MEMORANDUM

To: Charter Review Committee

From: Mary Alice Winters, City Attorney
Robyn Christie, City Recorder

Subject: Open Meetings Law/Email Exchanges, Public Records and Minority Reports

Date: July 26, 2017

As we start this process, we wanted to give you legal and policy background for your role as a citizen advisory committee to the City Council on several procedural issues. Some of you may know the basics already, but to be sure we are all on the same page, please review the discussion below.

Open Meetings Law and Advisory Committees:

The policy behind Oregon Public Meetings Law (ORS 192.610 to 192.690) is:

> The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly. ORS 192.620.

The term "governing body" is important in understanding the scope of Oregon Public Meetings Law. As defined under the Oregon Public Meetings Law, "governing body" includes not only the City Council, but every other board, committee, commission, task force or subcommittee that makes a decision for the City or makes a recommendation to any other "governing body". Since the Charter Review Committee is charged with making recommendations to the City Council, it is considered a "governing body" subject to the Oregon Public Meetings Law. As long as an advisory body is itself a governing body, the fact that its members may be private citizens is irrelevant. The Oregon Public Meetings Law extends to private citizens without any decision-making authority when they serve on a group that is authorized to furnish advice to a public body.

Whenever a quorum gathers, it is a meeting. If a subcommittee is formed, the quorum rules then apply to the subcommittee.

Successive Conversations and Electronic Communications as "Meetings".

The main point of the Oregon Public Meetings Law is to require that all decisions and deliberations toward a decision by a "governing body" be made in a public meeting. The terms "deliberate" or "deliberation" are not defined, but are broadly applied. Any discussion or communication regarding a subject that is before (or could be before) the committee constitutes deliberation. *See* Attorney General's Public Meetings Manual at 139-40. Not only that, information may not be conveyed to a quorum of the board at a meeting unless the meeting complies with public meeting law.[1] *Oregonian Publishing Co. v. Oregon State Board of* Parole, 95 Or App 501 (1988); *see also* ORS 192.620 (policy that the public has the right to know the "information" that a body is basing its deliberations or actions on).

While some personal discussion between members of less than a quorum of a "governing body" is allowed, any communications between two members of a committee regarding a substantive matter before the committee creates some risk of an Oregon Public Meetings Law violation. There are two main ways this can happen. The first is a series of conversations that eventually involves a quorum of the body. If one member suggests a course of action to two other members of a seven-member committee, and then each of those has a follow-up conversation with another member, the conversation has now included a quorum of the committee and is an Oregon Public Meetings Law violation if the conversations constitute deliberation. If a decision is made in this manner, that decision is void.

The other common way that the Oregon Public Meetings Law can easily be violated is by electronic communication. A substantive email sent by one member of a committee to all or a quorum of the committee may constitute deliberation or conveying of information that can only be done in a public meeting. A "reply all" message on the same substantive subject could likely be found to be a violation. A series of emails, even if none of them involve a quorum, may constitute a meeting. *See Dumdi v. Handi*, Findings of Fact and Conclusions of Law, Lane County Circuit Court No 16-02760 (Jan. 14, 2011) (series of meetings and emails among or at the direction of certain Lane County Commissioners constituted a meeting that should have been public). The Oregon Court of Appeals recently held that a series of communications, some by email and some by phone or in-person conversations, among members of a governing body could constitute a violation of Oregon Public Meetings Law, even if no communication involved a quorum of the body. *Handy v. Lane County*, 274 Or App 644 (2015). If the communications constituted deliberation, then they violated the Oregon Public Meetings Law.

In addressing the issue of whether a quorum needs to be in simultaneous contact, the court stated:

> The legislative objective could be easily defeated if the statute rigidly applied only to contemporaneous gatherings of a quorum. For

[1] This does not mean that there can be no written communications to a governing body by staff or outside sources; however, if there are, those communications need to be made available to the public and included as part of the record of the proceeding. Any discussion or comment on those communications by members of the governing body must be in a public meeting.

> example, officials could be polled through an intermediary. In group email messages, officials could deliberate and declare their positions on upcoming issues. The same could be done through rapid, serial, group text messages in the moments before convening for an official meeting. In those examples, a quorum would have "deliberated" or "decided" the matter in "private" just as effectively as if all of the members had gathered secretly in a room and reached agreement before the public meeting. Given the purpose of the statute, we see no reason to treat those situations differently. *Oregonian Publishing Co.*, 95 Or App at 506.

The safest approach to compliance with the Oregon Public Meetings Law by committee members is to simply not have any substantive communication with other members of the committee outside of public meetings. Communication with staff is normally not a violation of Oregon Public Meetings Law,[2] so all substantive communication should be with staff.

Finally, emails are not the only potential means of violating Oregon Public Meetings Law – texts and social media posts may also constitute deliberation if related to the recommendation to council. Discussions via social media between members of the committee is also best avoided.

Information for Advisory Committees and Public Records

Information. Documents, reports, etc., shared by committee members either directly or through staff are public records since they contain information related to the conduct of the public's business. ORS 192.410(4)(a) and 192.420.

Minority Reports or Statements

Other advisory committees have discussed minority reports—when they are appropriate, how they should be used, and what constitutes a minority. Therefore, we thought it might be appropriate to address it with this committee in case the issue arises. As you all know, the committee was formed to represent a wide variety of community views as well as individual expertise. The idea is to encourage compromise, with the understanding that individuals can always testify as to their own views separately as citizens or part of other groups. Minority reports, while at times useful, to a certain extent undermine the value of the advisory committee process as a whole IF they distract members from reaching compromise. They also should not be a substitute for elevating the position of a small number of individual views simply because they are committee members. Members will have every right to individually testify, write letters and make their views known if they choose during later public processes.

With a committee of ten members, a minority position, if any, should be on a key substantive topic that has been debated and discussed, where it would aid the review of the City Council to be formally informed of the minority view. To meet this end, at least three to four people should be in the minority. As with the majority view, any minority

[2] Committee members cannot use staff to communicate with other members of the committee – the communications have to be directed solely to staff.

position should be drafted or reviewed by staff (consultant and/or city staff) for accuracy and fact-checking.

Procedurally, if a minority becomes a subcommittee with the authority to make a recommendation to the governing body, it becomes a “governing body” itself, subject to the Open Meetings Law. Thus, for example, a three-member committee of a seven-member board is a “governing body” if it is authorized to make decisions for or to advise the full board or another public body. If the subcommittee is only gathering and reporting information to the full committee then it is not a governing body. Therefore, if a group of advisory committee members meet to formulate a minority report/recommendation, it is likely forming a subcommittee subject to the Open Meetings Law, so the gathering should occur subject to the public meeting and notice requirements. No public participation is required, but the discussion cannot be held in a location that preempts right of the public to attend and listen (i.e., by phone, email, or at a coffee shop or pub--sorry).

Our recommendation: To the extent a strong minority position exists on a key issue, and there is time for the drafting of a minority position, the discussion should occur at the time of the vote on the topic. Thus, no separate process (scheduling/notice) of a meeting is then required and the minority position can become part of any written report to Council. For the reasons discussed at the beginning of this section, this approach should be used sparingly and wisely by the committee.