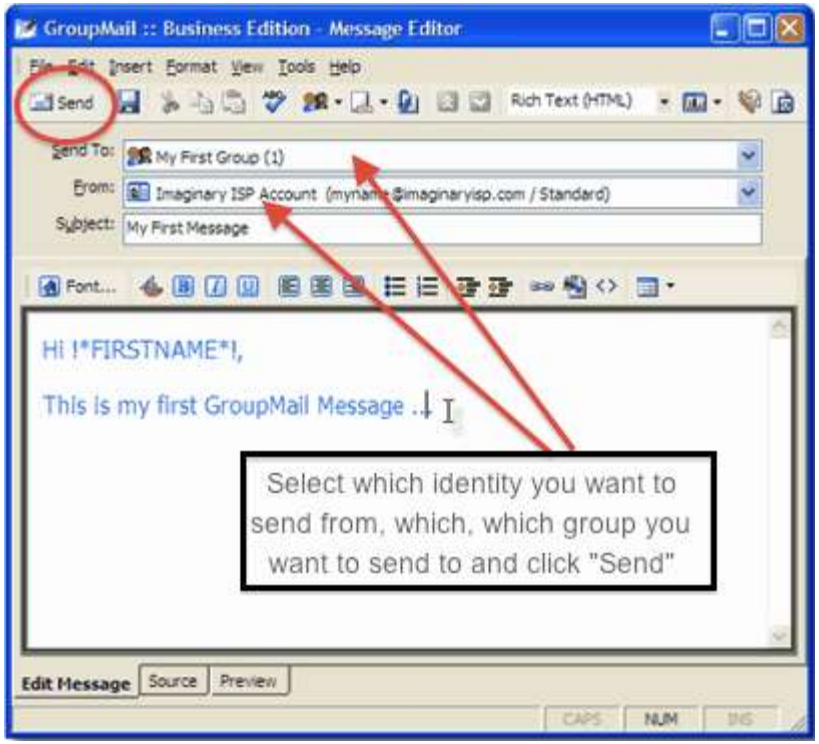
- Conducting a privileged conversation in a crowded elevator.

Privileged Communications (cont.)

- Leaving a privileged memo from your lawyer out in a public area where others can see it.

Privileged Communications (cont.)

- Sending an email intended for your lawyer to the wrong person.



Privileged Communications (cont.)

A big issue in inadvertent waiver cases—How broad was the waiver?

Was the one communication that was revealed the only thing waived, or is the scope broad enough to include all privileged communications?

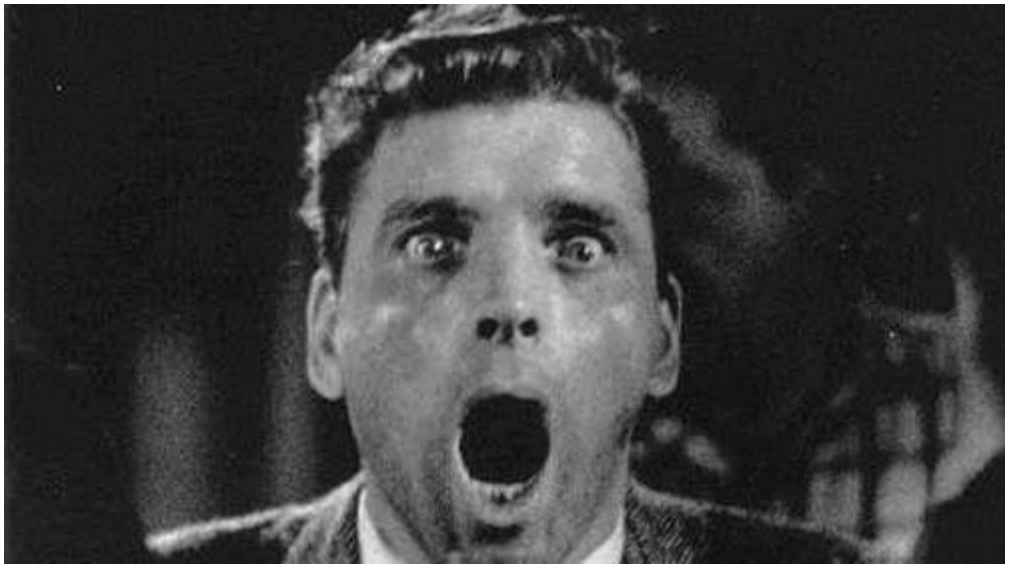
Written Communications

We've been talking about the issues surrounding open meeting laws. Let's now turn our attention to public records laws.

Written Communications

- These laws are also state laws that control what documents from government agencies are subject to disclosure when requested by members of the public.

Written Communications (cont.)



- These laws can be very strict and many officials who are new to public service are often shocked to find out what has to be turned over.

Written Communications (cont.)

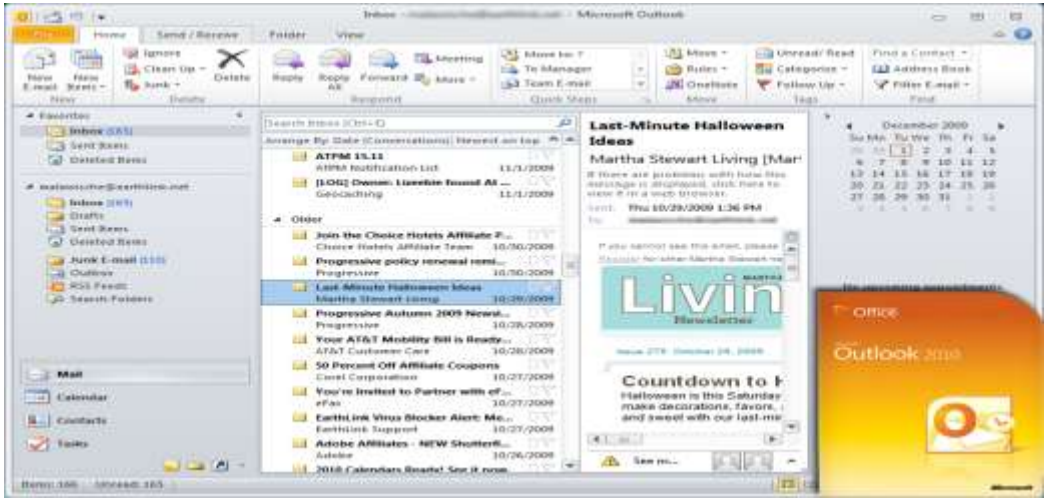
First, you need to make sure you understand what is meant by “document.”
In Washington state, like many other states, it’s more than just something on a piece of paper. Here’s the definition in our law of what constitutes a “writing” that could be subject to disclosure:

Written Communications (cont.)

"Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

Written Communications (cont.)

Many organizations use Microsoft Outlook as the platform for email. One of the features of the most recent versions of Outlook is that it allows for voice mails left on the phone (if coordinated with the right kind of phone service) to show up in the inbox, with the voice mail recorded on the message.



Written Communications (cont.)

Assuming the email system is backed up regularly, this means that the organization's voice mail is part of the public record and can be subject to public disclosure.

Written Communications (cont.)

Any official who is worried that a friend might leave an inappropriate message should warn them to be careful about leaving messages.

Written Communications (cont.)

A “writing” under our law that is a “public record” is subject to potential disclosure.

Written Communications (cont.)

In Washington, a public record is defined as:

any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

Written Communications (cont.)

This language is broad enough to include information known as “metadata.”

Metadata is data about data.

Written Communications (cont.)

Metadata is stored on every document that is generated on an electronic device. This includes such things as emails, word processing documents, spread sheets, and PowerPoint slides.

Written Communications (cont.)

Metadata says when the document was created, perhaps shows changes or earlier versions of the document, and who else may have worked on the document.

Written Communications (cont.)

The danger about metadata is illustrated in a recent case out of Washington.

In the case, a city official used her home computer to send an email relating to city business. Someone made a request for a copy of the email and specifically asked for an electronic copy of the email with the metadata to be included. The official was only able to provide a copy of the email sent to other computers that had not preserved the metadata.

Written Communications (cont.)

The city was fined for violating the public disclosure laws and the court left open the possibility of conducting a search of the official's personal computer to try and retrieve the original email.

Written Communications (cont.)

These laws tend to be “liberally construed” in favor of disclosure. This is a term of art in law which means that if there is any ambiguity about whether or not something is subject to disclosure, then disclosure is required. All ties go to disclosure.

Written Communications (cont.)

Similar to the open meetings laws, most states recognize that there is a necessity to have public documents remain out of the public's view.

Written Communications (cont.)

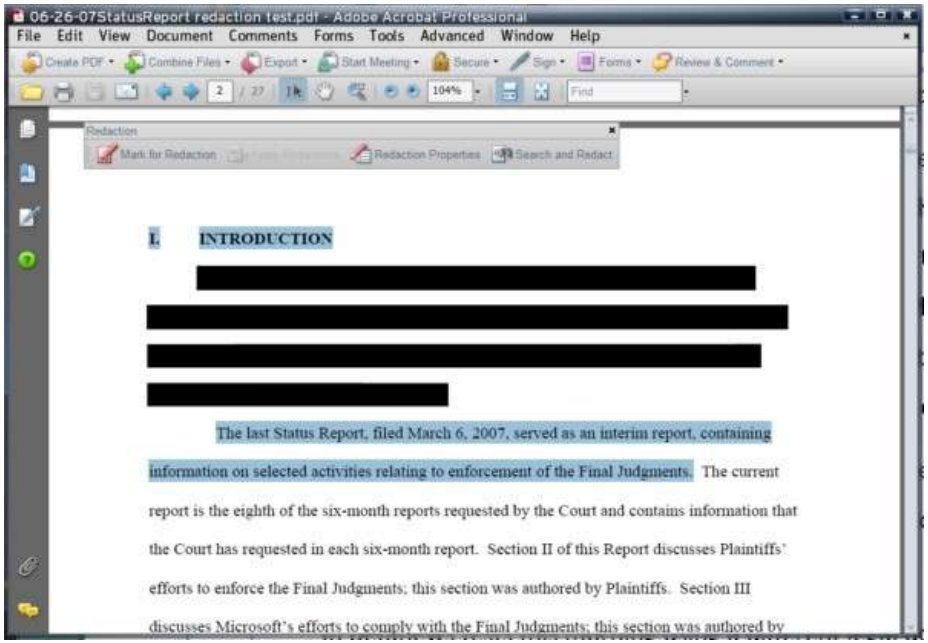
These exemptions are “narrowly construed” which is the flip side of “liberally construed.” Again, anything that falls in the gray area between disclosable or not is disclosed if requested.

Written Communications (cont.)

The exemptions must be strictly followed. Often, there are conditions in the exemptions and every condition must be met in order to withhold a public document.

Written Communications (cont.)

Also keep in mind that if a portion of a document is subject to non-disclosure, that can be redacted, but the rest of the document must be disclosed if requested.



Written Communications (cont.)

The public records laws—another trap for the unwary.

All states have requirements for maintaining public documents a certain number of years.

Written Communications (cont.)

Remember all of the public disclosure requirements we just reviewed.

Also remember that we described situations where officials could be communicating between themselves using social media like Facebook or Twitter.

There is a strong argument that those electronic records, even though they are on private accounts, need to be preserved for purposes of complying with the public record retention laws (as distinct from the public disclosure laws).

Questions?