



Board of Supervisors
Monthly Board Meeting Minutes
Tuesday, June 26, 2018 (2:00pm)

Present at Meeting:

Eric Johnson, TCD Board Chair	Sarah Moorehead, TCD Interim Executive Director
Richard Mankamy, TCD Board Auditor	Heather Roskelley, TCD Staff
Paul Pickett, TCD Board Supervisor	Chris Stearns, TCD Associate Board Supervisor
Linda Powell, TCD Board Vice-Chair	Shana Joy, WSCC
Alison Halpern, WSCC	Joe Hanna, TCAAC
TJ Johnson, Public	Madeline Bishop, Public
Martin McCallum, Public	Vickie Larkin, Thurston BoCC
Esther Kronenberg, Public	Gary Edwards, Thurston BoCC
Dan Calvert, PSP	

Action Items:

1. Staff to submit June 19 Subcommittee meeting notes as minutes
2. Staff to send RFP to employment law firms and solicit proposals; Sarah will also provide courtesy copy to Enduris and invite commentary
3. Board Chair to review and sign minutes provided at meeting so they can be published on website in compliance with Action Plan
4. Staff to send out Doodle poll to change Board meeting date in August because of conflict with USFWS meeting in Boise (August 28)
5. Staff to ask for public meeting guidance for Supervisors from Attorney General's office
6. Staff to put DOH Grant on July 31 agenda for discussion and provide two hard copies for Supervisors
7. Staff will email quarterly payroll and staff reports to Board
8. Staff to send Doodle poll to Supervisors to schedule Work Session mid-July sometime between 3-6pm or 5-8pm
9. Staff to provide revised mid-year budget with additional information to Supervisors
10. Richard will contact HR temp agencies to hire a temp and will provide recommendations to Board during Work Session in mid-July
11. Staff to provide entire contract for WRIA 13 Lead Entity as hard copies for approval during July 31 Board meeting
12. Staff will provide Chehalis Outreach meeting announcements
13. Travel Policy to be discussed by Board in July Work Session
14. Linda will attend a staff meeting (date TBD) to co-create Code of Conduct with staff
15. Staff to put policy updates in books

1. Welcome, Introductions, Audio Recording Announcement and Pledge of Allegiance

- Eric Johnson called the meeting to order at 2:09pm. There was a quorum.
- Welcome, Introductions, & Pledge of Allegiance conducted
- Chair announced meeting is audio recorded

2. Public Comment (3 minutes per person)

- Persons who provided public comment:
 - TJ Johnson
 - Joe Hanna

54 3. **Agenda Review**, All

- 55 ▪ Include Supervisor Reports in Partner Reports – 6D
- 56 ▪ Include quarterly payroll and staff reports in Financial Report – 8E
- 57 ▪ Paul made a motion to move the Executive Session Statement earlier in the meeting. No
- 58 second.
- 59 ▪ VSP Technical Support MOU Addendum (B) and CREP Assignment of Payment Forms (C)
- 60 under Conservation Projects are tabled to July 31 Board meeting
- 61 ▪ Add Chehalis Outreach Grant Work Addendum to Conservation Projects as -11D
- 62 ▪ Discuss potential OPMA violations – 9B
- 63 ▪ Discuss HR/legal services as it relates to budget – 10B
- 64 ▪ Move #15 Protocol for Supervisor Requests to 13B
- 65

66 4. **Board Officer Elections**, All

67 Table until July 31 Board Meeting

68

69 5. **HR/Legal**, Sarah Moorehead

70 A. **HR/Legal Subcommittee Report**

- 71 • At subcommittee meeting, there was discussion about whether to move forward with
- 72 attorney first
- 73 • Sarah provided the names of two additional employment law firms in the Olympia area;
- 74 they provide free initial consultation
- 75 • Pierce CD has an interest and the capacity to provide some HR support after legal
- 76 issues are resolved
- 77 • Need to have budget discussion to decide whether we can afford legal or HR services

78 B. **Legal Services RFP**

- 79 ▪ Paul moved to use Richard's version of RFP and solicit proposals from employment law
- 80 firms. Linda seconded. Unanimous approval with the following amendments:
- 81 o Line 5: Thurston Conservation District Board of Supervisors (BoS)
- 82 o Lines 11 & 18: Mailed, hand-delivered or emailed to: Board Chair and Acting
- 83 Executive Director
- 84 o Page 3, Scope of Services, Description a, Line 77: Act as general legal counsel
- 85 to the TCD's Board of Supervisors

86 AI – Staff to submit June 19 Subcommittee meeting notes as minutes

87 AI – Sarah to send RFP to employment law firms and solicit proposals; Sarah will also

88 provide courtesy copy to Enduris and invite commentary

89

90 6. **Partner Reports**

91 A. **NRCS** – No Report

92 B. **WSCC**, Shana Joy

- 93 ▪ Introduced new Puget Sound Regional Manager, Alison Halpern
- 94 ▪ WSCC meeting July 18 and 19 in Shelton at Little Creek Casino and Resort; Mason CD tour
- 95 ▪ WSCC has concluded their investigation of TCD; drafting final report; report should be available
- 96 soon
- 97 ▪ Livestock technical assistance – WSCC is asking more questions of each CD so they can track
- 98 funding
- 99 ▪ Thurston CD will be audited this year – to be reimbursed through grant money; each district is
- 100 audited every three years
- 101 ▪ Legal requirements for TCD – still have 4 different elements not in compliance with
- 102 Conservation Accountability and Performance Program (CAPP - handout): open public
- 103 meetings act; keeping public informed through minutes; adherence to labor laws; unresolved
- 104 Human Rights Commission complaints
- 105 ▪ Shana will be reporting CDs in red (TCD) to the Commission and they make decision; there is a
- 106 new CAPP program so she is not sure what they will do

- It is up to TCD to provide evidence that they have complied by July 18
- Shana mentioned that it's OK to not post minutes for a couple of months, but not beyond two months
- C. **WACD/NACD** – Doug Rushton was not able to attend June 26 Board meeting but provided handouts that were included in Board Packet
- D. **Supervisor Meetings**
 - Eric and Richard have attended US Fish and Wildlife Service meetings; they would like to attend a meeting in Boise on August 28 that addresses how landowners are handling easements; other issues are problems with endangered species and making the building permit process easier
 - Meetings with Partners in Conservation
- AI – Board Chair to review and sign minutes provided at meeting so they can be published on website in compliance with Action Plan
- AI – Sarah to send out Doodle poll to change Board meeting date in August because of conflict with USFWS meeting in Boise (August 28)

Letter from Eric Johnson and his attorney read by Richard Mankamyer

- Letter states that closed door sessions are legal to discuss employees including Acting Executive Director; final action may be taken in public meeting

AI – Staff to ask for public meeting guidance for Supervisors from Attorney General's office

Handout - Statement of Paul Pickett

- Re: sending emails for discussion to other Board Supervisors
- In the future, it is recommended that all Supervisors use bcc (blind copy) when communicating by email so that they can't all reply and create a discussion
- In addition, Shana advised not putting anything in email that's to do with Executive Session

Handout – Statement of Paul Pickett and Doug Rushton

- Because of potential legal liability regarding the June 7th Special Meeting Executive Session, Paul Pickett and Doug Rushton issued a statement

7. Board Meeting Minutes Review, All

A. April 24, 2018 Regular Meeting & Work Session minutes

Linda moved to approve minutes as amended in work session. Richard seconded. Eric, Richard, and Linda approved. Paul abstained. Motion passed.

B. May 29, 2018 Regular Meeting & Work Session minutes

Paul moved to approve minutes as amended in work session. Linda seconded. Unanimous approval.

C. June 7, 2018 Special Meeting & Work Session minutes

Paul distributed minutes through Sarah with his edits.

- Edits 64-69 – OK
- Remove 70
- Edits 80-82 – OK
- Take out D

D. February 27, 2018 Regular Meeting minutes

Linda moved to approve as amended. Richard seconded. Eric, Richard, and Linda approved. Paul abstained. Motion passed.

- Lines 79-81 – put on agenda for July 31 Board meeting

8. Financial Report

A. Monthly Financial Report

- If Richard would like different information provided, Sarah will implement
- Staff birth dates to be removed from Regence invoice/statement

160 **B. May Check Register**

- 161 ▪ Paul moved to approve checks 19602-19642 totaling \$104,171.78 with voided checks
162 19604, 19626, 19638. Linda seconded. Unanimous approval.

163
164 *Break at 3:54pm. Meeting resumed at 4:07pm.*

165
166 **C. DOH Grant**

- 167 ▪ Ready for signature; Sarah emailed it to Supervisors during previous week (54 pages)
168 ▪ \$300,000 total
169 ▪ Approved in 2018 annual budget; through March 31, 2020
170 ▪ Provides for technical assistance – working with school and urban gardens, farm tours,
171 beginning farming training programs, riparian programs
172 ▪ Two hard copies requested for Supervisors

173 **AI – Staff to put DOH Grant on July 31 agenda for discussion and provide two hard**
174 **copies for Supervisors**

175
176 **D. Quarterly Payroll and Staff Reports**

177 **AI – Sarah will email quarterly payroll and staff reports to Board**

178
179 Linda moved to have Work Session scheduled mid-month to handle routine items and place
180 them on consent calendar. Paul seconded. Unanimous approval.

181
182 **AI – Staff to send Doodle poll to Supervisors to schedule Work Session mid-July**
183 **sometime between 3-6pm or 5-8pm**

184
185 **9. Executive Session Statement**

186 **A.** Paul Pickett read statement earlier (refer to 6D)

187 **B.** Potential OPMA violations

188 It was decided that emails sent by Paul and Doug were not in violation as they were not reply
189 all; as mentioned earlier in this meeting, it is best to blind copy other Board Supervisors or send
190 to Sarah and she will distribute

191
192 **10. Mid-Year Budget Revision, All**

193 **A. Budget and 2018 Mid-Year Staffing Needs**

- 194 ▪ Supervisors concluded they need more information to make budget decisions
195 ▪ TCD can subcontract out to Pierce, King, Mason and other districts; However,
196 permanent staff are needed to fulfill grant commitments; TCD needs to retain staff
197 ▪ Union labor negotiator will be contacting Board through Sarah

198 **B. HR/Legal Services**

- 199 ▪ Richard will provide recommendations to Board mid-July during Work Session
200 ▪ Shana Joy noted that TCD policy states the hiring is done by the permanent or acting
201 executive director, not Board Supervisors. TCD needs to know if there is budget to hire
202 HR and/or legal services.
203 ▪ Paul stated that the Board did not know where the money was to fund the position; he
204 would like to see a better budget first to ensure that the Board is doing this the right way
205 and not the wrong way
206 ▪ Sarah shared concerns about operating against TCD policy and the Board authorizing
207 expenses of unknown amounts. She recommended first ensuring there is sufficient
208 funding available and second following the District's policy on hiring staff.
209 ▪ Eric stated the HR position would not be supervised by Sarah and it was authorized by
210 the Board to contract an HR position

- Eric moved to authorize Board Auditor to contract with a qualified HR person through a temp agency who reports back to the Auditor and the Board. Linda seconded. Eric, Linda, Richard approved. Paul objected. Motion Passed.

AI – Staff to provide revised mid-year budget with additional information to Supervisors
AI – Richard will contact HR temp agencies to hire a temp and will provide recommendations to Board in Work Session mid-July

11. Conservation Projects, All

A. WRIA 13 Lead Entity Contract Renewal

- This is the next contract with RCO to continue TCD's commitment to operate as the fiscal agent for the WRIA 13 Lead Entity
- Staff recommendation is to approve this second half biennium contract with RCO (July 1, 2018 – June 30, 2019) and authorize the TCD Board Chair, or Interim Executive Director to sign the final contract document upon receipt
- Billable time starts July 1
- Final contract not yet available
- Shana advised Board to vote to approve at July 31 Board meeting and backdate it to July 1
- Board would like entire contract (as hard copies) to be provided for approval
- Board Chair stated that there is to be no monetary expenditure by staff until contract is signed

B. VSP Technical Support MOU Addendum - Tabled

C. CREP Assignment of Payment Forms – Tabled

D. Chehalis Outreach Grant Addendum

- Staff working on this: Sarah, habitat team, education and outreach staff
- Chehalis Basin Strategy work – Skookumchuk – interested in working lands easements; flood mitigation, aquatic species restoration work; making sure that landowners have a seat at the table; Kathleen Berger has been a big advocate for landowners
- Paul moved to approve Chehalis Outreach Grant addendum. Linda seconded. Unanimous approval.

AI – Staff to provide entire contract for WRIA 13 Lead Entity as hard copies for approval during July 31 Board meeting

AI – Stop work on WRIA 13 Lead Entity contract effective July 1 until contract is signed

AI – Staff will provide Chehalis Outreach meeting announcements

12. Rates & Charges, Sarah Moorehead

Preparation for Board of County Commissioner's Briefing

- Meeting on June 27 9:30am-10am; second meeting scheduled for July 18 2:30pm-3pm in case more time is needed
- County has been supportive; all individuals who spoke at May 10 Public Hearing were supportive

13. Review of TCD Governance Action Plan and Protocol for Supervisor Requests, All

A. Action Plan Discussion

- Action Plan items – some have been accomplished and noted
- Travel Policy has not been approved
- Code of Conduct needs to be created; Enduris' Code of Conduct sent by Shana in January 2018 for reference; decided that one Board member, Linda, will attend a staff meeting to co-create Code of Conduct with staff

B. Protocol for Supervisor Requests

- 262 ▪ Between meetings there are requests; Interim Executive Director can either 1) provide
263 answer fairly quickly, 2) set a time frame for deliverable, or 3) defer to discussion in
264 meeting because request requires extensive time commitment
265 ▪ Sarah gets conflicting direction from Supervisors; need a broader discussion on priorities
266 - how best to prioritize from a collective Board with one voice

267 **AI - Travel Policy to be discussed by Board in July Work Session**

268 **AI - Linda will attend a staff meeting (date TBD) to co-create Code of Conduct with staff**

269
270 **14. Review of Policies & Procedures**

271 **AI – Staff to put policy updates in books**

272
273 **15. Adjourn, All**

274 Paul moved to adjourn. Linda seconded at 6:33pm. Unanimous approval.

275
276 Respectfully Submitted,

277 

278 Eric Johnson, Board Chair

279 
280

Statement of Paul J. Pickett
Supervisor, Thurston Conservation District

Several email exchanges that involved me are mentioned in the statement regarding Executive Sessions. I am providing for the record a copy of the entire email threads and attachments.

The first set of exchanges began on May 31, when Supervisor Richard Mankamyer sent an email to Acting Executive Director Moorehead and copied me, and presumably the other supervisors, by blind CC. I responded by email on June 24th, offering "feedback", and noted that I had asked for time at the next board meeting to discuss the matter. Supervisor Mankamyer responded to this email by stating "you just held an illegal TCD Board of Supervisor meeting", suggesting that it might constitute a violation of the Open Public Meetings Act. He continued: "you are welcome to seek legal advice on this if you feel this is in error."

I believe that my email was not a violation, because it was informational only, and that I specifically suggested that the Board discuss the matter in open session. Nevertheless, I understand that one might construe it as soliciting a policy discussion prior to full public discussion, which might be a violation. In any case, as I stated at the outset, I now put the entire email string on the record to cure any real or perceived violation.

A second incident occurred on June 4th, when Supervisor Mankamyer sent a draft "Letter of Direction" to Supervisor Eric Johnson, with a blind cc to me. I presume other Board members received the blind cc.

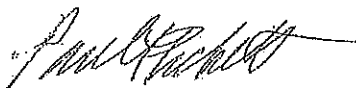
I responded with an email on June 4th, cc'd to the entire Board, where I stated: "I'll try to send a draft for your consideration before the meeting, or at least I'll share my ideas then." I then sent a draft document regarding expectations for the Acting Executive Director position to the Board on June 6th. In that email, I stated "attached are some ideas for our discussion tomorrow."

Supervisor Mankamyer again responded with the exact same wording as in the previous message, accusing me of holding an illegal meeting and suggesting I seek legal counsel.

Again, my email was informational and intended for a Board discussion in an open meeting. But to provide transparency for my communications and cure any real or perceived violation, I am also providing this email thread and my draft document for the record.

I have reviewed the rules regarding communication by email outside of public meetings and completed the training for new Supervisors. I will ensure that any email communication will be marked clearly "for information only" in the future, and avoid any discussion of issues by email outside of a public meeting.

Signed



Paul Pickett, Supervisor



Paul Pickett <paulpickett@conservewa.net>

MOU with WSU Energy 053118

Richard TCD <rmtcd6@gmail.com>

Wed, Jun 6, 2018 at 10:36 PM

To: Paul Pickett <paulpickett@conservewa.net>

Hello Paul,

Thank you for sharing your thoughts. #2

According to my understand of the rules, by sending this e-mail to the TCD Board as you did, you just held and illegal TCD Board of Supervisor meeting. There was no public notice or any of the notifications that I am aware of that are suppose to be given.

Of course, you are welcome to seek legal advise on this if you feel this is in error.

Thank you
Richard Mankamyer
TCD Board, Auditor

On Mon, Jun 4, 2018 at 9:55 PM, Paul Pickett <paulpickett@conservewa.net> wrote:

Richard,

I wanted to provide some feedback on this letter.

I understand your desire for good information. I share that desire and an interest in learning more on the subject of MOUs and other Partner agreements. The binder you suggest sounds like a good tool to help.

However, I'm concerned about the way you present your request in the email. There are several points I'd like to share:

1. Although you say "please", the email has a demanding tone and calls for several actions that could be significant workloads. In addition, the multiple cc's to WSCC staff and a local attorney can be interpreted as intimidation and seems excessive given the small request. Within the current context of the Human Rights complaints, I hope we can be extra careful in communicating in ways that are respectful and collegial. A simple friendly request posed as a question would have sufficed I believe.

2. Having five supervisors who can all make requests creates a difficult situation for Sarah. I'd like us to discuss protocols for requesting actions or information from Sarah between meetings. At the PUD we worked out a pretty reasonable approach, which for the CD might look like this:

- Supervisors can make requests between meetings of the Executive Director (Interim or permanent). The ED should feel safe to provide three possible responses: 1) no problem, not a big workload, can do; 2) will take some time - ok to get this to you at some future date; 3) significant workload - would like the full Board to prioritize this request against other work assignments.

If we are working together as a team, it should be easy to make polite requests and allow the ED to respond and manage her workload. This would be an approach applied fairly by all Supervisors.

I've asked for some time at the next Board meeting to discuss this topic.

3. In general, email creates some challenges in communication. We only read the words, and there is not voice inflection or body language. It's easy to misunderstand the tone or intent of an email, and I've experienced disagreements simply from this kind of misunderstanding. Emails are very good at sharing information but poor at sharing feelings. It's a good idea to pick up the phone and talk in person if the subject could be

misunderstood.

I'm probably violating my own suggestion by writing this email, but I wanted to share information to help our relationships. I'm not angry, and I'll add a smiley to prove it! :) I hope this simply leads to more discussion in person among the Board as a whole and some protocols we all agree with. It's one step to better relationships and rebuilding our team.

Thank you for your kind consideration of my thoughts.

Paul

On Thu, May 31, 2018 at 12:23 PM, Richard TCD <rmtcd6@gmail.com> wrote:

Hello Sarah,

You mentioned at the board meeting on 052918 that the MOU with WSU Energy had sunsetted?

Please explain how and why this happened and provide all relevant records concerning this assertion. I have a copy of the original MOU and there is no expire date on it.

Also, please have available a copy of all current and expired MOU's that TCD has organized into a booklet, like our 3 ring Policy and Procedure booklets, for at least the past 3 years, including to June 01, 2018, available for the next time the board meets.

Thank You for your attention in this matter.

Richard Mankamyar
TCD Board, Auditor



Paul Pickett <paulpickett@conservewa.net>

Confidential for Executive Session

Richard TCD <rmtcd6@gmail.com>

Wed, Jun 6, 2018 at 10:33 PM

To: Paul Pickett <paulpickett@conservewa.net>, mclark@scc.wa.gov, "Robinson, Kirk (SCC)" <KRobinson@scc.wa.gov>, "Shultz, Ron (SCC)" <rshultz@scc.wa.gov>, Shawn Newman <newmanlaw@comcast.net>

Hello Paul,

Thank you for sharing your thoughts.

According to my understand of the rules, by sending this e-mail to the TCD Board as you did, you just held and illegal TCD Board of Supervisor meeting. There was no public notice or any of the notifications that I am aware of that are suppose to be given.

Of course, you are welcome to seek legal advise on this If you feel this is in error.

Thank you
Richard Mankamyer
TCD Board, Auditor

On Wed, Jun 6, 2018 at 10:09 PM, Paul Pickett <paulpickett@conservewa.net> wrote:
Attached are some ideas for our discussion tomorrow.

Paul

On Mon, Jun 4, 2018 at 9:58 PM, Paul Pickett <paulpickett@conservewa.net> wrote:
Thank you for sharing this Richard. I'd like to propose an alternative approach that addresses these issues and provides Sarah with clear guidance on improvement. I'll try to send a draft for you consideration before the meeting, or at least I'll share my ideas then.

Paul

On Mon, Jun 4, 2018 at 12:33 PM, Richard TCD <rmtcd6@gmail.com> wrote:
Confidential for your eyes only.
(Letter for discussion at executive session next special board meeting on 050718 for evaluation of public employee)

April 24, 2018

Sarah Moorehead
Acting Executive Director, TCD

Re: Letter of Direction

Dear Sarah,

This is a letter of direction, which is not a disciplinary action. As we have discussed, since your becoming TCD Acting Executive Director and observing your work, I have had several concerns about your performance. Specifically, the areas are: working overtime, teamwork, and following my directions. Therefore, I am setting forth below my expectations for you in these areas.

1. Overtime—As an overtime eligible employee, you are expected to work your assigned hours and no more unless authorized to do so by the Board Chair or the Board Auditor.

2. Teamwork—You, Sarah, and the Board of Supervisors (BoS) are a team and we expect you to share information, work collaboratively, maintain a high level of communication with us, assist others and back up others at times. To date, the BoS was not informed of the absence of Mara Healy and why she is off work. We were also not informed of the resignation of Amy Franks in a timely manner and had to hear about it from a member of the greater community. We were also not informed of the reason and why Ashley McBee is no longer here and those circumstances of her departure.

3. Staff Reports – It has been a continuous point of contention, not getting the weekly staff reports in a timely manner. I am constantly having to ask for and remind you to get these reports to the board. Sometimes there have been no reports for over a month.

4. I have repeatedly ask for updates on the budget and we had all agreed that the board needs to approve any budget changes. This was discussed with you as recently as April 17, 2018 at TCD office.

New Directions—Although we are a team, I, and the BoS, are your supervisor's and expect you to follow our directions. I want a written report to me and the BoS of the personnel questions raised in #2 above within one working week from the date of this letter.

Again, please understand this letter does not constitute disciplinary action; It is a letter of direction intended to clarify what I (BoS) expect of you. If you have any questions about this letter, please let me know.

Best regards,

Eric Johnson, Chair
TCD Board of Supervisors

June 7, 2018

From: Paul J. Pickett, Thurston Conservation District Supervisor
To: Thurston Conservation District Supervisors
Subject: Recommended Evaluation Procedures

In response to the proposed Letter of Direction, I'm concerned that this action is being carried out in a way that is inappropriate, since it is being done in advance of a formal evaluation. The process I would recommend is:

1. Develop a set of expectations for the Interim Executive Director (IED), preferably based on Policy 1.3.1, which describes the Acting Executive Director's function, responsibilities, and expectations.
2. Provide an evaluation of the IED based on her performance in this position and the expectations.
3. Provide a set of future expectations describing areas of continuing high performance or areas needing improvement.

Based on Policy 1.3.1, here are suggestions for Expectations:

1. Supervision of District employees, including work force planning, hiring and promotion, merit raises, performance reviews, disciplinary actions, leave, training, and professional development
2. Communication with the public regarding meetings, policy and procedure changes, and other notices both required by law and consistent with effective public outreach.
3. Engagement with and satisfaction of District clients, partners, and the general public
4. Implementation of District mission, plans, policies, and budget
5. Execution of contracts and agreements
6. Management and Implementation of District programs, functions, and services in accordance with all applicable laws, regulations, and District policies.
7. Compliance with all applicable laws, regulations, and District policies related to the IED's job duties and performance
8. Responsiveness in carrying out Board directions
9. Communication and consultation with the Board regarding:
 - a. Interactions with clients, partners, and the general public
 - b. Employment activities, including merit raises, disciplinary actions, and staff hiring and other changes
 - c. Modification or adoption of District procedures

**Statement of Paul Pickett and Doug Rushton
Supervisors, Thurston Conservation District**

The Laws of the State of Washington require that, with few exceptions, the public's business be done in a public way. The legislature has repeatedly confirmed this with statutes such as the Public Disclosure Act, the Public Records Act and the Open Public Meetings Act. This is not a new idea. As long ago as 1914, Justice Louis Brandeis wrote: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants."

We are concerned that events during the Thurston Conservation District Board of Supervisors Special Meeting on June 7, 2018 – before, during, and after the Executive Session – rendered that Executive Session unlawful. Because we were present and participated in that executive session, our participation may have placed us and the District in legal jeopardy. We believe that the actions of Supervisors Linda Powell, Richard Mankamy, and Chair Eric Johnson violated the Open Meetings Act, Chapter 42.31 RCW; specifically RCW 42.31.110 (1)(f), (1)(g), and (2).

We have retained legal counsel, and on the advice of counsel, we are releasing this statement to remedy such unlawful action as we believe occurred. It is our understanding, confirmed by counsel, that the general remedy in Washington law for doing in the dark that which should have been done in the light is bring it into the light.

The following description is as accurate as our memories allow, but should be considered paraphrasing, since we can't guarantee that we recall the exact wording.

All five Supervisors were in attendance at the Special Meeting on June 7, along with Acting Executive Director (AED) Sarah Moorehead, staff from other agencies, and members of the public. A sign-in sheet was provided which can provide the names of the attendees. Copies of the agenda were also available for attendees.

The agenda called for an Executive Session that was listed on the agenda "To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee," which is a proper subject for executive session under RCW 42.31.110 (1)(g).

An audio recording of the meeting was made until the Executive Session began. The recorder failed to operate after the Executive Session. We have listened to the audio recording of this portion of the meeting, and this is what was said, as best as we understand the recording.

- When we reached the agenda item for the Executive Session, AED Sarah Moorehead stated: "I have a request to make that if it is to evaluate the performance of a public employee related to me, I'd like to have it in an open public meeting" This is an entirely appropriate request and must be honored under RCW 42.31.110 (1)(f).
- Supervisor Johnson announced that the Executive Session was about to begin to discuss the evaluation of an employee.
- AED Moorehead asked: "Is the public employee is to be evaluated myself?"

- Supervisor Johnson responded: "I don't believe so, no".
- Supervisor Pickett stated: "I thought we were discussing expectations for the executive director."
- Supervisor Johnson responded: "We will not be talking about her, but expectations for the position, correct?"
- Supervisor Pickett then stated: "True, if that's all we talk about. That doesn't have to be in executive session, though."
- Supervisor Johnson, responding to questions from Linda Powell, noted: "We get into more specifics on Sarah, then we might come out and go into public session".
- AED Moorehead then stated: "I believe that this use of executive session is supposed to evaluate specific performance of a specific employee, so talking generally about position expectations; I'm not sure that's a proper use of executive session."

One of our obligations and goals is for the District to operate legally. During the Executive Session, several events occurred that lead us to our need to make this statement:

- Supervisors Johnson and Mankamyer discussed a copy of a "Plaintiff's Reply Brief" from the case Eric Johnson vs. Washington State University (WSU) Energy Program Office. They quoted the brief with several statements that we interpreted as being critical of AED Moorehead. A copy of this brief is attached. The airing of complaints was inconsistent with the announced purpose of the meeting. In addition, we believe it would be improper to take any action based on one-sided statements or filings by a lawyer in ongoing litigation, particularly involving a Supervisor and an employee, and especially without being presented with opposing filings or hearing the evidence directly.
- Supervisor Mankamyer raised some of the issues in an April 24, 2018 draft "Letter of Direction". On June 4th Supervisor Mankamyer had emailed us this letter, and told us that he wanted the Board to discuss it. The letter outlined several expectations and included several complaints about AED Moorehead's performance. A copy of this letter is attached. This airing of complaints regarding AED Moorehead was also inconsistent with the announced purpose of the meeting.
- We asked several times to return to the topic of reviewing expectation as part of an evaluation process. Supervisor Pickett described the process that he felt was appropriate: first setting expectation, then completing an evaluation of the staff, and then describing areas of improvement for the staff. He tried to offer a draft list of expectations for discussion, but Supervisors Johnson, Mankamyer and Powell ignored him. Supervisor Rushton noted that he had redrafted the position description for the executive director position, as agreed at the March 27, 2018 board meeting. He had had the AED distribute it to the entire board on April 24, 2018 asking for comments from all supervisors – but received no response. Supervisor Rushton expressed support for Supervisor Pickett's suggested approach, and encouraged the others to follow that process. Both of us made good faith efforts to return the Executive Session to the announced topic, but we were rebuffed.

To us, the Executive Session seemed mostly to be an extended rant by Supervisors Johnson, Mankamyer and Powell about their perceived problems with AED Moorehead's performance in the past and the need to remove her from that position and find a consultant to take over as AED.

When we came out of the Executive Session, Supervisor Johnson reported that we had nothing to report and no action to take.

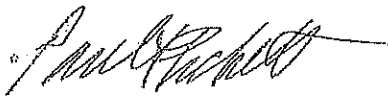
In conclusion, we believe the events of this meeting rendered it unlawful due to the following violations of state statute:

- RCW 42.30.110 (1) states that "Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:"
 - Subsection (f): "To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;"
AED Moorehead made a request for an open meeting if we were to discuss a complaint against her. Supervisor Johnson said that we were not going to discuss her. But the Executive Session actually mostly consisted of Supervisors Powell, Mankamy, and Johnson discussing complaints against AED Moorehead.
 - Subsection (g): "To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee."
This was the announced purpose of the meeting, but no discussion occurred regarding the evaluation of an employee.
- RCW 42.30.110 (2) states that "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". Considering what actually took place in the meeting, Supervisor Johnson, as Chair, provided false description of the purpose, and he and the other two Supervisors deviated from the announced purpose in a manner that he explicitly stated would not take place.

Because of the events in this meeting, we are taking actions consistent with our duty under Chapter 42.30 RCW regarding what appears to have been a violation of this statute. Supervisor Pickett contacted the Attorney General's Office, who advised him to consult the District's Counsel. Unfortunately, the District has no Counsel, who might have stopped the violations described here. We will be sending a copy of this statement to the State Auditor and the Washington Conservation Commission.

We take the confidentiality of executive sessions seriously but also take transparency of government operations in what we tell the public seriously. Therefore, because the meeting appears to have violated the law, pointing out and stopping that illegality supersedes executive session confidentiality.

Signed:



Paul Pickett, Supervisor



Doug Rushton, Supervisor

(Letter for discussion at executive session next special board meeting on 050718 for evaluation of public employee)

April 24, 2018

Sarah Moorehead
Acting Executive Director, TCD

Re: Letter of Direction

Dear Sarah,

This is a letter of direction, which is not a disciplinary action. As we have discussed, since your becoming TCD Acting Executive Director and observing your work, I have had several concerns about your performance. Specifically, the areas are: working overtime, teamwork, and following my directions. Therefore, I am setting forth below my expectations for you in these areas.

1. Overtime—As an overtime eligible employee, you are expected to work your assigned hours and no more unless authorized to do so by the Board Chair or the Board Auditor.

2. Teamwork—You, Sarah, and the Board of Supervisors (BoS) are a team and we expect you to share information, work collaboratively, maintain a high level of communication with us, assist others and back up others at times. To date, the BoS was not informed of the absence of Mara Healy and why she is off work. We were also not informed of the resignation of Amy Franks in a timely manner and had to hear about it from a member of the greater community. We were also not informed of the reason and why Ashley McBee is no longer here and those circumstances of her departure.

3. Staff Reports — it has been a continuous point of contention, not getting the weekly staff reports in a timely manner. I am constantly having to ask for and remind you to get these reports to the board. Sometimes there have been no reports for over a month.

4. I have repeatably ask for updates on the budget and we had all agreed that the board needs to approve any budget changes. This was discussed with you as recently as April 17, 2018 at TCD office.

New Directions—Although we are a team, I, and the BoS, are your supervisor's and expect you to follow our directions. I want a written report to me and the BoS of the personnel questions raised in #2 above within one working week from the date of this letter.

Again, please understand this letter does not constitute disciplinary action; it is a letter of direction intended to clarify what I (BoS) expect of you. If you have any questions about this letter, please let me know.

Best regards,

Eric Johnson, Chair
TCD Board of Supervisors

1 Hearing Set: June 15, 2018
2 Time: 9:00 am
3 Judge: Schaller
4
5
6
7

8 THURSTON COUNTY SUPERIOR COURT
9 IN AND FOR THE STATE OF WASHINGTON

10 Eric Johnson,

Plaintiff, No. 18-2-00943-34

11 vs.

Plaintiff's Reply Brief

12 Washington State University (WSU) Energy

Public Records Act

13 Program Office.

Liability Issue

14 Defendant.
15
16

17 I. Summary Reply:

18 Contrary to WSU's argument that "the Public Records (PRA) does not require agencies
19 to be mind-readers,"¹ WSU simply needed to follow the law. According to WSU's own
20 NextRequest² file for Johnson's PDR, WSU "received" his PDR on "January 31, 2018 via
21
22
23
24

25 ¹ WSU Br. at 16:9.

26 ² According to the Dec. of WSU's Public Records Program Specialist, Sheri Glaesman, "NextRequest is a web-
27 based application by which individuals can submit a PRA request to WSU and through which WSU can then
28 respond and provide records to the requester." Glaesman Dec. at 1:23-26.

29 PLAINTIFF'S REPLY BRIEF
30 PRA LIABILITY ISSUE

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

1 email.”³ Despite NextRequest noting that Johnson’s PDR was “received” on “January 31, 2018
2 via email”, WSU did not formally acknowledge Johnson’s request until February 26, 2018.

3 It is undisputed that WSU-Energy Information Systems Department Manager James
4 Colombo told Johnson in person on January 31, 2018 that “it would take a few days to get the
5 information.”⁴ It is undisputed that Colombo’s assistant, Michael Pierson,⁵ began working with
6 TCD’s Interim Executive Director, Sarah Moorhead, on February 2, 2018.⁶ Pierson’s emails
7 refer to “Records request” and “PDR for Eric Johnson.”⁷ After Johnson emailed Colombo on
8 February 8, 2018⁸ regarding the status of his requests, Colombo informed Johnson that “We have
9 been instructed that all Public Information Requests must come through the Director of TCD.”⁹

10 Johnson never filed a PDR with the Director (Moorehead) because he and the Board
11 Auditor, Supervisor Richard Mankamy, were engaged in an investigation involving Ms.
12 Moorehead.¹⁰ Colombo knew this because Johnson told him in person on January 31, 2018 that
13 “he was doing an investigation of Ms. Moorehead.”¹¹

14
15
16
17
18
19 **II. Status: Too little too late.**

20 ³ Ex. O: Newman Dec. attaching full NextRequest printout for Request #18-115 [available online at:
21 <http://wsu.nextrequest.com/requests/18-115>]. WSU’s Public Records Coordinator, Stephanie Kalasz, only attaches a
portion of that file as Ex. 1 to her declaration.

22 ⁴ WSU Br. at 6:17.

23 ⁵ WSU-Energy IT Support Specialist. See Declaration of James Colombo at 2:6-8 [“Information Technology
Specialist Michael Pierson is the primary IT Specialist that assists our external clients, including TCD.”].

24 ⁶ See Pierson Dec. at 3.

25 ⁷ Ex. G and N. Therefore, WSU’s assertion that “Neither Pierson nor Colombo interpreted this email to be a public
records request” is absurd. WSU Br. at 7:13-14.

26 ⁸ Ex. D: Email from Johnson to Colombo (2/8/18 @ 11:30 am).

27 ⁹ Ex. E: Email from Colombo to Johnson, cc Moorehead (2/8/18 @ 12:19 pm); Colombo Dec. Ex. 4.

28 ¹⁰ Ex. B: Johnson Dec.; Colombo Dec. at 3:9-10.

29 ¹¹ Colombo Dec. at 3:9-10.

30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

PLAINTIFF’S REPLY BRIEF
PRA LIABILITY ISSUE

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

1 As noted in Johnson's Opening Brief, WSU closed out his PDR on May 9, 2018 but did
2 not produce metadata specifically requested by him in his first request or produce the 1032
3 emails Pierson identified by name in response to Johnson's second request.¹² Surprisingly, after
4 filing his opening brief early on May 15, 2018,¹³ Johnson received notice from WSU's Public
5 Records Office on May 22, 2018, that WSU was "reopening" his public disclosure request.¹⁴

6
7 Subsequently, on June 1, 2018 WSU sent Johnson several new installments in pdf format
8 amounting to 2,079 additional records for a total of 6,864 records.¹⁵ WSU closed his PDR later
9 that same day (June 1, 2018) stating:

10
11 We have processed all records that were provided to us by WSU Energy
12 Program. We were previously provided a list of records that you believed were
13 missing from the search. It is our understanding that this list was provided by your
14 attorney, Shawn Newman, to the Attorney General's Office. We have located
15 some of the listed records. We were unable to identify some of the listed records
16 even after a thorough follow-up search. We have provided a list of the records
17 that identifies those unidentified records to the Attorney General's Office and
18 they will follow up directly with Mr. Newman.¹⁶

19 This is not discussed in the declaration of WSU's Counsel (Feulner).

20 Johnson and his counsel have not had the opportunity to sift through the document dump,
21 but WSU admits they were unable to provide all the requested records. This includes the
22 metadata in response to Johnson's first PDR. While the pdf associated with the metadata was
23

24 ¹² Ex. G: Email from Pierson to Moorehead (2/5/18) re: Records request and Eric Johnson [Emphasis added].

25 ¹³ The Scheduling Order set the deadline as May 18, 2018.

26 ¹⁴ Ex. O: See Email from Sheri Glaesman, WSU Public Records, to Johnson (5/22/18); WSU Br. at 10:2.

27 ¹⁵ WSU Br. at 10:3-4; Ex. P (Newman Dec.); compare WSU Br. at 9 (Kalasz Dec.) totaling 4779 but noting some
documents could not be converted.

28 ¹⁶ See Ex. O [Emphasis added].

29
30 PLAINTIFF'S REPLY BRIEF
PRA LIABILITY ISSUE

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

1 provided and is attached to Mr. Feulner's Declaration of Counsel as Exhibit 3, the metadata was
2 not.¹⁷

3 Astonishingly, Mr. Feulner emailed Johnson's counsel (Newman) on June 4, 2018 (at
4 7:25 am), the date set for WSU's response, stating:

5
6 Sorry for the delay in responding to this email as I wanted to wait until my client
7 finished producing records. They completed that process on Friday, June 1. The
8 majority of the emails that Mr. Mankamyer identified in his list have been
9 produced to Johnson. There are some emails that we were unable to either
10 identify or find. Without seeing the actual emails, it is hard to give a definitive
11 answer. However, most of the emails appear to be between your two clients,
12 Mankamyer and Johnson. I believe that they use gmail email addresses. As I
13 understand it, such emails would not pass through the TCD email system that has
14 an email domain name of @thurstoncd.com and there would be no copy in TCD's
15 email system as a result. There is also one email that was listed that was outside
16 of the timeframe that Johnson provided. I'm attaching a list with each email name
17 that was provided by Mankamyer that contains where each email is located in the
18 various installments produced by WSU. Please let us know if you have follow up
19 questions.

20 Newman immediately responded at 7:57 am stating:

21 I'll forward to my client for his review.

22 As for what is in the system, please refer to the email from Pierson to Colombo
23 dated February 2, 2018 @ 12:30:31 PM [Bate Stamped as Johnson v. WSU DEFS
24 -000654] and Pierson's email to Amy Hatch-Winecka, dated March 6, 2018 [Bate
25 Stamped as Johnson v WSU DEFS -000665].

26 He has yet to receive the metadata regarding his first request.¹⁸

27 Feulner did not respond to that email and does not discuss the exchange in his declaration.

28 Contrary to WSU's assertion in its brief that it "has now produced all records that have

29 ¹⁷ See Opening Brief at 14:2-4.

30 ¹⁸ Ex. R: Emails between Newman and Feulner (6/4/18).

1 been requested,¹⁹ WSU closed Johnson's PDR (again) on June 1, 2018²⁰ and has yet to produce
2 the metadata in response to Johnson's first PDR. As noted in WSU's own brief, "A denial of
3 records occurs when it reasonably appears that an agency will not or will no longer provide
4 responsive records."²¹ Contrary to WSU's assertions,²² the relevant email does exist and was
5 provided by WSU in pdf format which stripped off the metadata.²³ It is attached to the Feulner's
6 as Exhibit 3 (pages 24-28). The original email and Word document along with associated
7 metadata should be available. According to Colombo, "Even if a staff person deletes the email
8 from a live account, the emails would still be stored on Barracuda."²⁴

9
10 **III. WSU's process argument ignores the facts and the law. *Parmelee* is distinguishable**
11 **on the facts and the applicable law. It predated recodification of the PDA and, specifically,**
12 **adoption of a new section: RCW 42.56.580.**

13 WSU claims that Johnson did not follow proper protocol when he made his PDRs
14 because he did not make it to WSU's Public Record's Officer. Johnson made his PDR to
15 Colombo because Colombo signed the MOU with TCD.²⁵ WSU argues that "Neither Pierson
16 nor Colombo interpreted this email²⁶ to be a public records request." This is absurd given the
17 emails characterizing Johnson request as a "records request" and as the "PDR for Eric
18 Johnson."²⁷ Moreover, according to WSU's Public Records Office response, Johnson's PDR
19 was "received" by WSU's Public Record's Office (NextRequest) on January 31, 2018 via
20
21

22 ¹⁹ WSU Br. at 20:12-13; 21:19.

23 ²⁰ Ex. O.

24 ²¹ WSU Br. at 20:19-20 [citing *Hobbs v. State*, 183 Wn.App. 925, 936 (2014)].

25 ²² WSU Br. at 23: 7-8.

26 ²³ The email at issue was specifically discussed in Johnson's opening brief at 13:15-21.

27 ²⁴ Dec. of Colombo at 2:9-12.

²⁵ Ex. Q; See also Colombo Dec. Ex. 1.

²⁶ Referring to Johnson's PDR dated 1/31/18. Ex. B, K and O.

²⁷ See, Ex. E, F and G.

1 email.²⁸ Yet, contrary to WSU's assertions regarding the NextRequest PDR program,²⁹ no
2 confirmation was sent until February 26, 2018. In the interim, WSU IT staff worked with and
3 took directions from Moorehead who was under investigation by TCD supervisors.

4
5 WSU relies upon *Parmelee v. Clarke*, 148 Wn.App. 748 (2008). That case concerned a
6 PRA suit by an inmate. The Court held that the Department of Corrections' failure to respond to
7 the inmate's requests in a timely fashion was excusable because the plaintiff had not submitted
8 his requests to the department's designated public disclosure coordinator. That case cites the old
9 public records statute prior to recodification which included adoption of a new PRA section
10 which became RCW 42.56.580. According to RCW 42.56.580 (2):

11
12 For state agencies, the name and contact information of the agency's public
13 records officer to whom members of the public *may* direct requests for disclosure
14 of public records and who will oversee the agency's compliance with the public
15 records disclosure requirements of this chapter *shall* be published in the state
web site for the duration of the designation.³⁰

16 RCW 42.56.580 provides that state agencies "*shall* appoint" a public records officer "to whom
17 members of the public *may* direct requests for disclosure." General rules of statutory
18 construction require avoidance of unlikely, absurd, or strained results.³¹ Where a provision
19 contains both the words "*shall*" and "*may*," it is presumed that lawmakers intended to distinguish
20 between them, "*shall*" being construed as mandatory and "*may*" as permissive.³² WSU also cites
21 WAC 504-45-020(2) which states that requestors "*should*" contact the university's public
22

23
24 ²⁸ Ex. O [NextRequest #18-115].

25 ²⁹ WSU Br. 3:5-6 ["NextRequest automatically sends an email to the requester acknowledging that the request has
been received."].

26 ³⁰ Emphasis added.

27 ³¹ *State ex rel. Evergreen v. WEA*, 140 Wn.2d 615, 632 (2000).

28 ³² See, e.g., *Scannell v. Seattle*, 97 Wn.2d 701, 704 (1982).

1 records office.³³ "Should" is the past tense of "shall" and is not normally synonymous with
2 "may."³⁴ The WAC cannot contravene the PRA by mandating something the PRA deems
3 permissive.³⁵ As stated above, Johnson sent his PDR to Colombo because Colombo signed the
4 MOU with TCD.³⁶ Moreover, according to WSU's own NextRecord file, Johnson's PDR was
5 transmitted to WSU's Public Records Office via email on January 31, 2018.³⁷ Contrary to
6 WSU's reference to "the form of a proper PRA request,"³⁸ the courts have held that there is no
7 official format for a valid request under the PRA.³⁹

8
9 Although WSU admits it stores TCD records, it argues it does not "retain" them for
10 purposes of the PRA.⁴⁰ WSU asserts that this is a case of "first impression."⁴¹ WSU ignores the
11 liberal construction in favor of disclosure⁴² and the broad definitions in the PRA. According to
12 RCW 42.56.010(3) "public record"

13
14 includes any writing containing information relating to the conduct of government
15 or the performance of any governmental or proprietary function prepared, owned,
16 used, or retained by any state or local agency regardless of physical form or
17 characteristics.

18 ³³ WSU Br. at 2.

19 ³⁴ Black's Law Dictionary.

20 ³⁵ "Agencies may exercise only those powers conferred on them expressly or by necessary implication. If an
21 enabling statute does not authorize a particular regulation, either expressly or by necessary implication, "that
22 regulation must be declared invalid despite its practical necessity or appropriateness." *Wash. Indep. Tel. Ass'n v.*
Telecomm. Ratepayers Ass'n for Cost-Based & Equitable Rates, 75 Wn. App. 356, 363, 880 P.2d 50 (1994). To
23 hold otherwise would be to "defer to an agency the power to determine the scope of its own authority." *In re Elec.*
Lightwave, Inc., 123 Wn.2d 530, 540, 869 P.2d 1045 (1994)." *Impoundment of Chevrolet Truck*, 148 Wn.2d 145,
156-157 (2002).

24 ³⁶ Ex. Q; Colombo Dec. Ex. 1.

25 ³⁷ Ex. O: NextRequest printout for Request #18-115 [available online at: <http://wsu.nextrequest.com/requests/18-115>]

26 ³⁸ WSU Br. at 11:16-25 [quoting WAC 504-45-020(1)].

27 ³⁹ *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447 (2004).

28 ⁴⁰ WSU Br. at 19:4-5.

29 ⁴¹ WSU Br. at 18:6-10.

30 ⁴² RCW 42.56.030.

31 PLAINTIFF'S REPLY BRIEF
32 PRA LIABILITY ISSUE

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

1 RCW 42.56.010(4) defines "writing" to include

2 every other means of recording any form of communication or representation
3 including ... magnetic or paper tapes ... discs ... and other documents including
4 existing data compilations from which information may be obtained or translated.

5 Moreover, the word "retain" is defined by Black's Law Dictionary as "to continue to hold, have,
6 use, recognize, etc., and to keep." According to WSU-Energy's website and Colombo,⁴³ having
7 WSU host accounts has several benefits, including:

- 8 • Daily backup of your data with snapshots captured throughout the day.
- 9 • Nightly backup of your data with Disc-to-Disc and then Disc-to-Tape for secure
10 off-line storage
- 11 • All processed Email is copied and stored on our Archive Server for a minimum of
12 seven years.
- Data is stored on a Storage Area Network (SAN) device with multiple hard disks
in an array which allows for hard disk failures without loss of data.

13 Pierson explained to Johnson and Mankamyer how "we back up their systems to how we keep
14 TCD data from being lost."⁴⁴

15 There is no dispute that Johnson submitted a request for records retained by WSU.

16 Colombo acknowledged it was a records request when they met on January 31, 2018.⁴⁵

17 Colombo initially told Johnson he would get him the records in "a couple of days."⁴⁶ It was after
18 the PRA statutory 5-day time limit to respond had passed, that Johnson emailed Colombo on the
19 status of his PDR. Colombo emailed Johnson that same day stating: "We have been instructed
20 that all Public Information Requests must come through the Director of TCD."⁴⁷
21
22

23
24 ⁴³ <http://www.energy.wsu.edu/ComputerServices.aspx>; See also Ex. Q [MOU and Letter dated 6/16/14 from
Colombo to Whalen at TCD.]; Colombo Dec. Ex. 1.

25 ⁴⁴ Pierson Dec. at 2:23.

26 ⁴⁵ See, Ex. B: Johnson Dec.; Ex. E: Email from Colombo to Johnson (2/8/18).

27 ⁴⁶ Ex. B: Johnson Dec.; WSU Br. at 6:17 ["Colombo told him that it would take a few days to get the information."]

28 ⁴⁷ Ex. E: Email from Colombo to Johnson, cc Moorehead (2/8/18).

1 Unlike the situation in *Parmelee*,⁴⁸ Colombo did not direct Johnson to WSU's Public
2 Records Coordinator. Johnson never made a PDR to Moorehead. Yet, Pierson had already
3 begun⁴⁹ working with Moorehead on February 2, 2018 (within the 5-day statutory time limit⁵⁰) to
4 filter what would be provided to Johnson. Pierson specifically referred to Johnson's PDR in his
5 emails to Moorehead⁵¹ and Hatch-Winecka.⁵²

7 Finally, WSU's Public Records Office received Johnson's request on January 31, 2018.⁵³
8 Yet, WSU did not provide Johnson with acknowledgement until February 26, 2018.⁵⁴ WSU
9 closed the PDR on May 9, 2018 only to reopened it again on May 22, 2018, after Johnson's
10 Opening Brief was filed.⁵⁵ To date, WSU has belatedly provided over 6,864 documents – over
11 six times the number of documents (1032) initially identified by WSU to Moorehead.⁵⁶ WSU
12 has yet to provide the metadata in response to Johnson's first request.
13
14
15
16

17 **IV. WSU enabled Moorehead to censor records without seeking an injunction.**

18 On May 31, 2018, the Washington State Supreme Court issued its opinion in *Lyft, Inc. v.*
19 *City of Seattle*. In that case, the court considered whether the trial court properly granted an

20 ⁴⁸ "Collins responded to Parmelee by letter dated March 1, 2005. She acknowledged receipt of the letter of February
21 25 and instructed Parmelee to submit his records request to the facility's public disclosure coordinator...." *Parmelee*
22 *v. Clarke*, 148 Wn. App. 748, 751 (2008).

⁴⁹ WSU's WACs provide that "The public records officer oversees compliance with the act, but another university
staff member may process the request." WAC 504-45-020(3).

⁵⁰ RCW 42.56.520(1).

23 ⁵¹ Ex. F: Email from Pierson to Moorehead (2/2/18) ["Subject: PDR and board members"]; Ex. G: Email from
Pierson to Moorehead (2/5/18) [Subject: Records request and Eric Johnson].

24 ⁵² Ex. N: Email from Pierson to Hatch-Winecka (3/6/18).

25 ⁵³ Ex. Q: Request #18-115 Time Line

⁵⁴ Ex. K: Letter from WSU Public Records Office (Sheri Glaesman) to Johnson (2/26/18).

26 ⁵⁵ Ex. Q: Request #18-115 Time Line.

⁵⁶ Opening Br. at 14; Ex. P.

1 injunction to Lyft concerning certain "trade secrets." The State Supreme Court reversed the trial
2 court finding it had improperly applied the injunction standard. In so doing, the Court stated:

3 A "public record" "includes any writing containing information relating to the
4 conduct of government or the performance of any governmental or proprietary
5 function prepared, owned, used, or retained by any state or local agency
6 regardless of physical form or characteristics." RCW 42.56.010(3).

7
8 The PRA is "liberally construed and its exemptions narrowly construed to
9 promote this public policy [to keep Washington residents informed and in control
10 over the instruments they have created] and to assure that the public interest will
11 be fully protected." RCW 42.56.030.

12 *Lyft, Inc. v. City of Seattle*, 2018 Wash. LEXIS 350, 7 and 9 (May 31, 2018).

13 As noted in Johnson's Opening Brief at pages 5-6, WSU AAG (Adam Malcolm) advised
14 the TCD Interim Executive Director, Sarah Moorehead, that she should consult with legal
15 counsel and seek an injunction to stop disclosure.⁵⁷ According to Colombo, he was advised by
16 WSU-Energy Deputy Director Todd Currier to "make Ms. Moorehead aware of the request so
17 that she could consult with an attorney, if she wanted."⁵⁸ According to Colombo, Moorehead
18 told Pierson that "she had spoken to an attorney and that all requests for TCD information
19 needed to go through her."⁵⁹ The attorney is not identified.

20 Rather than seek an injunction, WSU - Energy staff deferred to Moorehead based on her
21 representation that she had spoken with an unnamed attorney on how to proceed. She did not
22 seek any injunction. She didn't need to since WSU IT staff were taking directions from her.
23 This is illustrated by her alarming directive to Colombo and Pierson regarding Johnson's
24

25 ⁵⁷ See Dec. of WSU Counsel (Reulner) Ex. 1, page 5.

26 ⁵⁸ Colombo Dec. at 4:6-7.

27 ⁵⁹ Colombo Dec. at 4:17-18.

1 Subpoena Duces Tecum for Amy Hatch-Wineka.⁶⁰ Moorehead directed WSU IT staff not to
2 respond to Johnson's subpoena. She wrote: "Please note that we are requesting that this is not
3 fulfilled by either party mentioned in the subpoena (Michael and Jim)."⁶¹

4 V. Conclusion

5
6 WSU makes various excuses why it violated the PRA. WSU's argument that it "had no
7 duty to respond"⁶² is absurd, contrary to the facts and public policy. WSU own NextRequest file
8 shows that Johnson's PDR was "received January 31, 2018 via email."⁶³ WSU's argument that
9 Colombo was confused⁶⁴ is contradicted by his own emails and that of his assistant, Pierson,
10 which specifically refer to a "records request".⁶⁵ WSU's argument that it was "understaffed" is
11 irrelevant.⁶⁶

12
13 WSU sat on Johnson's PDRs and opted to take directions from Moorehead, presumably
14 to preserve its contractual relationship⁶⁷ with the TCD. Colombo admits he and Pierson "wanted
15 guidance from TCD" (Moorehead) on how to proceed.⁶⁸ In so doing, they treated Moorehead as
16 their boss when Johnson was the requester and Moorehead's actual boss.⁶⁹ This enabled
17 Moorehead to intervene and filter what was provided to Johnson. Although WSU's AAG (Adam
18

19
20 ⁶⁰ See Dec. of WSU Counsel (Feulner) Ex. 1, pages 7-11.

21 ⁶¹ Id., page 10 [Email from Moorehead to Hatch-Winecka and IT Help Staff (4/24/18). Referring to Michael Pierson
22 and James Colombo.] Emphasis added.

23 ⁶² WSU Br. at 2:8-9.

24 ⁶³ Ex. O: Request #18-115 Time Line

25 ⁶⁴ WSU Br. at 12:12.

26 ⁶⁵ See, Ex. E, F and G.

27 ⁶⁶ WSU Br. at 4:3-7.

28 ⁶⁷ Ex. Q: MOU between WSU-Energy and TCD (Letters from Colombo to TCD Whalen dated 8/8/11 and 6/14/14);

29 See also, Colombo Dec. Ex. 1.

30 ⁶⁸ Colombo Dec. at 4.

31 ⁶⁹ See Colombo Dec. at 3:1. TCD Supervisors Johnson and Mankamyer told Colombo "they were Ms. Moorehead's
32 bosses."

1 Malcolm) advised Moorehead to hire an attorney and seek an injunction if necessary,⁷⁰ that was
2 unnecessary given WSU Energy IT staff was taking orders from her.

3 Finally, WSU's 11th hour document dump⁷¹ was after WSU closed the PDR and after
4 Johnson filed his opening brief. Despite providing over 6,800 records⁷², WSU has yet to provide
5 the metadata records responsive to Johnson's first request. Johnson specifically identified that
6 record⁷³ and it is attached as Exhibit 3 to Feulner's declaration. WSU provided the underlying
7 document as a pdf but not the metadata. This continued obfuscation is contrary to state law.⁷⁴
8

9 DATED: 6/6/18

10 Shawn Timothy Newman
11 Attorney at Law, P.S.
12 WSBA #14193
13
14
15
16
17
18
19
20
21

22 ⁷⁰ Ex. H: Email from Malcolm (WSU AAG) to Moorehead (2/21/18); WSU Energy's Deputy Director (Todd
23 Currier) suggested to Colombo that he "make Ms. Moorehead aware of the request so that she could consult with an
24 attorney, if she wanted." Colombo Dec. at 4:6-7.

25 ⁷¹ See Ex. P [Newman Dec.]. WSU provided 2,079 records on June 1, 2018, via email. The total number of records
26 provided is 6,864.

27 ⁷² Ex. P.

28 ⁷³ Opening Br. at 13:15-21.

29 ⁷⁴ See Opening Br. at 11-12, 14. Discussing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 146-147 (2010). In that
30 case, the plaintiff requested copies of an e-mail chain which had been circulated among members of the City
31 Council and which contained certain allegations of governmental mismanagement.

32 PLAINTIFF'S REPLY BRIEF
33 PRA LIABILITY ISSUE

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I served
a copy of Plaintiff's Reply Brief on the date below as follows:

TO: Thurston County Superior Court Clerk (Personally original)
TO: The Honorable Christine Schaller (Personally Bench Copy)
TO Timothy J. Feulner, WSBA #45396 [TimF1@ATG.WA.GOV]
Adam N. Malcolm, WSBA #32126 [adam.malcolm@wsu.edu]

VIA EMAIL PER AGREEMENT

Date: 6/6/18

SHAWN TIMOTHY NEWMAN
Attorney at Law, P.S. #14193
2507 Crestline Dr., N.W.
Olympia, WA 98502
PH: (360) 866-2322
newmanlaw@comcast.net

PLAINTIFF'S REPLY BRIEF
PRA LIABILITY ISSUE

Shawn Timothy Newman
Attorney at Law, Inc., P.S.
WSBA 14193
2507 Crestline Dr. NW
Olympia, WA 98502-4327
(P) 360-866-2322



Paul Pickett <paulpickett@conservewa.net>

Question about OPMA and executive sessions

Krier, Nancy (ATG) <NancyK1@atg.wa.gov>
To: Paul Pickett <paulpickett@conservewa.net>

Mon, Jun 11, 2018 at 8:36 AM

Dear Mr. Pickett,

Thank you for your email below. I suggest you contact your agency's legal counsel to discuss the matter. I am not able to provide you legal advice or a legal opinion. If you or your legal counsel need general information about the Open Public Meetings Act (OPMA) at RCW 42.30, you can see the information we have posted on our website here (Lesson 3) or contact me.

I trust this assists you.

Sincerely,

Nancy Krier

Assistant Attorney General for Open Government

(360) 586-7842

From: Paul Pickett [mailto:paulpickett@conservewa.net]

Sent: Thursday, June 7, 2018 5:59 PM

To: Krier, Nancy (ATG) <NancyK1@ATG.WA.GOV>

Subject: Question about OPMA and executive sessions

I'm an elected Thurston CD Supervisor. I am concerned that a violation of the Open public meetings act occurred by improper use of executive session. Who should I discuss this with?

Paul Pickett

Thurston Conservation District

