

# **OREGON AVIATION BOARD TRAINING**

**December 7, 2023**

**Oregon Aviation Board/Oregon Dept of Aviation  
Stacy C. Posegate Sr. Assistant Attorney General**

# TOPICS WE WILL COVER:

- *Who am I/  
Who are you?*
- *Public Meetings*
- *Public Records*
- *Administrative Rules*
- *Litigation/Contested Case  
Processes*



# WHO AM I



- All state agencies are represented by the AG
  - Representation in any civil, criminal or admin matter where the state is a party or may be interested or to protect the interests of the state
  - Written advice to the State at the State's request
  - AG performs all legal services for the state on request (contracts!)
- Contact Counsel.
- Plus: Employment, Trial and Appellate
- Conversations with the AG based on legal advice are privileged as to nonstate agencies and persons.

# WHO ARE YOU?

You are a state executive agency that derives all of its authority from statute.



## Your makeup:

7: Number of you.

4 years: Your term

1: One of you must be from the Cascade Range,

4: The total number of you that may be of the same political party,

All of you must be from private and public and sectors.



## Your powers (just some):

Authorize contracts and leases and other agreements

Authorize the ODA Director to: accept, receive, loan and spend

Authorize the ODA Director to acquire, dispose of and condemn real property

Authorize the ODA Director to designate, design and construct airport sites

Adopt rules necessary for ODA and OAB to carry out their duties

# BOARD MEETINGS ARE PUBLIC MEETINGS.



**“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 the public meetings law that decisions at governing bodies be made openly.”**

**OREGON'S  
POLICY ON  
PUBLIC  
MEETINGS**

**Public has a  
right to be  
informed about  
information  
upon which  
decisions are  
made.**

# WHAT IS A PUBLIC MEETING

**Meeting** means the convening of a governing body of a public body for which a quorum is required to make a decision or to deliberate toward a decision on any matter. ORS 192.610 as amended by HB 2805, section 1

## **Convening means**

- Gathering in a physical location
- Using electronic, video or telephonic tech to communicate contemporaneously among participants.
- Using serial electronic written communications among participants
- Using an intermediary to communicate among participants

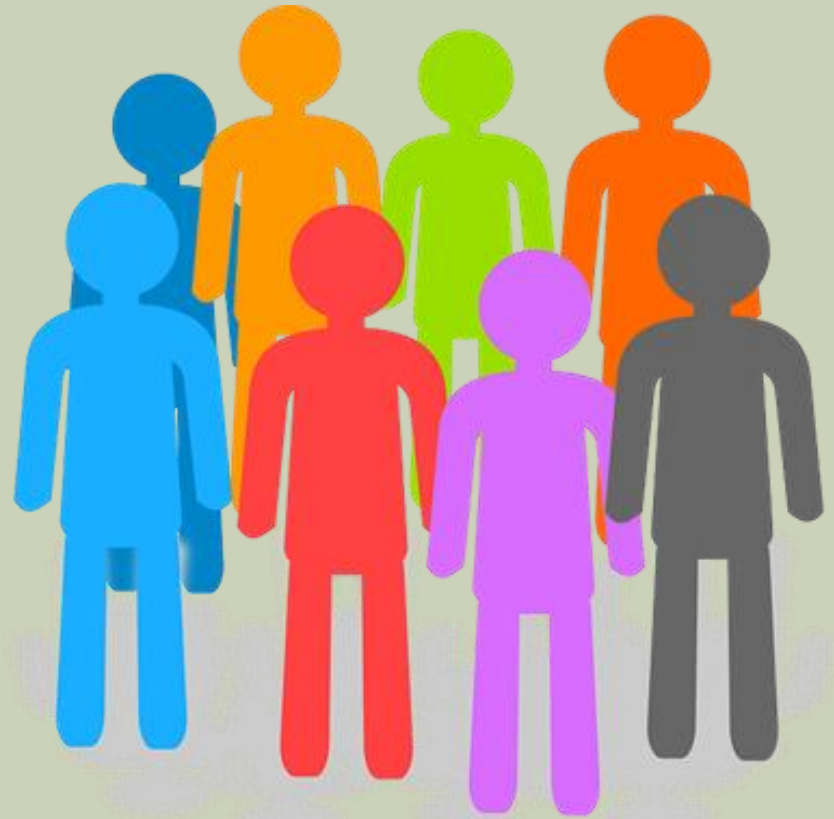
**Deliberation** means discussion or communication that is *part* of the decision-making process

**EASIEST EXAMPLE:  
A REGULARLY  
NOTICED BOARD  
MEETING**



# PUBLIC MEETING REQUIREMENTS

1. Notice to all stakeholders and other interested person must be given of the time and place of the meeting
2. The public has a right to attend - but not comment
3. The meeting must be recorded, accessible and free. (NEW)
4. All deliberations, decisions and information gathering to reach a decision must be made part of a public meeting, for most matters
5. Must have a quorum (majority) to take action.



# QUORUM

Quorum = majority of Board member seats (usually).

Refers to the number of persons present

OAB has 7 Members = 4 person quorum

Abstention still means you are present for quorum

Minimum number of concurring votes to pass or reject a motion:

- If 3 members voting, all three must concur
- If 4 to 5 members voting, three votes must concur
- If 6-7 members voting, four votes must concur

# PUBLIC MEETING EXAMPLES

## **At least four Board Members:**

- **Email each other to discuss the subject of an upcoming meeting**
- **Use the director as an intermediary to pass information**
- **Attend a dinner meeting where matters that may be the subject of a decision in the future are discussed**
- **Meet with Department staff to hear staff reports and recommendations or otherwise gather factual information, even about basic administrative functions. This applies even if the matter is not related to something that requires immediate attention as the information could have some bearing on future decisions.**
- **Participate in or attend an information or investigation gathering meetings, like airport tours! (except on-site inspections, like COAR grant projects...).**

# THE PURPOSE OF THE MEETING DEFINES THE MEETING - MORE EXAMPLES

## GOAL SETTING

**S**PECIFIC  
**M**EASURABLE  
**A**TTAINABLE  
**R**ELEVANT  
**T**IMELY

Retreats or goal setting session: The Board is deliberating toward a decision on official business or gathering information for making that decision.

Training – depending on the topic. Depends on whether the training is on a subject within the Board’s jurisdiction.

Work sessions even though there are no decisions, no motions, no arguments by Board members for a particular position, and no arguments made by the public or directed to the Board concerning a question within the Board’s jurisdiction.



**Anytime official business is discussed unless exempt**

# NOT PUBLIC MEETINGS

- Contested case deliberation – following the information gathering portion and prior to decision making
- Meeting to discuss topics outside of your jurisdiction.
- Purely social gatherings – as long as official business is avoided
- On-site inspection of any project or program
- Gathering of national, regional or state association to which the Board belongs



# PUBLIC MEETINGS?

**“Serial” email conversations**



**Phone calls**

**Lunch meetings**

**Retreats**

**Ski trip where officially business is inadvertently discussed**



# CONTROL OF PUBLIC MEETINGS

- Chair has authority to keep order and to impose reasonable restrictions necessary for efficient and orderly conduct of a meeting.
- Can regulate order and length of appearance
- Can limit testimony to relevant points
- Persons who do not comply with Chair's rules or cause a disturbance can be asked to leave
- Includes control of electronic equipment – but public can record the meeting unobtrusively





**Public meetings that are closed to the public**



**Cannot take any final action or make a final decision.**



**But can come to a consensus – public just needs to know the result of the discussion.**



**Meeting is still recorded.**



**Media is allowed.**



**Allowed only in limited circumstances**

## **EXECUTIVE SESSIONS**

**“NO EXECUTIVE SESSION MAY BE HELD FOR THE PURPOSE OF TAKING ANY FINAL ACTION OR MAKING ANY FINAL DECISION” UNLESS OTHERWISE ALLOWED....**



# WHEN IS AN EXEC SESSION ALLOWED?

- **Real Property Transactions - meet with person designated to negotiate on the agency's behalf. Sale of ODA Salem Property....**
- **Consulting with legal counsel on active or pending litigation**
- **To review exempt public records**
- **NEW!!! To consider matters relating to the safety of the governing body and of the public body staff and volunteers and the security of the public body facilities and meeting spaces**
- **NEW!!! To consider matters relating to cyber security infrastructure responses to cyber security threats.**
- **Agent appointment**

# CONFIDENTIALITY OF EXECUTIVE SESSION

- **Still a public meeting but everything discussed is confidential**
- **Documents reviewed may be exempt from disclosure as a public record**
- **Media allowed to attend but:**
  - **Board can require media not to report on contents of executive session but must announce restriction before starting executive session.**
  - **Media has no right to copies of exempt documents being reviewed.**
  - **Media has no right to record executive session.**
  - **Media may report on all other matters and any additional matters discussed that were not part of your notice. Keep discussion on topic!**



# EX SESSION PROCEDURES

## Calling an Executive Session:

- ✓ Chair will announce that Board is going into executive session pursuant to ORS 192.660 and:
- ✓ The specific reason for the session and statute for each subject discussed
- ✓ Board will be returning to open meeting to make a final decision, and estimate the time.
- ✓ Tell media what may not be disclosed.

# EX SECTION PROCEDURES

## Coming back into open session

- ✓ **Board must to return to open session to vote.**
- ✓ **Must make reasonable efforts to ensure public has notice you are back.**
- ✓ **If you are back too early or too late, take reasonable efforts to give actual notice to interested persons that you are coming back.**
- ✓ **May require postponement**

# EMERGENCY MEETINGS

- Meeting called with less than 24 hours notice
- Notice requirements are reduced
- Actual emergency must exist justifying less than 24-hours notice
- Purpose of the meeting defines whether its an emergency
- Board member inconvenience is not an emergency
- Court of Appeals will scrutinize heavily
- Emergency as to one matter does not mean emergency as to other tangential matters



# ENFORCEMENT OF THE PML

Unlike the Public Records Law, the Attorney General **does not have any role in enforcing the Public Meetings Law.** Attorney General acts only as legal counsel to state agencies

# ENFORCEMENT OF THE PML - CIVIL ACTIONS

**ANY PERSON** affected by a decision reached in violation of the PML may sue the decision-making body in circuit court.

*What can a court do if it finds a violation of Public Meetings law?*

- Void the challenged decision if no other relief is available.



- Enjoin further violations

- Award attorney fees and costs to the person who brought the suit – may be 10s of thousands of \$s.



- Any single commission member may be jointly and severally liable to the agency for the attorney award fee if Court finds that member acted intentionally or willfully.

## ENFORCEMENT OF THE PML- NEW GRIEVANCE PROCEDURES (HB 2805)



**ANY PERSON WHO BELIEVES THAT A PML VIOLATION HAS OCCURRED HAS 30 DAYS TO SUBMIT A WRITTEN GRIEVANCE TO THE DECISION-MAKING BODY.**



**THE PUBLIC BODY MUST RESPOND IN WRITING WITHIN 21 DAYS, ADMITTING OR DENYING THE VIOLATION.**



**IF YOU ADMIT, YOU CAN RESCIND OR CURE THE VIOLATION.**



**IF THE PUBLIC BODY DOES NOT RESPOND, DENIES THE GRIEVANCE, OR ADMITS THE VIOLATION, BUT DOES NOTHING, THE PERSON MAY FILE A COMPLAINT WITH OGE**



## ENFORCEMENT OF THE PML- CIVIL PENALTIES

For violations, OGEC may set civil penalties up to \$1,000.

However, if violation occurred as a result of the governing body acting upon the advice of the public body's counsel, a civil penalty may not be imposed. When in doubt, always wise to confer with your contact counsel.

Civil penalty is the personal liability of that member, and may not be paid by the governing body or the public body.

## IMPORTANT AMENDMENTS TO THE PML

1) HB 2805 expands the enforcement authority of OGEC. Previously OGEC could only investigate complaints of an executive session violation. Now, OGEC can investigate any complaint of a Public Meetings Law violation *if* a complaint is timely filed, otherwise it must be dismissed.

2) OGEC may open an investigation on its “own motion” with out a filed complaint if the violation involves an executive session violation.

3) Previously, OGEC had authority to impose a civil penalty up to \$1,000 for a violation of the executive session, OGEC can impose this penalty for any violation of the PML.

4) Clarification/confirmation that a civil penalty for violation of the public meetings law imposed on an individual member of a governing body is the personal liability of that member, and may not be paid by the governing body or the public body.

5) If OGEC finds a PML violation by a public official, it is required to notify the public body on which that person serves.

6) If OGEC finds a PML violation by an appointed public official that was committed with intentional disregard of the law or willful misconduct, the finding is prima facie evidence that the public official is unfit to serve where removal from that position is authorized for cause by law or under section 6, Article VII of the Oregon Constitution.

# HANDY: A GUIDE AND A TALE OF CAUTION

Lawsuit against Lane County Board of Commissioners for violations of public meetings law because a quorum of commissioners met privately by email to deliberate toward a ultimate decision

No. 73

November 25, 2016

605

IN THE SUPREME COURT OF THE  
STATE OF OREGON

Rob HANDY,  
*Respondent on Review,*

*v.*

LANE COUNTY,  
Jay Bozievich, Sid Leiken  
and Faye Stewart,  
*Petitioners on Review.*

(CC 161213685; CA A153507; SC S063725)

En Banc

On review from the Court of Appeals.\*

Argued and submitted June 14, 2016.

# HANDY CONT.

## ➤ **Background:**

- **5 person Lane County Board of Commissioners, a quorum = 3.**
- **April 2011: Lane County Circuit Court enters \$350,000 judgment against Lane County Board of Commissioners for public meetings law violation and \$20,0000 against County Commissioner Handy.**
- **April 2012: Handy runs for reelection to the Lane County Board of Commissioners**
- **May 2, 2012: Lane County District Attorney receives letter complaining that Handy pushed local businessman to “donate” money to pay off prior judgment**
- **2 hours later: Local media makes PR request for the letter**

# HANDY CONT.

- **May 2, 4:04-7:30 p.m.:** County Administrator talks separately to **Commrs. Bozievich and Stewart** about the letter and the public records request, both ask about potential liability.
- **7:38 p.m.:** County Administrator emails **Commnr. Leiken and Bozievich**, with a cc to the DA:

"Commissioners, I've now had a chance to review the letter we received today from [the businessman's attorney]. **Commissioner Stewart** asked me about County liability. **Commissioner Bozievich** had the same concern when I spoke to him earlier. I would like to consult with [the district attorney] and/or [the senior county counsel], but at the very least it makes me concerned about what else may be occurring that we aren't aware of. I'd like to give some advice to Finance as to what they should do with the monies we've already received. I'm also concerned that it will look like we are trying to hide something if we refuse the public records request. Our practice is to use the exceptions if they exist, but it feels wrong in this case. I'll consult with counsel on all of these issues and get back to you tomorrow."

*Handy v. Lane Cnty.*, 360 Or. 605, 609-10 (Or. 2016)

# HANDY CONT.

➤ **12 minutes later Leiken replies to all:**

"I just read the letter from [the businessman's attorney] and I am very concerned as well with regards to the county's potential liability. I will be in tomorrow morning and look forward to what you find out."

➤ **May 3, 5:56 a.m. Bozievich replies to all:**

"I will be available to come in the morning also. Looking forward to a quick decision on disclosure. Seems like the actual letter to [plaintiff] putting him on notice is already putting any investigation at risk and I do not want to be seen as covering up the receipt of funds from a possible illegitimate source."

# HANDY CONT.

- **May 3, 7:00 a.m.:** DA advised that letter may be exempt from disclosure but Commission could decide to release
- **7:00 a.m. to 9:00 a.m.** County Administrator confers with Commnrs' Leiken and Bozievich to decide whether to hold an e-meeting (and presumably Stewart).
- **May 3, 9:00 a.m .** Emergency Meeting held. Commissioners Bozievich, Leiken and Stewart attend. Handy and Sorenson did not.
- **Commissioners vote by a quorum to release letter.**

# HANDY CONT.

**Handy sues Lane County and Commissioners Stewart, Leiken and Bozievich for public meetings laws violations based on:**

- 1) Failure to give sufficient notice of the May 3 meeting or sufficient explanation for holding the meeting and by not issuing minutes (no resolution)**
- 2) The communications among the three Commissioners that preceded the meeting violated ORS 192.630(2) because a quorum of the commissioners had met privately to decide or deliberate toward deciding (1) whether to meet on an emergency basis and (2) whether to release the attorney's letter.**



# HANDY: THE HOLDING

No public meetings violation because the evidence did not show a quorum had met as to whether to disclose the letter. Commissioner Leiken's email did not mention disclosure, only concern for liability. Stewart never made any oral or written statement regarding disclosure and no other evidence that County Administrator discussed the merits of the meeting with any other Commissioner. But, this was based on lack of evidence only.

## THE LAW OF THE CASE

A quorum of a public body can "meet" by means of seriatim communications if each member of the quorum communicates with the other members for the purpose of deciding or deliberating toward a decision

# No more secret meetings on police rules, Oregon agency says

Updated May 18, 2017; Posted Mar 4, 2017



Meetings about Oregon's rules for police officers won't happen in secret anymore, according to the Department of Public Safety Standards and Training. A 19-member work group held eight closed meetings last year to discuss when and how officers should lose their badges. The department's board grants and takes away police certifications in Oregon. This photograph is from its Basic Police Academy for new police officers. Beth Nakamura/Staff(Beth Nakamura/Staff)

# *Eugene Weekly*

## **A Need for Transparency**

*An investigation into issues with the 4J school board's meetings brings up importance of public records retention posted on 10/28/21*

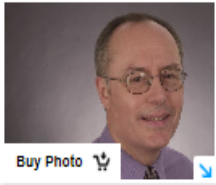


In August, Eugene School District 4J's board of directors was accused of violating public meetings law by holding meetings via text and other messages — aka discussing school business without other members of the board or the public present or even notified of the meeting.

Public records obtained by *Eugene Weekly* and interviews with board members revealed that while public meetings law may have been violated, the discussion in question was quickly stopped. Board members say any violation was accidental. The investigation did bring up concerns on the importance of retaining public records and of transparency from elected officials.

# Willamette ESD Board ordered to public meetings training

Tracy Loew, Statesman Journal Published 11:18 a.m. PT May 23, 2014 | Updated 6:24 p.m. PT May 30, 2014



(Photo: Statesman Journal file)



Willamette Education Service District Board members could have been fined as much as \$42,000 for multiple violations of Oregon's public meetings law.

Instead, they must attend a training on the laws, the Oregon Government Ethics Commission has

decided.

The commission launched an investigation a year ago, after the Statesman Journal reported that the board quietly hired a new superintendent, discussing his candidacy, hiring and contract in illegal closed-door sessions held over the previous 10 months.



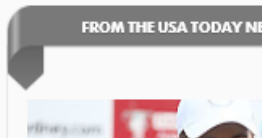
Phil Frey is on the Willamette Education Service District Board. (Photo: Statesman Journal file)

The law allows for closed-door meetings, called executive sessions, under certain conditions and when certain requirements have been met.

WESD didn't meet those requirements, and the board strayed from the topic it had stated would be covered, the ethics commission found last month.

Board members Anne Wylie, Phil Frey, Larry Trott and Alex Sanchez each were charged with six violations; Ken Hector and Frank Pender, Jr. each were charged with five violations; Mark Trumbo was charged with four violations and Rick Kimball was charged with one violation.

Each violation carries a fine of as much as \$1,000.



Kimball's case still is pending, ethics officials said.



Dixon Bledsoe was on the Willamette Education Service District Board (Photo: Statesman Journal file)

The eight other board members must attend the training, which will be offered by the ethics commission and focus on executive sessions. If they fail to complete the training, each will be fined \$150 or \$200, depending on the number of violations. WESD board members and officials could not immediately be reached for comment. They previously have said they were acting on the advice of their lawyer.

This is the second time the board has run afoul of public meeting laws during a superintendent search.



Dr. Ken Journal

In 2010, the board held an executive session on the hire of its previous

ite. That time, the

**The law allows for closed-door meetings, called executive sessions under certain conditions when certain conditions have been met.**

**WESD didn't meet those requirements, and the board strayed from the topic it had stated would be covered...**

## Lawyers Working for Attorney General Ellen Rosenblum Plotted to Keep Public Meetings Secret (Willamette Week Jan 2017)



Marion County Circuit Judge Claudia Burton ruled Jan. 17 that DOJ withheld information from the public relating to SAIF's firing of its agency director. Burton blamed the "bad advice" offered by DOJ lawyers for violations that "eviscerated" state transparency laws.

- The DOJ lawyers advising SAIF, relied on a 2013 DOJ memo laying out a road map for agencies with the subject line: "Dealing with at-will exec directors without public discussion."
- Burton found the DOJ's legal advice placed SAIF's desire for secrecy ahead of the public interest.
- "The policy behind the [public records and meetings law] is that the public needs to see the deliberations and the public needs to know what information the decision was based on," Burton said. "It eviscerates the act if a decision of this level of public interest can be deliberated on and the information kept behind closed doors in violation of the act."

# **PUBLIC RECORDS LAW**

## **“Public Record”**

**“Every persons has a right to inspect any public record of a public body of this state, except as other expressly provided.”**

# PUBLIC RECORDS

A public record is *any* writing containing information relating to the conduct of the public's business prepared, owned, used or retained by a public body (board)

*Any writing means:*

- regardless of its physical form or characteristics
- Includes electronic records, photos and text messages



# PUBLIC RECORDS REQUESTS

*Any person* may request records

Agency has a general obligation to respond within **10 business days** and complete its response “as soon as practicable and without unreasonable delay.”

Response means:

- ✓ Disclose all non-exempt records
- ✓ Identify exemptions by law
- ✓ Notify request of appeal rights





# PUBLIC RECORDS REQUESTS

**Tons of exceptions! But must be justified by the agency and construed very narrowly. Generally, they do not prohibit disclosure.**

- ❖ No implied exceptions**
- ❖ Narrowly construed**
- ❖ Most are discretionary and are weight against public interest**

**Assume that any record that you create, intended or not, will be made available to the public if requested.**

# PRL ENFORCEMENT

- Any person may petition the AG for a public records disclosure order
- If AG issues a Disclosure Order, the requestor enforces, by circuit court if necessary.
- Failure to comply:
  - Petitioner gets attorney fees regardless of who filed the suit and who prevails
  - DOJ does not defend - PRL lawsuits can get expensive, fast!
- AG PRL website: <https://www.doj.state.or.us/oregon-department-of-justice/public-records/public-records-and-meetings-law/>

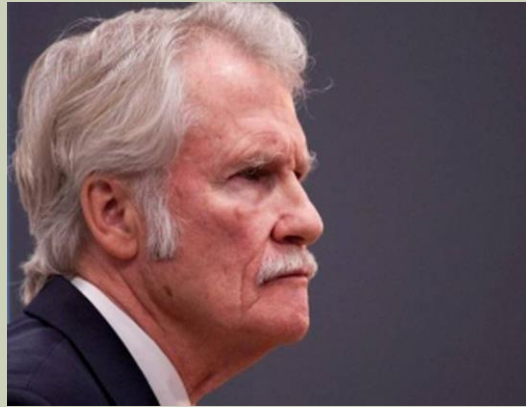
## **For Eight Months, Congresswoman Val Hoyle Has Not Produced Public Records Held on Her Personal Devices to the State Agency She Once Ran. Willamette Week. August 30, 2023**

**Her successor's administration asked for the records twice. Hoyle says she never saw the inquiries.**



**“It’s not customary, in my experience, to ask the outgoing administration for all public records held on personal devices,” says Clark, “because elected officials are informed through training and policy that personal devices should not be used to conduct public business....An outgoing administration would presumably know that if they did use a personal device at any point during their administration to conduct public business, those records would have needed to be captured and retained within state agency environments well before the end of the administration.” That would suggest that BOLI’s incoming leadership had reason to believe Hoyle did use personal devices to conduct state matters.”**

# Personal emails....dont use them!



Four different judicial proceedings all relating to Gov Kitzhaber's personal and professional emails. Including:

- Oracle America Inc. v Gov. Kate Brown seeking all emails identified as exempt and challenging the state's search and compilation of emails. MSJ granted, but mostly because tens of thousands of emails already disclosed.
- Federal criminal subpoena seeking personal emails. Motion to quash granted because of personal privacy rights)
- Separate Oracle case questioning whether the state could review Kitzhaber's emails held on DAS server. Court ruled that state could not review the records.
- Hayes v Oregonian: Hayes tried to block a public records request for her emails saying she wasn't a public official. Hayes required to disclose records and pay \$127,760 in fees

# ADMINISTRATIVE RULES

- **A rule is a law adopted by the agency that generally applies to persons outside of the agency**
- **Used to interpret a statute, create a procedure or establish a policy**
- **Board approves and directs ODA staff to initiate rule making**
- **Staff prepare the text of the rule, follows extensive procedures, including convening work groups of stakeholders, then presents a final version to the Board along with public comment on the rule for its approval (for permanent rules.)**
- **Or, staff may ask the Board to adopt an emergency rule.**
- **Board votes to adopt, amend or repeal rules in its regularly scheduled public meeting.**

# LITIGATION AND OTHER JUDICIAL PROCESSES

- **Circuit court cases**
- **Contested Case Proceedings**
- **Land Use Board of Appeals**



# CONTESTED CASES

- **An agency cannot enter a final order denying or terminating a license or permit or issuing a civil penalty without offering a contested case**
- **Final order = memorialization of final action in writing**
- **Types of Board final orders that may trigger a contested case:**
  - **Any civil penalty under OAR 738-140-0020; e.g. penalties for violating your rules relating to the registration of pilots and aircraft and the sale of aircraft, violation of licensing requirements for aircraft dealers, violation of rules regarding landing on public highways, vpds, etc.**
  - **Denial or termination of licenses, e.g. public use airport license or an aircraft dealer license**

# CONTESTED CASES PROCESS (POTENTIAL BECAUSE YOU NEED RULES)



Investigation/  
Review

Staff  
sends  
a  
notice  
of  
intent

Request  
for  
hearing

Matter goes to  
Office of  
Administrative  
Hearings (OAH)

Contested  
case  
hearing  
held



ALJ issues  
a proposed  
order

Exceptions

Board  
meeting  
held

Final  
order  
issued

Possible  
appeal to  
Court of  
Appeals and  
OR Supreme  
Court





# **AVOID EX PARTE COMMUNICATIONS**

**Applicants, licensees, others may (WILL) attempt to contact you with information about a pending proceeding.**

**This is an ex parte communication because you now have information that is not part of the record, the other party has not had a chance to respond, any you may unfairly rely on the information!**

**Courts generally find ex parte communications to be improper and may be grounds for overturning a decision.**

**If you get a call, an email, a text, anything from someone with information about a pending matter, disclose, disclose, disclose!**



**ANYTHING ELSE?**

**Unsure if you are in a grey area?**

**Avoid or Ask!**