

CENTERING COMMUNITIES OF COLOR  
REGULAR MEETING  
MINUTES

April 28, 2022  
5:00 p.m.

Bellevue City Hall  
Virtual Meeting

MEMBERS PRESENT: Kalika Curry, Monik Martinez, Randy Nuñez, Corvilia Thykkuttathil, Ken Wong, Royce Yuen

MEMBERS ABSENT: Amirah Haque, Kenny Pleasant, Gloria Northcroft

STAFF PRESENT: Linda Whitehead, Justin Chan, Sara Boyle, Marcus Johnson

OTHERS PRESENT: Kathleen Kline, City Attorney's Office

RECORDING SECRETARY: Gerry Lindsay

1. OPEN PUBLIC MEETINGS ACT & PUBLIC RECORDS ACT

Kathleen Kline explained that the Open Public Meetings Act (OPMA) and the Public Records Act (PRA) are collectively referred to as sunshine or open government laws. The idea behind them both is to increase transparency about the workings of government. The OPMA requires that all meetings of governing bodies, including cities, counties and special purpose districts, be open to the public. The state legislature a few years ago put in place a requirement that every member of a governing body must receive training on the OPMA requirements on a regular basis. Governing bodies are broadly defined under the OPMA as extending to boards, commissions, committees or other rule-making bodies and the committees thereof that act on behalf of a governing body. To determine if a group is acting on behalf of a governing body, it must be asked if the group has decision-making authority, if the group takes testimony or public comment, and if the group makes formal recommendations to a governing body such as the City Council.

Under the OPMA rules, all meetings must be open to the public, except for authorized executive sessions. Notice of every meeting must be published. Agendas for every meeting must be posted 24 hours in advance of a meeting, and meeting minutes for each meeting must also be published. When city business is reviewed, discussed and/or acted upon, a quorum of members of the governing body must be present. Quorum is defined as being a majority of the members. At a regular meeting, any member may move to amend the agenda. Special meetings for a special purpose can also be convened provided that a special notice of such meetings is published. At special meetings, the only actions that can be taken are those related to the items on the posted agenda.

The OPMA rules prohibit governing bodies from taking any action except in a public meeting. By definition, action is broadly construed to include the receipt of public testimony, deliberations, discussions, considerations, evaluations and final actions. Any meeting where action is taken must include a quorum of the members. If there is no quorum, there is no meeting and no public meeting is deemed to have taken place. Any action taken outside of a public meeting is a violation of the OPMA. The majority of OPMA litigation and claims is related to actions taken outside of public meetings.

Serial meetings occur where there are a series of conversations or interactions between smaller groups of a governing body that when added together constitute a quorum within the context of the OPMA. For example, an exchange of emails can be determined to be a serial meeting. One such instance occurred when a couple of members of a school board emailed each other, and then those emails were forwarded to other members, continuing the discussions. At some point a quorum was reached and what they were discussing was official business of the board, constituting action by a quorum outside of a regularly scheduled meeting in violation of the OPMA. Another example of a serial meeting would be where Board Member 1 talks to Board Member 2 about agency business, and where Board Member 2 talks with Board Member 3 about what the initial conversation was about. Board Member 3 then talks with Board Member 4 about what Board Member 1 and Board Member 2 said. By including Board Member 4, a quorum was reached and a serial meeting can be deemed to have occurred. A serial meeting can also occur where a quorum of the members of a governing body share documents and edits in real time.

Kathleen Kline clarified that the passive receipt of information is not deemed to be an action under the OPMA. It is common practice for city staff to email all the members of a board or commission and that is not an OPMA violation. Responding to an email and engaging in discussions about the topic can risk an OPMA violation. Accordingly, emails from staff include the notice not to reply to all specifically to avoid the serial meeting issue.

A case that occurred relatively recently involved discussions about the Seattle head tax. In a phone call with a consultant, four Councilmembers discussed the fact that the tax was not polling well. Given that there are nine members of the Seattle City Council, the four members did not constitute a quorum. However, the phone call discussion led to a series of small group discussions among Councilmembers, and city staff polled where the various Councilmembers stood on the issue, following which the staff began preparing a press release indicating that a majority of the Councilmembers supported repealing the tax, all before the Council had actually voted in an open meeting.

Another situation that arises somewhat frequently involves meetings outside of meetings where multiple members of a governing body attend an event or social gathering. In such cases the best practices is to avoid whenever possible attending groups where a quorum of members might be present. If a quorum of members do find themselves together at an event, they should be careful not to do anything that constitutes action under the broad definition in the OPMA.

Kathleen Kline said there are a couple of narrow exceptions where a governing body may hold meetings that are not open to the public. The exceptions are allowed only for very narrow purposes that are specified by statute. Some of the most common executive session discussions involve things like reviewing negotiations on the performance of publicly bid contracts; evaluating complaints against public officers or employees; and discussing pending litigation with legal counsel. Before convening an executive session, the presiding officer must publicly announce the purpose for excluding the public and the time the executive session will be concluded. The courts have interpreted executive session provisions very narrowly. Governing bodies may not discuss anything in executive session that is not covered by the limited exceptions.

A closed session is different from an executive session. Closed sessions are totally exempt from the OPMA. Closed sessions involve governing bodies acting quasi judicially, such as judges deciding certain LU-type issues. Closed sessions are not common.

Kathleen Kline explained that there are risks to OPMA violations. They include fees and costs against the city, including attorney fees awarded to the prevailing party that could run into the

thousands and tens of thousands of dollars. There is also the possibility for civil penalties against the violating members, starting at \$500 for a first violation and \$1000 for subsequent violations. An OPMA violation can lead to invalidation of the city's action or decision and the loss of public trust and confidence.

Ken Wong pointed out that some members of the CCC work together and run in similar circles, possibly creating situations that could be misinterpreted as conducting official business. Kathleen Kline said that is certainly a risk, which is why it is necessary to be extra careful to avoid discussing any issue that could come before the body as a whole. Ken Wong asked if it would come down to the word of the CCC members against the word of a member of the public who notices a gathering of members. Kathleen Kline said that could certainly be the case, necessitating taking care to avoid talking about official business and issues.

Ken Wong said the concern would lie in asking communities of color to come and share in open meetings, something they may be reluctant to do. Often members of communities of color want to know they are in a place in which they feel safe in having a dialog. The OPMA restrictions could in fact prevent communities of color from participating due to a lack of trust. Kathleen Kline suggested one answer to the issue would be to have people send written communications directly to a CCC member to be brought to and shared with the full group.

Monik Martinez commented that the CCC is engaged in working for equity, inclusion and anti-racism. Many members of the CCC are involved in the same work outside of the CCC, and many of them do that work together in various capacities. That makes it very difficult to distinguish between the issues that can and cannot be talked about outside of CCC meetings. Kathleen Kline noted that with the CCC having nine members, a quorum is five, so discussions involving four or fewer members of the group outside of an official meeting would not constitute a violation of the OPMA. Even so, there would only be a violation should the group discuss an issue that is likely to come before the CCC.

Kalika Curry pointed out that a quorum of CCC members participate together in Eastside Pathways rooms where pertinent conversations are being held. It would seem that as outlined, Eastside Pathways partners cannot be part of the work of the CCC, or Eastside Pathways would have to stop doing the work. Those selected to be members of the CCC were chosen because they all have connections and relationships in the community where they are doing the work together, but the rules appear to put them in an impossible situation. Kathleen Kline suggested her office would be willing to provide some detailed guidance on the issue, which is clearly a major concern for the group. It was stressed that not everything discussed outside of meetings by members of the CCC could be perceived as violating the OPMA, only issues and topics that are likely to come before the board.

Monik Martinez asked if the CCC is a city board. Kathleen Kline stated that the CCC is a governing body.

Kalika Curry asked for clarification, noting the understanding that the CCC does not in fact have any authority beyond offering recommendations to the City Council. Kathleen Kline reiterated that the OPMA applies to governing bodies and the committees thereof. Groups that make recommendations to the City Council, take testimony, hear from groups and solicit community feedback are all deemed to be acting on behalf of the City Council and are therefore subject to the OPMA.

Kalika Curry said that just reinforces how the work of the CCC and the work of the members are literally in opposition to each other. Those who work in a community organization that works with other community organizations can either do their jobs or they can be part of the

CCC, but it would not appear they can do both. Kathleen Kline reiterated the need to circle back and provide better guidelines and more clarity.

Turning to the issue of the PRA, Kathleen Kline explained that the Act started out as a citizens initiative in the 1970s following Watergate. The state Act largely mirrors the federal Freedom of Information Act (FOIA) but is much broader. The PRA is a strongly worded mandate for the broad disclosure of public records. Anything that constitutes a public record is subject to disclosure upon request, unless an exemption applies. The PRA requires training just as the OPMA does.

When the statute was first adopted in the 1970s, it was a little more straightforward in that a record was specifically a hardcopy paper writing. What constitutes a record has dramatically expanded. The bottom line is that a record is 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 characteristic. A record does not have to be produced or created by the agency; it could be something acquired and used to make decisions down the road.

Kathleen Kline said there have been questions raised about whether stored information in databases constitutes a public record under the Act. In almost every instance, the courts have concluded that it is. In one case the court stated that if there is data in a database that can be compiled into a file, it is a public record that must be compiled and produced. It is important to keep in mind that requesters are often not required to specifically identify what a record is called, but they do have to identify what they are looking for generally. As a result many will often ask for a class or category of records, such as all communications about the city's response to a particular issue or instance; others will ask for any and all records about an issue or decision. Emails are one of the most common forms of public records. Even personal emails can be deemed public records under certain circumstances. Where a personal email address is used to conduct city business, it is very important to segregate them from a personal email inbox. It is the content of a record, not the form, that matters. If the content of a communication meets the definition of a public record, it is a public record no matter what form it is in. If an electronic communication meets the definition of a public record, it not only has to be produced if requested, it must also be retained for the applicable retention period. Certain text messages are considered transitory and have no applicable retention period, though they must be retained while a request for records is pending.

The Nissan case involved a question of whether or not records located on someone's personal device, in that instance a cell phone, constituted records that had to be turned over. The case involved a prosecutor who had a personal cell phone and a county-issued cell phone. For whatever reason, the personal phone had records on it that related to the conduct of government in an official capacity, and the court held that the call logs and the text messages requested could be public records even if located on a personal device. From a practical perspective, Nissan resulted in the court providing guidance for how to balance the privacy of individuals serving in an official capacity with the need to produce responsive records that may be on a personal device. Specifically, the court has said persons can search their own personal devices for records that might be responsive. The fewer records kept on personal devices, the less searching that will need to be done. Keeping city-related business emails in a separate file is always a good idea.

Since the Nissan decision, there have been a number of cases involving similar issues, one of which was a Facebook post. In that case there was a closed Facebook account run by a city council member. The requester argued that the posts on that account were public records that needed to be retained and turned over, but the court disagreed and held that the posts in that particular instance were not public records, but also held that posts on an individual Facebook

account could be public records under a different set of facts. Posts made by a person acting within the scope of their employment or official capacity, and posts made about the conduct of city business, can be deemed public records. Posts required to be made by the person's position, posts made at the direction of a governmental agency, and posts made to somehow further the interests of a governmental agency all are public records and as such must be retained and produced when requested. In the Nissan case, the court determined the council member's posts did not constitute a public record.

Kalika Curry asked if posts made in the interest of the community or which advance the community's efforts constitute a public record, particularly if directed by a community member to share some information, or if what is shared is in the interest of the community. Sharing information on behalf of or at the direction of the community is a frequent behavior. Kathleen Kline said she did not believe that that would be enough to say what is shared furthers the city's interests. However, determinations are generally made on a case-by-case basis. Kalika Curry stated that the work of the CCC is to center communities of color, and that is all about bringing the voices, interests, experiences and concerns of communities of color into the space, and suggested it is not clear how that fits into the test as outlined. Kathleen Kline indicated having no great answer and allowed that more guidance is needed.

Kathleen Kline said conducting an adequate search for public records is something the city staff typically handle. The fact that retaining records is a key element of the PRA was stressed to the CCC members. When someone makes a request, the city has an obligation to conduct an adequate search. Missing a record after searching everywhere records can reasonably be expected to be found does not necessarily represent a violation of the PRA; it would, however, be a violation to choose not to look in places where a person should have known there are public records. The best practice always is to segregate public and personal documents. Documents retained on personal devices must be retained properly and produced when asked.

The state has very specific retention requirements for different types of records. Kathleen Kline said staff is able to provide specific guidance around the retention of records for the appropriate amount of time.

With regard to metadata, which is unseen information in electronic files that tells one things such as when the file was created and who created it, Kathleen Kline said the metadata for each electronic file is unique. If an email were to be sent to every member of the community, the metadata in each individual email will be linked to that member. Metadata does not have to be provided unless specifically requested; if ask for, it must be produced. It is not sufficient simply to print out emails and hand over hard copies.

City staff coordinates and oversees public record compliance. Public record requests should be made to the city's public records officer, but sometimes requests are sent to the persons who have the records. Such requests should be promptly forwarded to staff. The PRA requires that an initial response to records requests must be supplied within five days of the receipt of a request.

Kalika Curry noted that city employees are provided with devices that will protect them in following the correct protocols and asked what was recommended for the CCC members. Kathleen Kline said it is not necessary to have a separate email address for conducting city business so long as all city business emails are housed in separate folders on personal devices. Requests can only be made for records sent or received that have to do with a member's work on the CCC.

Monik Martinez said one thing that makes things difficult for the CCC members is that they do not separate themselves from being people of color and centering people of color. That is simply who the members are, but that makes making the distinction dicey.

Kathleen Kline said requestors can get significant monetary penalties and the courts have wide discretion in regard to imposing penalties. They can be imposed on a per-day basis and per-page basis. There have been cases in which millions of dollars in penalties have been imposed. Similar to the OPMA, there can also be significant attorney's fees awarded. That is why every good faith effort should be put into seeking requested records. Where there are questions, persons should ask direction from city staff.

Kalika Curry asked if the CCC members themselves are subject to the fees and what resources are in place to keep the members apprised of the requests in a timely manner. Kathleen Kline said fees are assessed against the city. City staff will contact individual CCC members if there is a request for records the member might have. Notification is sent as soon as possible and the member will be given a timeline in which to respond. Staff will also assist in the search for responsive records.

Corvie Thykkuttathil asked why the CCC staff is not responsible for collecting and providing information on behalf of the CCC members. Kathleen Kline stressed that fees and penalties are assessed against the city as a whole, not against individuals, adding that the fees and penalties are determined on an individual basis.

Sara Boyle referred to the three tiers of work approved by the City Council for the CCC to undertake, noting that one of them is dialoging with the community. There could be meetings or events focused on dialog. The question was asked if such meetings would meet the requirements of the OPMA if they are open to the public and if a quorum of CCC members is present. Kathleen Kline said they would.

Kalika Curry reiterated that given the work Eastside Pathways does, the member partners cannot be part of the work of the CCC, or CCC members cannot be part of Eastside Pathways, under the rules as outlined. There appears to be a conflict of interest that puts several members of the CCC in a rough legal position. Kathleen Kline asked the CCC members to exercise patience until the city can provide additional guidance on that point. The point was reiterated that CCC members are not prevented from attending meetings and participating in other groups. The issue is when there is a quorum of CCC members together talking about the issues. Kalika Curry said that necessitated putting participation with the CCC on hold until the issue is further clarified.

Justin Chan asked if there are examples where the members of other city boards or commissions also serve on non-profits that do essentially the same work. Kathleen Kline said she would pull together examples to share with the CCC, stressing again that the trigger point is where there is a quorum of the members present.

Monik Martinez suggested it would be helpful to have some background on the original intent of the group. Many in the group are confused as to what the Bellevue Diversity Advisory Network does and what the CCC is supposed to do. There was never any mention of the OPMA in the application to join the CCC or in the interview; it arose only in the first meeting of the group. In the first meeting an audio recording was made and posted to the website, which feels like a violation of the privacy of the individual CCC members. The members appear to have no choice in letting the city use their names, photos and voices. Linda Whitehead explained that the CCC is different from the BDAN in that the CCC has the responsibility of informing City Council members. The responsibility of the BDAN is to inform the City Manager. The CCC's recommendations to the City Council will impact

policy, whereas the BDAN's recommendations to the City Manager impact the city operations, procedures and practices and that wrapped around policy set by the City Council. It is unfortunate that the CCC members were not informed about the difference at the onset. The CCC influences elected officials, and the public has the right to know what the Council is being told, and that is why the CCC as well as other city boards and commissions fall under the OPMA.

Kalika Curry asked how being subject to the OPMA aligns with the city's values around creating safety and equity for community members, including the members of the CCC. The issues are that the requirements trigger a legal conflict when doing work as part of Eastside Pathways, and they do not create safety and respect while participating in the program. If the city wants to create equity, safety and respect for people of color, and also wants the members to be part of a governing body, some practices may have to be modified. The executive session is a good example of an exception to the rules that protect elected officials, but there is no exception to the rules that serve to protect people of color who are trying to participate in the system that was not designed to serve them. The design of the framework does not feel equitable, does not create safety, and conflicts with the ability to do work in the community.

Monik Martinez said the work done by CCC members in the community and about which they are all passionate needs to be done. However, it is very hard to do the work when not feeling protected. The fact remains that being subject to the OPMA was not stated until the first meeting, resulting in a violation of trust. Doing the work that clearly needs to be done, including centering communities of color, is hampered by being told what can and cannot be done in terms of daily non-CCC work. It appears that resigning from the CCC is the only way open to protecting peace in the community, but that could mean the CCC cannot move forward in a positive way.

Linda Whitehead thanked Monik Martinez and Kalika Curry for their comments and assured them the comments would not fall on dead ears. The OPMA is designed to keep governing bodies from hiding from their constituents. The concerns voiced are legitimate and deserve a response and a response will be sought, including from the legal department. The OPMA may present a hurdle to overcome, but it is established state law to which the city is subject. The law was not drafted by or governed by the city.

Monik Martinez added that the CCC members all care about their communities and about Bellevue. The members of the CCC are not, however, representing the city, rather they are representing their communities. In general, the systems in place have hurt communities of color a lot, and as such there is a reticence to say the city initiative is for real and will not just be another front to make it look like the city or the system really cares. It cannot be said there will be any meaningful impact and lasting change from the work of the CCC.

Kathleen Kline and Linda Whitehead ensured they would meet to discuss responses to the questions posed at the meeting tonight, including the scope of CCC and how that scope does or does not intersect with the daily work of CCC members. This discuss would also include responses to concerns about how and/or if the daily work of CCC members would put them at risk of violating the OPMA.

Meeting adjourned at 6:29 PM.