

Source: <https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3>:

### **(i) Litigation, Potential Litigation, or Enforcement Actions**

An agency must meet three basic requirements before it can invoke this provision to meet in closed session. First, "legal counsel representing the agency" must attend the executive session to discuss the enforcement action, or the litigation or potential litigation. This is the only executive session provision that requires the attendance of someone other than the members of the governing body. The legal counsel may be the "regular" legal counsel for the agency, such as a city attorney or the county prosecutor, or it may be legal counsel hired specifically to represent the agency in particular litigation.

Second, the discussion with the legal counsel either must concern an agency enforcement action or it must concern litigation or "potential litigation" to which the agency, the governing body, or one of its members acting in an official capacity is or is likely to become a party. Discussions concerning enforcement actions or existing litigation could, for example, involve matters such as strategy or settlement.

This provision for an executive session defines "potential litigation" as matters that are protected by attorney-client privilege concerning:

- Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;
- Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or
- 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.

This definition permits discussions by an agency governing body of actions that involve a genuine legal risk to the agency. This allows a governing body to freely consider the legal implications of a proposed decision without the concern that it might be jeopardizing some future litigation position.

The third requirement for meeting in closed session under this subsection is that public knowledge of the discussion would likely result in adverse legal or financial consequence to the agency. In [\*Port of Seattle v. Rio\*](#) (1977), the Court of Appeals stated that a closed executive session with legal counsel to discuss settlement or avoidance of litigation is proper because "A public agency should neither be given an advantage, nor placed at a disadvantage

in litigation.” The Washington Supreme Court, in [Recall of Lakewood City Council](#) (2001), held that a governing body is not required to determine beforehand whether disclosure of the discussion with legal counsel would likely have adverse consequences; it is sufficient if the agency, from an objective standard, should know that the discussion is not benign and will likely result in adverse consequences.

Since the purpose of this executive session provision is only to allow the governing body to *discuss* litigation or enforcement matters with legal counsel, the governing body is not authorized to take final action regarding such matters in an executive session. Case law suggests that a governing body may do no more than discuss litigation or enforcement matters and may therefore be precluded from decisions in the context of such a discussion in order to advance the litigation or enforcement action. In [Feature Realty, Inc. v. City of Spokane](#) (2003), the federal Ninth Circuit Court of Appeals invalidated a “collective positive decision” of a governing body in executive session to approve a settlement agreement. The *Feature Realty* court relied on the Washington Supreme Court’s holding in [Miller v. City of Tacoma](#) (1999) that a governing body can only take an action in executive session “explicitly specified” in an exemption to the OPMA.

This provision is, in practice, often used as a justification for executive sessions, particularly because “potential litigation” is susceptible to a broad reading. Indeed, many things a public agency does will subject it to the possibility of a lawsuit. However, a court will construe “potential litigation” or any other grounds for an executive session narrowly and in favor of requiring open meetings. [Miller v. City of Tacoma](#) (1999). To avoid a reading of this subsection that may be broader than that intended by the Legislature — and to avoid a suit alleging a violation of the OPMA — it is important for a governing body to look at the facts of each situation in the context of all the requirements of this subsection.

**Case Example:** *A board of county commissioners is considering adopting a stringent adult entertainment ordinance, and a company that had announced its intention to locate a nude dancing establishment in the county states that it will sue the county if it passes this ordinance. The commissioners call an executive session to discuss with the prosecuting attorney this “potential litigation.” Specifically, they intend to discuss with the prosecuting attorney his opinion as to the proposed ordinance’s constitutionality. May the commissioners meet in executive session to discuss this?*

**Resolution:** *The county commissioners may discuss with their legal counsel in executive session the constitutionality of the proposed ordinance, particularly in light of the threatened legal challenge. They want to have a strong position coming into the litigation. The company’s knowledge of their discussion would give it an unfair advantage in framing the constitutional*

*theories in support of its threatened suit against the county. Also, the prosecuting attorney may not feel he can be totally candid with the commissioners in open session.*

*The company, on the other hand, may argue that the commissioners are not discussing the potential litigation, but rather are only discussing the ordinance. The commissioners should always be aware of the constitutionality of the actions they take. But, that does not mean the commissioners have the authority to meet in executive session any time they are proposing legislation that may implicate constitutional issues. However, given the circumstances here – specifically that the company threatened to sue - the commissioners’ position should prevail. Consistent with the definition of “potential litigation” added by the Legislature in 2001, the county commissioners may discuss the “legal risks of a proposed action,” in this case, the legal risks of adopting a stringent adult entertainment ordinance, particularly when the company has threatened litigation if the county adopts the ordinance.*