

State Supreme Court Says Advisory Committees Are Not Subject to the OPMA

October 6, 2015 by [Bob Meinig](#)

Category: [Open Public Meetings Act](#)

The Washington State Supreme Court last week, in *Citizens Alliance v. San Juan County*, finally confronted head-on the Open Public Meetings Act (OPMA) issue of when a committee of a governing body “acts on behalf of” the governing body so as to have to comply with the OPMA. It did so by adopting, in a 6-3 decision, the reasoning of a 1996 attorney general opinion, concluding, among other things, that the OPMA does not apply to purely advisory committees of a governing body. The court’s opinion also touches on related OPMA issues that merit attention.

Factual background. *Citizens Alliance v. San Juan County* involved a challenge under the OPMA to the meetings of an informal group that met occasionally to discuss how to implement the county’s critical areas ordinance (CAO) update. This “CAO Team” had an uncertain origin, no defined membership or formal purpose, and few records regarding its existence. It met about 26 times during a year and a half period, and those attending its meetings, of which little is known, sometimes included three county councilmembers. However, nothing indicated that the CAO Team was specifically established by the county council. After the county prosecuting attorney submitted a memo to the council suggesting that all gatherings involving at least three members of the council should comply with the OPMA, the CAO Team held no further meetings.

Nevertheless, the Citizens Alliance for Property Rights Legal Fund (CAPR) filed a complaint against the county, the CAO Team, and the three county councilmembers who attended CAO team meetings, alleging OPMA violations. Both the superior court and the [Court of Appeals](#) denied the CAPR’s complaint.

Major issues. The state Supreme Court addressed three major issues relating to application of the OPMA to committees:

- When does a committee qualify under the OPMA as a committee of the governing body of an agency, as a “committee thereof”?
- When does such a committee “act on behalf” of the governing body?
- When does, for purposes of the OPMA, a “meeting” of a governing body take place?

When does a committee qualify as a committee of the governing body of an agency, as a “committee thereof”? The OPMA applies to “governing bodies” of public agencies, which are defined by [RCW 42.30.020\(2\)](#) to include “any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.” The court adopted the reasoning of [AGO 1986 No. 16](#), concluding that a “committee thereof” means any committee that the governing body creates, regardless of whether the committee includes members of the governing body.

In this case, there was no evidence that the county council established the CAO.

When does such a committee “act on behalf” of the governing body? Again agreeing with [AGO 1986 No. 16](#), the court concluded that “acts on behalf of” refers to situations when a committee “exercises actual or de facto decision-making authority for a governing body.” As such, the OPMA does not apply to “advisory committees and other entities that do nothing more than conduct internal discussions and provide advice or information to the governing body.”

The CAO here certainly did not exercise any form of decision-making authority on behalf of the county council.

But what does it mean for a committee to exercise “actual or de facto decision-making authority” for a governing body? I don’t think the answer to this question is self-evident. As such, I think it would have been helpful if the court had elaborated a bit.

“De facto” is defined by *Black’s Law Dictionary* as meaning “[a]ctual; existing in fact; having effect even though not formally or legally recognized.” So, I think a committee exercises actual or de facto decision-making authority either when it is formally given decision-making authority or when its governing body, routinely and/or without discussion, merely rubberstamps the committee’s recommendations.

In the latter circumstance, the decision of the committee is, effectively, the decision of the governing body. But does a committee exercise de facto decision-making authority also when, as suggested by Justice Yu in her partial dissent (page 10), a committee narrows the ideas or policies the full governing body ends up considering? Again, it’s not clear.

In the former circumstance, I don’t think that means a committee is formally given *final* decision-making authority, which could raise questions concerning the legality of such a delegation. As noted by Justice Yu (page 8):

a committee's activities certainly do not need not take the form of "final action" as defined in RCW 42.30.020(3) . . . If that were necessary, the committee would have to usurp the final decision-making authority of the governing body before the OPMA could apply.

When does a “meeting” occur? Unfortunately, the term “meeting” is circuitously defined under the OPMA as “meetings at which action is taken.” RCW 42.30.020(4). The court here provided some clarity on this issue, stating first that “the OPMA applies only to meetings where a majority of the governing body is present.” The court then held:

For a gathering to be considered a "meeting," then, the purpose of the gathering must be "to discuss or act on matters in which" the attendees "have a common interest." It follows that for a gathering of a governing body's members to be considered a "meeting" of the governing body itself, the "common interest" must relate to the official business of the governing body.

Consequently, and as our courts have held, members of a governing body "*must collectively intend to meet* to transact the governing body's official business" for their communications to constitute a meeting.

(Emphasis in original; citation omitted.) The court then concluded:

Thus, within the context of the OPMA, we adopt the following definitions: (1) a "meeting" of a governing body occurs when a majority of its members gathers with the collective intent of transacting the governing body's business, (2) a "committee thereof" with respect to a given governing body is an entity that the governing body created or specifically authorized, and (3) a committee "acts on behalf of" a governing body when the committee exercises actual or de facto decision-making authority on behalf of the governing body.

The court found that no facts applied to the above definitions that would lead it to conclude that the San Juan County CAO was subject to the OPMA.

Neither did the court find that “serialized” email and telephone communications involving the county councilmember participants in the CAO and another councilmember constituted a meeting of the county council. The court’s discussion of this issue at pages 17-19 is worth reading carefully for guidance on this issue – which comes up a lot – of telephone and email communications between members of a governing body as possibly being subject to the OPMA.

What's a "negative quorum" and does the OPMA apply to one? A secondary issue the court addressed is whether the OPMA applies to meetings involving a sufficient number of members of a governing body to block legislation being considered by the governing body, even if that number is not sufficient to enact legislation. This issue should not come up much because, typically, governing bodies have an odd number of members, but it became an issue in this case because, when the litigation began, the San Juan County Council had six members; it now has three members.

The court found no reason to depart from its long-standing rule requiring the presence of a simple majority of a governing body's members for there to be a "meeting" under the OPMA.

The result of the court's opinion. The state Supreme Court has provided some needed clarification – even if it could have provided more – regarding this nagging OPMA issue involving committees of a governing body.