

Wyoming Policy Review



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Cleaning the Fishbowl

DRAIN THE SWAMP / “STATE AGENCIES MUST ACT IN A FISHBOWL”

“Wyoming is a small town with really long streets” – Former Gov. Mike Sullivan

There is a well-adopted premise in Wyoming case law that, “State agencies must act in a fishbowl.”¹ This enables transparency when governmental officials and public figures are completing work on behalf of their constituents. It also lends credence to the moral belief that the means do not necessarily justify the end.

In 2010, Justice Kate Fox declined to interpret if the common law exception of “process privilege” was incorporated into the Wyoming Public Records Act. But four years later the Court made a move, adopting the common law exception when the legislature had put nothing on the books to the contrary. Since that time, the “process privilege” has been used to decline access to public records of everything from grizzly bear information to budget reduction plans.

In 2014, Wyoming case law held that the newly adopted “process privilege” protects the flow of ideas within government agencies, allows candid discussion and free exploration of ideas and improves governmental decision-making **“by taking official deliberations out of a fishbowl”** to prevent the “public ridicule and criticism” of public officials.²

BUT IT IS ESSENTIAL TO KEEP PUBLIC FIGURES IN THE FISHBOWL AND TO MAKE SURE THE FISHBOWL IS CLEAN AND TRANSPARENT! “There is a well-known expression applied to those in public office, ‘If you can’t stand the heat, you’d better stay out of the kitchen.’”³

The Public Meetings Act Summary

The overriding principle of the Wyoming Public Meetings Act is that government should conduct its business in an open and transparent manner. Public access to government agencies, boards, and commissions is critical to a representative from of government. The first duty of -government is to serve the public. Public meetings provide all people an opportunity to be heard on issues that are important to their lives.

The Act’s statement of purpose says: “agencies of Wyoming exist to conduct public business...”⁴

Problems with the Act:

Meetings of state boards and commissions are subject to the Act but meetings of directors of departments and State “stand-alone” agencies are not covered under the Act. These “stand-alone” agencies are defined as the agencies where the law vests full responsibility and authority for the agency’s decision in a single individual. This includes the Director of the Department of Administration and Information, Insurance Commissioner, State Examiner, and the State Engineer. The Act does not apply to them since an individual is not technically a “governing body” within the definition of the Act. A challenge with the existing law is that these people are appointed and then subject to virtually no public oversight. Perhaps a board of ethics committee, similar to that governing the ethics of lawyers should be established to field grievances, conduct investigations, and assign penalties accordingly.⁵



Another challenge with the existing law is that a governing body is allowed to go into executive session when any of the events listed in the Wyoming Statute occur.

This list is particularly lengthy and includes situations:

- (i) With the attorney general, county attorney, district attorney, city attorney, sheriff, chief of police or their respective deputies, or other officers of the law, on matters posing a threat to the security of public or private property, or a threat to the public's right of access;
- (ii) To consider the appointment, employment, right to practice or dismissal of a public officer, professional person or employee, or to hear complaints or charges brought against an employee, professional person or officer, unless the employee, professional person or officer requests a public The Public Meetings Act: A Summary January 1, 2015 Page 7 of 9 hearing. The governing body may exclude from any public or private hearing during the examination of a witness, any or all other witnesses in the matter being investigated. Following the hearing or executive session, the governing body may deliberate on its decision in executive sessions;
- (iii) On matters concerning litigation to which the governing body is a party or proposed litigation to which the governing body may be a party;
- (iv) On matters of national security;
- (v) When the agency is a licensing agency while preparing, administering or grading examinations;
- (vi) When considering and acting upon the determination of the term, parole or release of an individual from a correctional or penal institution;
- (vii) To consider the selection of a site or the purchase of real estate when the publicity regarding the consideration would cause a likelihood of an increase in price;
- (viii) To consider acceptance of gifts, donations and bequests which the donor has requested in writing be kept confidential;
- (ix) To consider or receive any information classified as confidential by law;
- (x) To consider accepting or tendering offers concerning wages, salaries, benefits and terms of employment during all negotiations;
- (xi) To consider suspensions, expulsions or other disciplinary action in connection with any student as provided by law.

The biggest challenges with the current law governing executive sessions are two fold. First, many issues relate to public interest yet can be withheld without public comment and attendance. Second, governing bodies are required to take minutes during executive session, but that are confidential and can be produced only in response to a court order.⁶

One hurdle is that there is no procedure set forth in the Act for asserting a right of access to public meetings. There is no way to assert the right at the time it is needed short of a martial law citizens' arrests. Wyoming courts have accepted petitions from citizens and media outlets for declaratory judgments regarding violations of the Public Meetings Act and whether actions at meetings in violation of the Act are null and void. The Act does not set forth procedural requirements for right of access. Venue calls for the court in the county in which the meeting took place as the proper place to seek relief from the courts. Most notably, certain public officials and entities may seek opinions from the Attorney General, but not members of the general public. Although, case law indicates that citizens may seek injunctive relief to prevent a body from meeting in secret.⁷



Wyoming Public Records Act

The Wyoming Public Records Act sets up a general rule of access to public records by persons in interest (the persons whom the records are about) and the public generally.⁸ The Act imposes a presumption that denial of inspection of records is contrary to public policy and interests.⁹

The Act does include both discretionary and quasi-mandatory exceptions to disclosure of records. General exemptions include: Materials otherwise not public under state law, materials not public under federal law, and materials which are not public under court rules or a court order. The Act gives citizens the right to access government information in a general sense, but the law specifically exempts the state legislature and the entire judicial branch.

One complication to existing law is that a public official has discretion to allow or not allow access to some records “on the ground that disclosure to the applicant would be contrary to the public interest.” Some interesting records subject to this exception include: Records of law enforcement authorities kept for investigation, “intelligence,” or prosecution purposes; details of research projects conducted at state institutions; appraisals of real estate relating to acquiring property; and interagency and intraagency memoranda which would not be available by law to a private party in litigation with the agency. Police records are open for inspection unless the disclosure would impair the investigation or prosecution of criminal activity. Any reason supporting withdrawal must outweigh the public’s interest in disclosure.

The custodian of public records has a degree of discretion when determining whether to release the records that fall within the discretionary exemption of the Act. The Wyoming Supreme Court has directed the official custodian to apply a balancing test in weighing the public’s right to access against an individual’s privacy interests. Most worrisome is that the list for this exception bears a strong resemblance to the list of subjects which can be considered in executive sessions under the Public Meeting Law.¹⁰ The custodian has discretion to decide if such disclosure would cause substantial injury to the public interest.¹¹

Budgets are open to inspection. The Wyoming Supreme Court has ruled that the public interest in access is never greater than it is in records related to the expenditure of public funds and exceptions in the statutes to public access must be “expressly textual.”¹² Expense reports should be open to public inspection, as no exemption applies. Salaries, along with any other documents containing the terms and conditions of employment, are open to public inspection.

Procedure for Obtaining Records

How to Start:

The Public Records Act is silent as to the procedure for obtaining records. One need not file a written request for access to records. Written requests are only necessary when the requester has been denied access to the records. A custodian must cite the reasons and the legal authority for denying access to records or information if requested to do so in writing.

The official custodian of any public record may make rules and regulations regarding the inspection of the records. If the custodian feels that substantial injury to the public interest would result from disclosure of the record, he may apply to the district court where the record is located for an order permitting him to restrict disclosures.¹³ The custodian of the public record receives the request and the law even covers oral requests.¹⁴ All public records are open for inspection at “reasonable times,” and the requester need not make arrangements beforehand.¹⁵ If an oral request is denied, the party denied access may request a written statement of the grounds for the denial. The statement must cite the relevant law or regulation under which access is denied.¹⁶ The law requires a response within a reasonable time, but no case has addressed how a reasonable time is to be calculated. There is no right to an administrative appeal of a denial in Wyoming. A person denied access to records may file an action in the state district court where the records are located requesting an order directing the custodian of the records to show cause why he should not permit inspection of the record.¹⁷ The Public Records Act has no provision for the award of attorney fees – this is a huge problem. ■



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ENDNOTES

¹ *Record-Times, Inc. v. Town of Wheatland, Platte County*, 650 P.2d 297 (Wyo. 1982); *Laramie River Conservation Council v. Dinger*, 567 P.2d 731 (Wyo. 1977); *Allsop v. Cheyenne Newspapers, Inc.*, 39 P.3d 1092 (Wyo. 2002); *Freudenthal v. Cheyenne Newspapers, Inc.* 233 P.3d 933 (Wyo. 2010); *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785 (Wyo. 1983); *Aland v. Mead*, 327 P.3d 752 (Wyo. 2014).

² See *Aland v. Mead*, 327 P.3d 752 (Wyo. 2014).

³ *Laramie River Conservation Council v. Dinger*, 567 P.2d 731, 734 (Wyo. 1977).

⁴ Wyo. Stat. Ann. § 16-4-401. The Act expressly provides that, “[a]ll meetings of the governing body of an agency are public meetings, open to the public at all times, except as otherwise provided.” Wyo. Stat. Ann. § 16-4-403(a).

⁵ See graphic at <http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx> for the lax penalties that Wyoming has in comparison to other states for corruption of public officials.

⁶ Wyo. Stat. Ann. § 16-4-405(b).

⁷ See concurrence of Justice Marilyn Kite in *Cheyenne Newspapers v. City of Cheyenne Building Code Board of Appeals*.

⁸ Wyo. Stat. Ann. §§ 16-4-201 to 16-4-205.

⁹ *Sheridan Newspapers v. City of Sheridan*, 660 P.2d 785, 796 (Wyo. 1983).

¹⁰ W.S. § 16-4-203(b).

¹¹ W.S. § 16-4-203(g).

¹² *Houghton v. Franscell*, 870 P.2d 1050 (Wyo. 1994).

¹³ W.S. § 16-4-203(g); *Sheridan Newspapers* at 798.

¹⁴ W.S. § 16-4-202.

¹⁵ W.S. § 16-4-202(a).

¹⁶ W.S. § 16-4-203(e).

¹⁷ W.S. § 16-4-203(f).