
Port District Transactions: Non-Disclosure Agreements, Document Data Rooms and Due Diligence

WPPA – Annual Meeting – CLE
Tacoma, Washington

December 6, 2022

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The Issues

- It has become popular and routine in business transactions for parties to demand “non-disclosure agreements (“NDAs”) before beginning negotiations.
 - Evolved to include even “letters of intent” and lease transactions.
- Port districts need to complete “due diligence” of counter-parties to confirm:
 - Financial capability.
 - Experience.
 - This information is gained by access to “data rooms” and on-site visits to counter-party offices.
 - Data Room Access Agreements.
- The Public Records Act “PRA” (chapter 42.56 RCW) and the Open Public Meetings Act “OPMA” (chapter 42.30 RCW) do not contemplate these developments in business practices.

The Challenge

- How can port districts successfully operate in this commercial environment and still:
 - Complete necessary due diligence with sufficient documentation in the file:
 - To allow the port commission to make an informed decision.
 - To withstand post-transaction auditor and public scrutiny.
 - Comply with the PRA and OPMA.
 - Provide enough information for an informed port commission decision.

What is a “public record”

Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristic.

When can a port commission discuss a transaction

- Other than a public discussion in an open public meeting, port commissioners can meet in executive session:
 - (b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;
 - (c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;
 - But the factors that effect price must be first addressed in public portion of meeting. Columbia Riverkeepers v. Port of Vancouver USA, 188 Wn2d 80 (2017).

“Best Practices” to address the Issues and the Challenges

1. **Discuss the OPMA and the PRA** with the counterparty early in discussions
 - The counterparty is dealing with a government – the port and the counterparty are not equals.
 - For example, the port may need to do a non-project SEPA.
 - The best approach is an “out-front” and “open approach.”
2. **Include authority for the executive director to sign NDAs and data room agreements**
 - In the port’s delegation of powers resolution (RCW 53.12.270).
 - Only port standard agreements.

3. **Provide a standard port form NDA or data room agreement**

- Notes the port district follows the “spirit and letter of the PRA and OPMA” – the NDA is a public record.
- Includes citations to these statutes.
- Includes representation and warranty that the counterparty has reviewed the statutes.
- Provides that the port, in its sole discretion determines when a document is a “public record” and when it must be released.
- Avoid reciprocal NDA provisions – the port has no interest in keeping its information “secret”.
- May allow an RCW 42.56.540 notification to counterparty.

4. **Provide a standard port data room agreement**

- Notes the port district follows the “spirit and letter of the PRA and OPMA” – the data room agreement is a public record.
- Only applies to port employee who examines records.
- Allows for preparation of a memo.

5. Review counterparty documents at the counterparty's office.
 - Prepare a deliberative process memo – exempt RCW 42.56.280.
 - Prepare a memo for real estate lease, purchase or sale for executive session memo – exempt RCW 42.56.260.

6. Understand and explain the “use” definition gray area – RCW 42.56.010.
 - No caselaw on what “use” of document in definition of “public record” means.

7. Develop a “marking” system
 - Mark records that may require notification to counterparty.

8. Be careful what you ask for and ask for what you need.
 - A port is a public agency – it needs adequate information from the counterparty

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