

Whatcom County Council (Special)

**COUNTY COURTHOUSE
311 Grand Avenue, Ste #105
Bellingham, WA 98225-4038
(360) 778-5010**



Minutes - Draft Minutes

Tuesday, April 30, 2024

10:15 AM

Hybrid Meeting

**HYBRID MEETING - (PARTICIPATE IN-PERSON, SEE REMOTE JOIN
INSTRUCTIONS AT www.whatcomcounty.us/joinvirtualcouncil, OR CALL
360.778.5010)**

COUNCILMEMBERS

Barry Buchanan
Tyler Byrd
Todd Donovan
Ben Elenbaas
Kaylee Galloway
Jon Scanlon
Mark Stremler

CLERK OF THE COUNCIL

Dana Brown-Davis, C.M.C.

Call To Order

Council Chair Barry Buchanan called the meeting to order at 10:16 a.m. in a hybrid meeting.

Roll Call

Present: 7 - Barry Buchanan, Tyler Byrd, Todd Donovan, Ben Elenbaas, Kaylee Galloway, Jon Scanlon, and Mark Stremler

Announcements

Committee Discussion

[AB2024-294](#) Discussion of recent employment law decisions

George Roche, Prosecuting Attorney's Office, read from a presentation (on file) about items to avoid in an open meeting, and a background of the WA Counties Risk Pool (WCRP).

Donovan asked how common settlements being paid by Whatcom County have been in the last ten years that the Council does not know about, and stated he wants to get a sense of how unusual or usual a situation like this (a payout of some substantial sum of money that the Council never knows about) is. Roche stated it is highly usual, but it depends on what they consider the threshold for a sum of money.

Buchanan asked whether this particular claim triggered us to have to pay the deductible and what fund that gets paid from.

Roche spoke about what was paid and stated it gets paid from the tort fund. He continued his presentation on the background of the WCRP and the 1988, 1995, and 2015 County legislation regarding who is appointed to handle the County's risk pool business and about the assignment of WCRP duties. He spoke about the authority of Council to expand upon the appointments made to represent the County at the WCRP, including the appointment of Councilmembers or Council staff to the WCRP board of directors. He answered whether a Councilmember could have come back to Council to let them know about the recent payout if one was on the risk pool board at that time, and stated they could, but the law comes with certain complexities to it and whoever would sit in that position would potentially be exposed to confidences and privileges that would need to be maintained.

Donovan stated he is still not getting a solid sense of how pervasive these incidents are for which we have to make these payouts and how our HR

system is working (or not working) that we do not know about as a Council. He stated a discussion the Council should have is what they want to look at changing so that the Council has some role as a check, and that they are aware of what is going on, within the bounds of what the Charter says regarding Council not directing the Executive or staff.

Donnie LaPlante, Administrative Services Department Human Resources (HR), read from the presentation about WCRP and Current County roles, and spoke about how he interfaces with the risk pool.

Roche spoke about how deeply involved Whatcom County is in the risk pool, and answered the difference between the risk pool settlement process and tort claims (as detailed in Whatcom County Code 3.05), and why this recent settlement was different than the kind of settlement that Council would otherwise have Code jurisdiction over. When a liability is tendered to the risk pool, the County is, in essence, selling it to them via a contract, and the liability then belongs to the risk pool and not the County. It is then Legal's interpretation that WCC 3.05 does not apply in any case where another insurer accepts the tender. He continued the presentation on defense and indemnification and settlement authority in non-WCRP liabilities where WCC 3.05 applies.

Donovan asked whether they could change WCC 3.05 to address the fact that if something goes to the risk pool, it does not have to be reported. They could change it to make it clear that Council expects to be notified if there is a payout from the risk pool.

Roche stated that is in the realm of possibility but they would need to proceed very cautiously to not do anything that would offend the contractual relationship with the risk pool.

Donovan stated his concern is that the interpretation of 3.05 is that Council does not need to know. He hopes the Council can look at what they can do with that code so that they do know when these things happen.

Roche stated he supports the endeavor to modernize WCC 3.05 but wants to make sure that whatever they do is appropriate from a legal perspective.

Buchanan asked whether executive session with the Council would shield some of the legal jeopardy he described, and Roche stated in certain settings that is the appropriate resolution but he still has some lingering concerns. They would need to identify certain parts of the conversation that are privileged or confidential.

Galloway asked whether there is anything in the contractual relationship with the risk pool that would have prevented Council notification of the situation even if it did not allow for or require Council approval, and Roche stated there is not.

Elenbaas spoke about public expectations of the Council and how this breaks trust because the Councilmembers did not receive communication about the situation.

Scanlon stated he has been hearing a lot about trust issues from friends, County employees, and the public. He thanked the people who came forward and reported these allegations of sexual harassment and the journalists who did their job. He asked how other legislative bodies and other counties are informed about their risk pool payments and what that relationship looks like. He stated data (about trends or continued payments around certain topics) would be helpful so they can develop a policy response. If there are continued payments on certain issues, that has financial impact on the county and could also cause insurance premiums to rise.

Roche stated it is important to realize that sometimes they can have good policies and bad actors.

Derek Bryan WCRP Executive Director, stated commissioners in non-charter counties (which is the majority of counties in the risk pool), have a lot more involvement when it comes to the departments reporting to them knowledge of these sorts of things going on. The risk pool works with a liaison between themselves and the County for handling a claim. If another individual of the County was to reach out to the pool, they would loop in the liaison so that they have a sole party at the County that they work with. It would never happen that the risk pool settles a claim and the County does not know anything about it. Most boards of County Commissioners have regularly scheduled updates from departments or a standing executive session about pending matters. They may also use a specific dollar threshold for what they would like to be updated about.

Roche answered whether one of the issues here was the amount for the deductible and whether there was any amount threshold at which the Council would have been informed. He stated the concern with this situation is when it relates to an employment liability that belongs to another branch of government. He answered whether there is a point *before* the risk pool accepts the liability where it would be more appropriate to have discussions

with Council and stated he endeavors to inform the risk pool the same day he gets information about a claim.

Stremmer asked whether there will be a time and place that the Council can ask questions about timelines, departments, news articles, and letters and have those questions answered. There is a level of pressure being put on the Council for answers but they cannot get those until there is a time and a place for it.

Donovan stated he does not think the Council is saying they want to authorize or not authorize the payment. They are saying they do not have a sense about how much this County is paying out for personnel matters. Knowing what happened is important, not necessarily the Council saying they should have paid this or not.

Byrd stated that because Roche represented this for the Executive, he might be filtering some of the questions through that view. He does not, however, believe the questions are directed at Roche or the actions he took, but are in regards to the Council being kept up to date from the Executive's Office.

Roche spoke about who he represents and the fact that the Council does not have a complete list of claims. He answered what attorney could assist the Council if they were to enter into an independent investigation, and stated there are mechanisms in place for that.

Elenbaas stated it shows an extreme lack of judgment and almost a negligence that this situation could happen and not be shared with the Council. He is appalled that they were not informed.

Roche answered whether monies have been appropriated for a special deputy prosecutor option for an investigation.

Donovan stated they have sought out independent counsel in the past and it was paid out of the General Fund.

Roche continued the presentation on the system in place for reporting misconduct, rules about the separation of powers in employment law, and employment separation agreements.

Donovan asked whether the letter of recommendation violates the separation agreement, and spoke about what role the Council should play in creating policies and digging into things, like how HR deals with people who are bringing forward allegations of harassment, and how that person is

put in the same room with the harasser as part of the process. He stated Roche mentioned that many claims do not go forward and that seems to be a policy or procedure that defies logic and discourages people from filing claims. He stated they cannot write the policies and procedures but they can do an investigation and ask how this practice compares to what is maybe healthier. He asked how they define their role as a legislative body in oversight of these matters given the parameters in the Charter.

Roche stated there were a number of things that occurred here that went outside of the scope of the County's policies. The County has a zero-tolerance policy on harassment and there is an open willingness to consult about the improvement of all of our HR policies. The County's policies are not what have created our liability. The County's employees not following our policies is what has created our liabilities.

Elenbaas read from Charter Section 2.20 (c) regarding powers of the Legislative Branch and stated they do have some need to know in regards to the branches of the Executive's Office. He read from Charter Section 2.21 regarding Council Subpoena Powers and stated, in his opinion, they have a duty to do what they are doing and that the public is calling for this type of investigation to hold the Executive accountable or find out if he needs to be. He does not know, however, if they can do that with the information that they have.

Roche spoke about using subpoena powers versus having a voluntary process and stated they should exhaust the voluntary process first.

Elenbaas stated his point in reading that section of the Charter was to say that he thinks it is expected of them that they look into this, whether they flex the subpoena power or not, and Councilmembers discussed that it is the investigatory part for which the Charter gives authority.

Scanlon spoke about resolutions in which the Council gave specific suggestions for the Executive and that they could do the same in this situation. He is also interested in hearing from HR about our policies and practice regarding sexual harassment.

Roche answered a question about separation agreements and what examples they could look at in Washington State law regarding processes for places of employment sharing information to avoid harassers being passed on from employer to employer. He stated if they can reach a conclusion of an investigation as an employer, that becomes public, but there are many things and efforts that can thwart that completion. He answered whether our policy

on investigations has changed to try to complete things before someone leaves and he spoke about what they learned through this process.

Buchanan moved that the Council, with the authority granted them in the Charter to investigate this issue, start that investigation. The motion was seconded by Donovan.

Councilmembers discussed having an executive session, concerns that the situation is politically charged and is a political hit piece that found a subject, having an independent third-party evaluation which would remove the political piece, maybe forming a small committee on the Council of three people operating out of Committee of the Whole who could discuss strategy and process, having the first report back to Council next week, not only looking at the Executive's role in the matter but also what code changes they might need, looking at the Council's role for oversight in the Charter, figuring out how they might improve the information about risk pool payments going forward, and whether the investigation should include both this matter and future policy.

The motion carried by the following vote:

Aye: 7 - Buchanan, Byrd, Donovan, Elenbaas, Galloway, Scanlon, and Stremmler

Nay: 0

Buchanan stated they will open this investigation in accordance with the powers given to them through the Charter.

Clerk's note: Donovan left the meeting at 12:10 p.m. just after the following presentation.

Melissa Keeley, Administrative Services Department Human Resources, continued to read from the presentation about the Whatcom County employee's personnel handbook, County investigation procedures and resources, and County training efforts. She answered questions about whether the County consulted with an independent evaluator when the policies underwent an update in 2021 to help review our policies against others to make sure we are adhering to best practices, how we can ensure we are keeping a pulse on what our employees are thinking and feeling and that they feel supported in this process, whether they are considering any changes moving forward after going through this, how to bring employee voice into any potential process changes, and whether there is anything in the employee handbook about the responsibilities of HR.

Roche answered whether there is a policy about separating a person who makes an allegation of sexual harassment and the one who has been accused when an accusation has been made.

Satpal Sidhu, County Executive, answered whether he would like to address the Council and stated he has already said in his email what he wanted to say, but he thanked them for the opportunity.

Elenbaas moved to go into executive session. The motion was seconded by Galloway.

Councilmembers discussed the motion and Elenbaas stated he has questions pertaining to the timeline so he can sort out the direction that they should investigate.

Buchanan stated they will meet in executive session until no later than 1:30 p.m. to discuss litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency, pursuant to RCW 42.30.110(iii).

The motion carried by the following vote:

Aye: 5 - Byrd, Elenbaas, Galloway, Stremmler, and Buchanan

Nay: 1 - Scanlon

Out of the Meeting: 1 - Donovan

Buchanan stated the attorney present will be George Roche and they will be back to either continue the open session or adjourn the meeting once executive session has concluded.

Councilmembers entered into executive session at 12:28 p.m.

At 1:28 p.m. Dana Brown-Davis, Clerk of the Council, announced for the chair that the Council is extending the executive session for a period of 20 minutes, until 1:50 p.m.

The executive session adjourned at 1:49 p.m.

Buchanan returned to the open meeting and stated they have adjourned the executive session and will be picking this up again next week as they continue their investigation. He gave a summary of this public meeting and stated there was a motion to open a formal investigation led by the Council, and they will be checking in with the public and everyone next week to let

them know where the Council is at.

This agenda item was DISCUSSED.

TIMESTAMPS FOR VIDEO RECORDING:

Meeting went into Recess

Meeting Reconvened for Extension Announcement

Meeting went into Recess After Announcement

Meeting Reconvened by Chair

Other Business

There was no other business.

Adjournment

The meeting adjourned at 1:51 p.m.

ATTEST:

WHATCOM COUNTY COUNCIL
WHATCOM COUNTY, WA

Dana Brown-Davis, Council Clerk

Barry Buchanan, Council Chair

Kristi Felbinger, Minutes Transcription