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## ADMINISTRATIVE LAW—Deliberating in the Open? Applying Wyoming’s Public Meetings Act to Contested Case Hearings; *Decker v. State ex rel. Wyo. Med. Comm’n (Decker II)*, 191 P.3d 105 (Wyo. 2008)

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## CASE NOTE

### ADMINISTRATIVE LAW—Deliberating in the Open? Applying Wyoming's Public Meetings Act to Contested Case Hearings; *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105 (Wyo. 2008)

*Justin Newell Hesser\**

#### INTRODUCTION

In 2001, the Wyoming Workers' Compensation Division denied Daniel Decker's claim for benefits.<sup>1</sup> The division referred Decker's claim to the Medical Commission (Commission), which established a hearing panel (Panel) to hold a contested case hearing under the Wyoming Administrative Procedure Act (WAPA).<sup>2</sup> The Panel upheld the denial and Decker appealed.<sup>3</sup>

The Wyoming Supreme Court remanded the case back to the Panel.<sup>4</sup> Citing the Wyoming Public Meetings Act (PMA), Decker filed a motion on remand with the Commission seeking to observe the Panel deliberations.<sup>5</sup> The Commission

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\* Candidate for J.D., University of Wyoming, 2011. I would like to thank Professor Michael Duff and Robert M. Brenner for their comments and advice. Also, thanks to my wife and mother for their continued support and endless feedback.

*Editor's Note:* As this issue was going to press, on January 8, 2010, the Wyoming Supreme Court handed down its decision in *Cheyenne Newspapers, Inc. v. Building Code Board of Appeals*, 2010 WY 2 (2010), discussed *infra* notes 29, 63, 177. The court held that quasi-judicial deliberations following a contested case hearing under the Wyoming Administrative Procedure Act are subject to the Wyoming Public Meetings Act. However, the court held that the agency's action was not null and void because the agency's ultimate action took place at a public meeting. The special concurrence and the dissenting opinion illustrate the continuing significance of the issues discussed by this note.

<sup>1</sup> *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 191 P.3d 105, 107 (Wyo. 2008). Decker claimed his employment with Mountain Aire Heating and Air materially aggravated his preexisting condition of thoracic outlet syndrome. *Id.* at 107–08.

<sup>2</sup> *Id.* at 107. The Wyoming Administrative Procedure Act is located at Wyoming Statutes §§ 16-3-101 to -115. This case note will refer to the Medical Commission and the hearing panel as separate bodies. The Medical Commission is made up of at least eleven health care providers who are appointed by the governor and serve as members. WYO. STAT. ANN. § 27-14-616(a)–(b) (2009). One of the Commission's duties is to provide three members to serve as a hearing panel for contested cases referred to the Commission. § 27-14-616(b)(iv).

<sup>3</sup> *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 124 P.3d 686, 688 (Wyo. 2005). Appeals from an administrative agency are first taken to the district court. WYO. STAT. ANN. § 16-3-114. A district court's final judgment can then be reviewed by the Wyoming Supreme Court. WYO. STAT. ANN. § 16-3-115. However, the Wyoming Supreme Court gives the district court's decision no deference and instead reviews the case as if it came directly from the agency. *McIntosh v. State ex rel. Wyo. Med. Comm'n*, 162 P.3d 483, 487 (Wyo. 2007). The district court affirmed the denial of Decker's benefits. *Decker I*, 124 P.3d at 688.

<sup>4</sup> *Decker I*, 124 P.3d at 697.

<sup>5</sup> Transcript of Record vol. II at 500–01, *Decker II*, 191 P.3d 105 (S-07-0051) [hereinafter *Decker Motion*]. While Decker was seeking to attend the hearing panel's deliberations, his motion

denied Decker's motion, and the hearing panel entered a supplemental order upholding the denial of benefits.<sup>6</sup> Decker again appealed.<sup>7</sup>

The Wyoming Supreme Court held the hearing panel was not subject to the provisions of the PMA, and therefore was not required to allow parties or the public to attend deliberations following a contested case hearing.<sup>8</sup> While the court found the Panel followed proper procedures, it ultimately held substantial evidence did not support the order and reversed on that basis.<sup>9</sup>

This case note examines the Wyoming PMA and how it applies to quasi-judicial bodies, particularly when they deliberate following contested case hearings.<sup>10</sup> First, this note will examine the policies and purposes behind open meeting acts in general and the Wyoming PMA specifically.<sup>11</sup> This discussion will also examine the nature of quasi-judicial bodies and how open meeting laws apply to them.<sup>12</sup> Next, this case note will explain how the majority relied on alternative rationales to reach its holding in *Decker II*, and discuss the dissent's argument.<sup>13</sup> Furthermore, this note will argue that while the majority was correct in its conclusion, it erred by finding the hearing panel was not a body subject to the PMA—instead the court should have determined that, while the Panel is subject to the act, its deliberations are not.<sup>14</sup> Finally, this note will conclude the court should continue to hold the PMA does not cover quasi-judicial deliberations following contested case hearings, given the purpose and policies of the act.<sup>15</sup>

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was filed with the Office of the Medical Commission. *Id.* The Wyoming Public Meetings Act is located at Wyoming Statutes §§ 16-4-401 to -408. Decker's motion argued the PMA would allow his attendance because the Panel was an agency and its deliberations were a meeting and action under Wyoming Statute § 16-4-402(a). Decker Motion, *supra*. Even though Decker cited the PMA as authority, his argument to the Wyoming Supreme Court stated he did not believe the deliberations should be open to the entire public. Brief of Appellant at 25, *Decker II*, 191 P.3d 105 (S-07-0051) [hereinafter *Decker II* Appellant's Brief].

<sup>6</sup> *Decker II*, 191 P.3d at 112; Transcript of Record vol. II at 526-36, *Decker II*, 191 P.3d 105 (S-07-0051) [hereinafter Commission's Decision].

<sup>7</sup> *Decker II*, 191 P.3d at 108. The district court affirmed the Panel's decision and Decker continued his appeal to the Wyoming Supreme Court. *Id.* at 113.

<sup>8</sup> *Id.* at 118.

<sup>9</sup> *Id.* at 122. This case note focuses on the issue Decker raised regarding the right to attend the Panel's deliberations; therefore the court's discussion of the substantial evidence standard is outside the scope of this note.

<sup>10</sup> See *infra* notes 113-94 and accompanying text.

<sup>11</sup> See *infra* notes 16-43 and accompanying text.

<sup>12</sup> See *infra* notes 44-78 and accompanying text.

<sup>13</sup> See *infra* notes 79-107 and accompanying text.

<sup>14</sup> See *infra* notes 120-74 and accompanying text.

<sup>15</sup> See *infra* notes 175-94 and accompanying text.

## BACKGROUND

The press began to lobby legislatures to pass open meeting statutes in the 1950s, because many press organizations thought state and local governments conducted too much business behind closed doors.<sup>16</sup> The public has no common law right to attend meetings of governmental bodies, and the U.S. Constitution does not guarantee the right to attend public meetings; therefore open meeting laws are necessary to ensure an open government.<sup>17</sup> There are many purposes and benefits of open meeting laws: they are essential to the democratic process by providing information to the citizens, creating a public forum to discuss issues, serving as a check on those elected, guarding against corruption, and allowing taxpayers to see how their money is spent.<sup>18</sup> On the other hand, critics of open meeting laws often argue there are times when decision-makers should be free from public pressure.<sup>19</sup> Critics also argue open meeting laws prematurely disclose some information, produce unintended consequences, and discourage debate among politicians who may elect to stay silent because they fear appearing ignorant.<sup>20</sup> Despite the objections some have, open meeting laws exist in all fifty states.<sup>21</sup>

Open meeting laws typically contain the following types of provisions: (1) definitions that determine what bodies the act applies to and its scope, (2) general procedural requirements, (3) exemptions, and (4) provisions prescribing

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<sup>16</sup> Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1199 (1962) [hereinafter *The Press Fights*]. These types of statutes have many names, including open meeting, right to know, public meeting, and sunshine laws. ANN TAYLOR SCHWING, *OPEN MEETING LAWS* 3 (2d ed. 2000). For the purpose of this note they will be referred to as open meeting laws.

<sup>17</sup> Charles N. Davis, Milagros Rivera-Sanchez & Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 41 (1996).

<sup>18</sup> *The Press Fights*, *supra* note 16, at 1200–01; Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 245–46 (2008); Davis, Rivera-Sanchez & Chamberlin, *supra* note 17, at 43; Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L. Q. 1165, 1166 (1993).

<sup>19</sup> *The Press Fights*, *supra* note 16, at 1202. The often-cited example is the Constitutional Convention in which the delegates met in secret. *Id.* However, it is noted the Federalist Papers were necessary to gain the public's acceptance of the Constitution because the Convention was closed to the public. *Id.* at 1202 n.18; Pupillo, *supra* note 18, at 1167 n.13. Also, despite the closure of the Convention, the Founding Fathers did argue for open meetings. Pupillo, *supra* note 18, at 1167 n.12.

<sup>20</sup> *The Press Fights*, *supra* note 16, at 1202; Chance & Locke, *supra* note 18, at 246; Davis, Rivera-Sanchez & Chamberlin, *supra* note 17, at 43.

<sup>21</sup> Pupillo, *supra* note 18, at 1165. The last state to adopt such a statute was New York in 1976. *Id.* at 1165 n.1.

remedies and penalties.<sup>22</sup> While the purpose of open meeting laws is often clearly stated, application of the laws can be difficult because they are vague.<sup>23</sup>

The Wyoming legislature passed the PMA in 1973.<sup>24</sup> The legislature adopted a statement of purpose declaring, “[A]gencies of Wyoming exist to conduct public business. Certain deliberations and actions shall be taken openly as provided in this act.”<sup>25</sup> The PMA does not specify bodies or activities it applies to, but instead provides definitions of action, agency, and meeting.<sup>26</sup> The general requirement under the PMA is “[a]ll meetings of the governing body of an agency are public meetings, open to the public at all times, except as otherwise provided.”<sup>27</sup> While the legislature and judiciary are exempt from coverage, the only other exemptions

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<sup>22</sup> *Id.* at 1168.

<sup>23</sup> *Id.* at 1175.

<sup>24</sup> 1973 Wyo. Sess. Laws 192–94. The PMA was partially based on the California and Florida open meeting statutes passed in previous years. 1973 Op. Wyo. Att’y Gen. No. 17, 51 (Aug. 3, 1973). However, those states more actively amended the statutes since enactment, and a comparison is no longer beneficial. *Compare* WYO. STAT. ANN. §§ 16-4-401 to -408 (2009), *with* CAL. GOV’T CODE §§ 11120–32 (West 2009) (covering public meetings of state bodies), CAL. GOV’T CODE §§ 54950–63 (West 2009) (covering public meetings of local bodies), *and* FLA. STAT. § 286.011 (2009).

<sup>25</sup> WYO. STAT. ANN. § 16-4-401. The original statement of purpose adopted in 1973 stated, “[v]arious agencies of Wyoming exist to conduct public business.” 1973 Wyo. Sess. Laws 192 (emphasis added). But the legislature eliminated the word “various” in 1982. 1982 Wyo. Sess. Laws 376. That has been the only change made to this section. *See id.*

<sup>26</sup> WYO. STAT. ANN. § 16-4-402. This statute states:

- (a) As used in this act:
  - (i) “Action” means the transaction of official business of an agency including a collective decision of a governing body, a collective commitment or promise by a governing body to make a positive or negative decision, or an actual vote by a governing body upon a motion, proposal, resolution, regulation, rule, order or ordinance;
  - (ii) “Agency” means any authority, bureau, board, commission, committee, or subagency of the state, a county, a municipality or other political subdivision which is created by or pursuant to the Wyoming constitution, statute or ordinance, other than the state legislature and the judiciary;
  - (iii) “Meeting” means an assembly of at least a quorum of the governing body of an agency which has been called by proper authority of the agency for the purpose of discussion, deliberation, presentation of information or taking action regarding public business.

*Id.*

<sup>27</sup> WYO. STAT. ANN. § 16-4-403. This statute continues to provide, “No action of a governing body of an agency shall be taken except during a public meeting following notice of the meeting in accordance with this act. Action taken at a meeting not in conformity with this act is null and void and not merely voidable.” *Id.*

relate to executive sessions.<sup>28</sup> The PMA also provides that its provisions control if there is any conflict with other statutes.<sup>29</sup> The Wyoming legislature amended the PMA three times since its adoption.<sup>30</sup> The most substantive amendment occurred in 1995 when the definition of “meeting” was changed to include deliberations.<sup>31</sup> In 2005 the legislature added a penalty provision.<sup>32</sup>

In 1977, the Wyoming Supreme Court first mentioned the PMA and declared “state agencies must act in a fishbowl” unless their actions fall within an exemption.<sup>33</sup> In a later case addressing public records, the court summarized its position toward openness, declaring “courts, [the] legislature, administrative agencies, and the state, county and municipal governments should be ever mindful that theirs is public business and the public has a right to know how its servants are conducting its business.”<sup>34</sup> Despite pronouncements about the public’s right to know, the Wyoming Supreme Court has never held a public body’s action void for violating the PMA.<sup>35</sup>

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<sup>28</sup> WYO. STAT. ANN. §§ 16-4-402(a)(ii), 16-4-405. While a public body can meet in executive session, the body must still have a motion to do so, and minutes must be kept. WYO. STAT. ANN. § 16-4-405(b)–(c).

<sup>29</sup> WYO. STAT. ANN. § 16-4-407. This statute has been used to argue the PMA provisions control over other provisions. See Brief of Appellant at 28, *Cheyenne Newspapers, Inc. v. Building Code Bd. of Appeals (Cheyenne Newspapers PMA Case)* (S-09-0103) [hereinafter *Cheyenne Newspapers PMA Case Appellant’s Brief*]; see Editor’s Note *supra* p. 203. However, at least one party has argued provisions of the open meeting laws are repealed by implication if a specific provision is adopted after the open meeting laws. See *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990). Wyoming Statute § 16-4-407 was last amended in 1982. 1982 Wyo. Sess. Laws 378. Statutes relating to contested case proceedings in workers’ compensation cases were first adopted in 1986. 1986 Wyo. Sess. Laws 35–41 (Special Session). Implication by repeal is not favored, and a party must demonstrate “beyond question that the legislature intended that its later legislative action evinced an unequivocal purpose of affecting a repeal.” *Mathewson v. City of Cheyenne*, 61 P.3d 1229, 1233 (Wyo. 2003) (quoting *Shumway v. Worthey*, 37 P.3d 361, 367 (Wyo. 2001)). A party must also show that the later statute “is so repugnant to the earlier one that the two cannot logically stand together.” *Id.*

<sup>30</sup> 2005 Wyo. Sess. Laws 494–95; 1995 Wyo. Sess. Laws 207–08; 1982 Wyo. Sess. Laws 376–78.

<sup>31</sup> 1995 Wyo. Sess. Laws 208. The previous definition of meeting stated: “Meeting’ means an assembly of the governing body of an agency at which action is taken.” *Id.*

<sup>32</sup> 2005 Wyo. Sess. Laws 494. This amendment created Wyoming Statute § 16-4-408, which provides that any member of an agency who “knowingly and willfully” violates the act is guilty of a misdemeanor. *Id.*

<sup>33</sup> *Laramie River Conservation Council v. Dinger*, 567 P.2d 731, 734 (Wyo. 1977). The issue in that case involved whether a transcript of a public meeting was subject to disclosure under the Public Records Act. *Id.* at 732. The court did not have to decide if the meeting was subject to the PMA, but did address generally the state’s “disclosure acts.” *Id.* at 734.

<sup>34</sup> *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 791 (Wyo. 1983).

<sup>35</sup> See *Hicks v. Dowd*, 157 P.3d 914, 923 (Wyo. 2007) (holding members of a Board of County Commissioners did not violate the PMA when they met in their capacity as trustees of the Scenic Preservation Trust); *Mayland v. Flitner*, 28 P.3d 838, 849 (Wyo. 2001) (holding no action was taken by County Commissioners when they instructed a county attorney to prepare findings of

The Wyoming Supreme Court has addressed whether deliberative meetings prior to decisions are in violation of the PMA.<sup>36</sup> The most recent of these cases is *Mayland v. Flitner*, which occurred after substantive amendments to the PMA were made in 1995.<sup>37</sup> The plaintiffs in *Mayland* alleged a board of county commissioners violated the PMA by meeting in private to discuss a private road application.<sup>38</sup> The court accepted previous holdings that allowed agencies to gather for informal meetings prior to making a decision and held the commissioners did not perform any action that could be void.<sup>39</sup>

The only time the court has addressed deliberations with reference to quasi-judicial bodies was in a case prior to adoption of the PMA—when the court considered a claim that a district boundary board met behind closed doors.<sup>40</sup> The plaintiffs in that case complained the board met in private to make a decision and then later announced that decision to the public.<sup>41</sup> The court stated due to the nature of quasi-judicial boards and agencies, they were required to hold hearings in the open, even though no statute then required it.<sup>42</sup> However, the court noted the right to attend and present evidence at the meeting did not prohibit such boards from planning and deliberating in private sessions.<sup>43</sup>

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fact and conclusions of law prior to the Commissioners' decision); *Deering v. Bd. of Dirs. of County Library*, 954 P.2d 1359, 1364–65 (Wyo. 1998) (holding no violation of the PMA occurred because the alleged improper meeting was a rescheduled regular meeting and not a special meeting); *Ward v. Bd. of Trs. of Goshen County Sch. Dist. No. 1*, 865 P.2d 618, 622 (Wyo. 1993) (holding there was not sufficient evidence to find a school board made a “collective decision” in a closed meeting); *Emery v. City of Rawlins*, 596 P.2d 675, 680 (Wyo. 1979) (holding no action resulted from a “preliminary gathering” of city council members and therefore no violation of PMA occurred); *see also* *Fontaine v. Bd. of County Comm'rs*, 4 P.3d 890, 891 (Wyo. 2000) (holding no violation of PMA occurred, but a County Clerk is required to attend executive sessions and take minutes).

<sup>36</sup> *Mayland*, 28 P.3d at 849; *Ward*, 865 P.2d at 621–22; *Emery*, 596 P.2d at 680; *see also* *Sch. Dist. No. 9 v. Dist. Boundary Bd.*, 351 P.2d 106, 110 (Wyo. 1960).

<sup>37</sup> 28 P.3d at 841; *see supra* note 31 and accompanying text (discussing the 1995 amendments).

<sup>38</sup> *Mayland*, 28 P.3d at 848.

<sup>39</sup> *Id.* at 849 (citing *Ward*, 865 P.2d at 621; *Emery*, 596 P.2d at 679).

<sup>40</sup> *Sch. Dist. No. 9*, 351 P.2d at 110. A district boundary board establishes and has the power to alter school district boundaries. *Id.* at 108 n.1.

<sup>41</sup> *Id.* at 108.

<sup>42</sup> *Id.* at 110.

<sup>43</sup> *Id.*

### *Character of Quasi-Judicial Agencies*

The two main functions of administrative agencies are adjudication and rulemaking.<sup>44</sup> A single agency often performs both of these functions.<sup>45</sup> When an agency performs an adjudication it acts in a quasi-judicial capacity, determining an individual's rights or duties.<sup>46</sup> In contrast, when an agency performs rulemaking it acts in a quasi-legislative capacity, adopting regulations which reflect general policy.<sup>47</sup> A quasi-judicial activity must possess certain characteristics.<sup>48</sup> These characteristics include investigating a claim, weighing evidence, applying preexisting standards to the controversy, and making binding decisions.<sup>49</sup> While quasi-judicial agencies do not technically hold judicial proceedings, the courts performed many of the agencies' functions prior to their existence.<sup>50</sup>

In Wyoming, an administrative agency acts in a quasi-judicial capacity when it performs a contested case proceeding.<sup>51</sup> A contested case requires a right to a hearing, and such a right may exist by statute, by agency rule, or because it is necessary to satisfy due process requirements.<sup>52</sup> The Workers' Compensation Division is among the Wyoming agencies that provide for contested case hearings.<sup>53</sup> Originally, workers' compensation hearings were handled exclusively

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<sup>44</sup> E.g., CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 2.11 (2d ed. Supp. 2009); 73 C.J.S. *Public Administrative Law and Procedure* § 1 (2009) [hereinafter C.J.S. *Administrative Law*]. Each of these functions can be conducted in either a formal or informal manner. KOCH, *supra*, § 2.10.

<sup>45</sup> C.J.S. *Administrative Law*, *supra* note 44, § 1; 2 AM. JUR. 2D *Administrative Law* § 48 (2009) [hereinafter AM. JUR. *Administrative Law*].

<sup>46</sup> KOCH, *supra* note 44, § 2.11; C.J.S. *Administrative Law*, *supra* note 44, § 16.

<sup>47</sup> KOCH, *supra* note 44, § 2.11; C.J.S. *Administrative Law*, *supra* note 44, § 17.

<sup>48</sup> KOCH, *supra* note 44, § 2.11; AM. JUR. *Administrative Law*, *supra* note 45, § 28; C.J.S. *Administrative Law*, *supra* note 44, § 16.

<sup>49</sup> KOCH, *supra* note 44, § 2.11; AM. JUR. *Administrative Law*, *supra* note 45, § 28; C.J.S. *Administrative Law*, *supra* note 44, § 16.

<sup>50</sup> C.J.S. *Administrative Law*, *supra* note 44, § 16.

<sup>51</sup> Nancy D. Freudenthal & Roger C. Fransen, *Administrative Law: Rulemaking and Contested Case Practice in Wyoming*, 31 LAND & WATER L. REV. 685, 698 (1996). A contested case is defined as a proceeding "in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." WYO. STAT. ANN. § 16-3-101(b)(ii) (2009).

<sup>52</sup> Freudenthal & Fransen, *supra* note 51, at 698–99. The WAPA does not create the right to have a contested case, and instead provides the procedure to be followed in a contested case. *Id.* at 699.

<sup>53</sup> WYO. STAT. ANN. § 27-14-601(k)(iv) (2009). A worker is entitled to request a hearing regarding his or her claim after the Workers' Compensation Division has made a final determination. *Id.*

by the district courts.<sup>54</sup> Beginning in 1986, workers' compensation cases were heard exclusively by hearing examiners.<sup>55</sup> In 1993, the legislature created the Medical Commission, which provides an additional venue to hear workers' compensation cases which are "medically contested."<sup>56</sup>

A medically contested case has been defined as "one in which the primary issue requires the application of a medical judgment to complex medical facts or conflicting diagnoses."<sup>57</sup> Medically contested cases must be referred to the Commission.<sup>58</sup> Once a worker requests a hearing, the Workers' Compensation Division refers contested cases to either the Office of Administrative Hearings or the Commission based on issues in the case.<sup>59</sup> Upon referral, the Commission establishes a hearing panel to decide each medically contested case.<sup>60</sup>

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<sup>54</sup> George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Worker's Compensation Legislation, 1986-1997*, 33 LAND & WATER L. REV. 489, 500 (1998). Under this system, deliberations of district court judges would have been conducted in private, because the PMA has always exempted the judiciary. See WYO. STAT. ANN. § 16-4-402 (1973).

<sup>55</sup> *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105, 115 (Wyo. 2008); 1986 Wyo. Sess. Laws 36 (Special Session). This process was formalized in 1992 when the legislature created the Office of Administrative Hearings. Santini, *supra* note 54, at 505.

<sup>56</sup> *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 124 P.3d 686, 694 (Wyo. 2005); Santini, *supra* note 54, at 507. The Medical Commission is created pursuant to Wyoming Statute § 27-14-616. See *supra* note 2 for a discussion of the commission and hearing panel.

<sup>57</sup> *McIntosh v. State ex rel. Wyo. Med. Comm'n*, 162 P.3d 483, 492 (Wyo. 2007) (quoting *French v. Amax Coal W.*, 960 P.2d 1023, 1030 (Wyo. 1998)); accord 025-220-006 WYO. CODE R. § 1 (Weil 2008).

<sup>58</sup> WYO. STAT. ANN. § 27-14-616(b)(iv) (2009); *McIntosh*, 162 P.3d at 491; 025-220-006 WYO. CODE R. § 1.

<sup>59</sup> WYO. STAT. ANN. § 27-14-616(b)(iv); 025-220-006 WYO. CODE R. § 1. The Division's decision regarding where to refer a contested case is not subject to administrative review. WYO. STAT. ANN. § 27-14-616(b)(iv). A hearing panel can also receive a case from the Office of Administrative Hearings if there is a medically contested issue and all parties agree to the transfer. § 27-14-616(e); 025-240-003 WYO. CODE R. § 2 (Weil 2008). A hearing panel can also provide advice to the OAH hearing examiner on specified medical issues. 025-240-003 WYO. CODE R. § 2.

<sup>60</sup> 025-240-006 WYO. CODE R. § 1 (Weil 2008) (providing the selection process for establishing hearing panels). The Commission can establish different Panels to hear cases, or the same panel can hear multiple cases. *Id.* When possible, commission members are assigned to cases based on their expertise relevant to medical issues in the case. *Id.* A presiding officer is designated and has "all powers necessary to conduct a fair and impartial hearing." 025-240-006 WYO. CODE R. § 2 (Weil 2008). The Panel has "exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable under" the Workers' Compensation Act. WYO. STAT. ANN. § 27-14-616(b)(iv). The Panel's hearing procedure includes the opportunity for opening and closing statements, presentation of evidence, and written arguments when appropriate. 025-240-009 WYO. CODE R. § 2 (Weil 2008). The Panel must enter a written final decision which contains findings of fact and conclusions of law. 025-240-010 WYO. CODE R. § 3 (Weil 2008).

*Quasi-Judicial Agencies as Being Covered by Open Meeting Laws*

The majority of states have addressed the issue of whether quasi-judicial bodies are covered by open meeting laws, but they reach varying conclusions depending on multiple factors.<sup>61</sup> The states can be classified into three main groups: (1) states that address the issue by statute, (2) states that address the issue in case law interpreting statutes, and (3) states that have not addressed the issue.<sup>62</sup> The Wyoming PMA does not address the issue, and prior to *Decker II*, Wyoming was among the group of states that had not addressed the issue.<sup>63</sup>

Among states that address the issue by statute, a majority exempt quasi-judicial agencies in at least some form.<sup>64</sup> Some of these state statutes broadly exempt all quasi-judicial agencies with no qualifications.<sup>65</sup> Other statutes exempt only state quasi-judicial bodies, and still require local quasi-judicial bodies to hold deliberations in the open.<sup>66</sup> Another group of states have statutes that allow quasi-judicial bodies to deliberate in closed session, but still require the body to follow

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<sup>61</sup> SCHWING, *supra* note 16, at 122–28 (discussing how states do not treat quasi-judicial bodies uniformly and stating the result depends on a variety of factors).

<sup>62</sup> *See id.*

<sup>63</sup> *See* WYO. STAT. ANN. §§ 16-4-401 to -408 (2006). The premise of this note is that *Decker II* did not clearly decide the issue because it relied on alternative rationales. *See infra* note 177 and accompanying text. However, it can be argued *Decker II* stands for the proposition that quasi-judicial deliberations are not subject to the PMA. *See* Brief of Appellee at 5, 11, *Cheyenne Newspapers PMA Case*, (S-09-0103) [hereinafter *Cheyenne Newspapers PMA Case Appellee's Brief*] (relying on *Decker II* for proposition that quasi-judicial deliberations do not need to be conducted in public). *But see* *Cheyenne Newspapers PMA Case Appellant's Brief*, *supra* note 29, at 21–22 (arguing the court's analysis in *Decker II* applies only to the Panel). *See infra* note 177 and accompanying text for a discussion of *Cheyenne Newspapers PMA Case*. *See also* Editor's Note *supra* p. 203.

<sup>64</sup> *See infra* notes 65–70 and accompanying text.

<sup>65</sup> *See* ALA. CODE § 36-25A-7(a)(9) (2009) (stating a quasi-judicial body is allowed to “deliberate and discuss evidence or testimony presented during a public or contested case hearing” as long as the body either votes on the decision in a public meeting or issues a written decision which may be appealed); ALASKA STAT. § 44.62.310(d)(1) (2009); KAN. STAT. ANN. § 75-4318(g)(1) (2009); KY. REV. STAT. ANN. § 61.810(1)(j) (West 2009); N.C. GEN. STAT. ANN. § 143-318.18(7) (West 2009) (exempting public bodies subject to the State Budget Act that perform “quasi-judicial functions, during a meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding”); VT. STAT. ANN. tit. 1, § 312(e)–(f) (2009); WASH. REV. CODE ANN. § 42.30.140(2) (West 2009) (“[T]his chapter shall not apply to . . . [t]hat portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group . . .”); W. VA. CODE § 6-9A-2(4)(A) (2009) (“[M]eeting does not include . . . [a]ny meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding . . .”); WIS. STAT. ANN. § 19.85 (West 2009) (stating a closed session may be held to deliberate a case subject to a quasi-judicial trial or hearing).

<sup>66</sup> *See* MASS. GEN. LAWS ANN. ch. 30A, § 11A (West 2009) (exempting quasi-judicial bodies from the state open meeting law); MASS. GEN. LAWS ANN. ch. 34, § 9F (West 2009) (providing no exemptions for quasi-judicial bodies from the county open meeting law); MASS. GEN. LAWS ANN. ch. 39, § 23A (West 2009) (providing no exemptions for quasi-judicial bodies from the municipal open meeting law); OR. REV. STAT. ANN. § 192.690 (West 2009).

certain procedures and make a final decision in the open.<sup>67</sup> A smaller group of states list specific quasi-judicial bodies that are exempt.<sup>68</sup> A few statutes generally exempt all quasi-judicial bodies, but then list certain quasi-judicial bodies the act applies to.<sup>69</sup> Finally, a minority of state open meeting statutes explicitly cover quasi-judicial agencies.<sup>70</sup>

When state courts interpret open meeting laws to determine if quasi-judicial bodies are subject to the laws, they reach different results.<sup>71</sup> First, some courts hold quasi-judicial bodies and their deliberations are subject to open meeting statutes.<sup>72</sup> Second, some courts hold deliberations by quasi-judicial bodies are not subject to open meeting statutes; and these courts give varying rationales.<sup>73</sup> One approach is for courts to rely on policy and “practical application” of the laws to hold that quasi-judicial deliberations are not subject to open meeting

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<sup>67</sup> See CAL. GOV'T CODE § 11126(c)(3) (West 2009); 5 ILL. COMP. STAT. ANN. 120/2(c)(4), 120/2a (West 2009); IOWA CODE ANN. § 21.5(1)(f) (West 2009); N.M. STAT. ANN. § 10-15-1(H) (3), (I) (West 2009) (exempting “deliberations by a public body in connection with an administrative adjudicatory proceeding”); 65 PA. CONS. STAT. ANN. § 708(a)(5) (West 2009).

<sup>68</sup> See IDAHO CODE ANN. § 67-2342 (2009) (allowing closed deliberations by the board of tax appeals, public utilities commission and industrial commission following an adjudicatory proceeding); MICH. COMP. LAWS ANN. § 15.263(7) (West 2009); MINN. STAT. ANN. § 13D.01 (West 2009) (providing the open meeting law does not apply “to a state agency, board, or commission when it is exercising quasi-judicial functions involving disciplinary proceedings”); MISS. CODE ANN. § 25-41-3(a)(vi), (x) (West 2009) (exempting the Workers' Compensation Commission and State Tax Commission when it holds hearings).

<sup>69</sup> See HAW. REV. STAT. § 92-6(a)(2), (b) (2009) (exempting “adjudicatory functions,” but requiring the land use commission to deliberate in the open); MD. CODE ANN., STATE GOV'T § 10-503 (West 2009) (exempting a public body which performs a quasi-judicial function, but requiring public bodies which grant licenses or permits, or consider zoning matters to comply with the open meeting law); N.Y. PUB. OFF. LAW § 108(1) (McKinney 2009) (“Nothing contained in this article shall be construed as extending the provisions hereof to . . . judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals . . .”).

<sup>70</sup> See ARIZ. REV. STAT. ANN. § 38-431 (2009) (stating a “[p]ublic body includes all quasi-judicial bodies,” and defining quasi-judicial body as “a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims”); MO. ANN. STAT. § 610.010(4)(d) (West 2009) (stating that “[p]ublic governmental body” includes any “administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power”); TEX. GOV'T CODE ANN. § 551.001(3)(D) (Vernon 2009) (stating “[g]overnmental body” includes “a deliberative body that has rulemaking or quasi-judicial power”).

<sup>71</sup> See *infra* notes 72–76 and accompanying text.

<sup>72</sup> See *Lanes v. State Auditor's Office*, 797 P.2d 764, 766 (Colo. App. 1990) (holding a board which acts in a quasi-judicial manner does not “negate its obligation” under the open meeting law); *Canney v. Bd. of Pub. Instruction*, 278 So. 2d 260, 263 (Fla. 1973); *Bryan County Bd. of Equalization v. Bryan County Bd. of Tax Assessors*, 560 S.E.2d 719, 720 (Ga. Ct. App. 2002); *Citizens Action Coal. of Ind. Inc. v. Pub. Serv. Comm'n*, 425 N.E.2d 178, 183–84 (Ind. Ct. App. 1981); *Remington v. City of Boonville*, 701 S.W.2d 804, 807 (Mo. Ct. App. 1985).

<sup>73</sup> See SCHWING, *supra* note 16, at 122–28; see also *infra* notes 74–76 and accompanying text.

laws.<sup>74</sup> Another approach is for courts to find that quasi-judicial bodies are part of the judiciary and therefore exempt.<sup>75</sup> An Oklahoma court expressed a final approach when it relied on the Oklahoma Administrative Procedure Act to hold a final decision by a quasi-judicial body does not need to be reached in an open meeting.<sup>76</sup>

Finally, the remaining states have open meeting laws that do not address whether quasi-judicial bodies are covered, and the issue has not been raised to the appellate courts.<sup>77</sup> In some of these states, attorney general opinions provide guidance.<sup>78</sup>

#### PRINCIPAL CASE

After the Workers' Compensation Division denied Decker's claim for benefits, his case was referred to the Medical Commission, which established a hearing panel to decide whether his claimed injury was compensable.<sup>79</sup> The Panel denied Decker's claim for benefits.<sup>80</sup> In Decker's first appeal, the Wyoming Supreme Court concluded the hearing panel's findings of fact failed to provide the court with a rational basis for judicial review and remanded.<sup>81</sup>

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<sup>74</sup> *Common Cause of Utah v. Utah Pub. Serv. Comm'n*, 598 P.2d 1312, 1315–16 (Utah 1979); *accord Angerman v. State Med. Bd. of Ohio*, 591 N.E.2d 3, 7 (Ohio Ct. App. 1990).

<sup>75</sup> *See McQuinn v. Douglas County Sch. Dist. No. 66*, 612 N.W.2d 198, 206–07 (Neb. 2000) (construing an exemption of judicial proceedings to apply when a body “decides a dispute of adjudicative fact”); *Stockmeier v. Nev. Dept. of Corr. Psychological Review Panel*, 135 P.3d 220, 223 (Nev. 2006); *Roberts II v. City of Cranston Zoning Bd. of Review*, 448 A.2d 779, 781 (R.I. 1982).

<sup>76</sup> *Stillwater Savings & Loan Assoc. v. Okla. Savings & Loan Bd.*, 534 P.2d 9, 11 (Okla. 1975).

<sup>77</sup> *See SCHWING, supra* note 16, at 122–28 (citing statutes and cases from states which have addressed the issue); ARK. CODE ANN. §§ 25-19-101 to -110 (West 2009); CONN. GEN. STAT. ANN. §§ 1-200 to -205a, 225 to -243 (West 2009); DEL. CODE ANN. tit. 29, §§ 10001–10006 (2009); LA. REV. STAT. ANN. §§ 42:4.1 to 4.13 (2009); ME. REV. STAT. ANN. tit. 1, §§ 401–412 (2009); MONT. CODE ANN. § 2-3-201 to -221 (2009); N.H. REV. STAT. ANN. § 91-A:1–9 (2009); N.J. STAT. ANN. § 10:4-6 to -4-21 (West 2009); N.D. CENT. CODE § 44-04-17.1 to -22 (2009); S.C. CODE ANN. § 30-4-10 to -110 (2009); S.D. CODIFIED LAWS § 1-25-1 to -9 (2009); TENN. CODE ANN. § 8-44-101 to -106 (West 2009); VA. CODE ANN. § 2.2-3701 to -3714 (West 2009).

<sup>78</sup> *E.g.*, 42 MONT. OP. ATT'Y GEN. 239 (1988) (determining county tax appeal board could not close its deliberations based on the fact it was a quasi-judicial body); ARK. OP. ATT'Y GEN. NO. 97-080 (1997) (stating that “generally” deliberations of quasi-judicial bodies must be open).

<sup>79</sup> *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 124 P.3d 686, 698 (Wyo. 2005).

<sup>80</sup> *Id.* at 688.

<sup>81</sup> *Id.* at 697. The Wyoming Supreme Court concluded the Panel did not explain how it weighed conflicting medical opinions and appeared to be independently diagnosing Decker. *Id.* at 694. The court stated an independent diagnosis would be contrary to the WAPA and without a weighing of the evidence there was no basis to determine the reasonableness of the Panel's decision. *Id.* at 697.

On remand, Decker filed a motion with the Commission seeking to present additional arguments and to observe the Panel deliberations.<sup>82</sup> Decker cited the PMA as authority for allowing him to observe the deliberations.<sup>83</sup> The Commission denied both aspects of Decker's appeal.<sup>84</sup> The Commission first concluded the hearing panel functions as a quasi-judicial body, which is allowed private deliberations.<sup>85</sup> The Commission then determined no provisions of the WAPA required deliberations to be open, and the PMA did not apply to the Panel because it was not an "agency," "quorum of the governing body," nor holding a "meeting."<sup>86</sup>

After the Commission denied Decker's motion, the hearing panel entered a supplemental order denying Decker's claim for benefits.<sup>87</sup> Decker again appealed and presented two issues for review: first, whether substantial evidence supported the hearing panel's supplemental order or if it was arbitrary and capricious; and second, whether the Commission's decision denied Decker's due process rights because he could not attend the deliberation or present additional argument.<sup>88</sup> The district court and Wyoming Supreme Court summarily dismissed any due process violation.<sup>89</sup> The district court and the Wyoming Supreme Court instead treated Decker's second issue as a claimed violation of the PMA.<sup>90</sup>

With little discussion, the district court affirmed, stating the PMA was not violated because the Panel's deliberations were not a "meeting" under the PMA.<sup>91</sup> The Wyoming Supreme Court noted a PMA violation would void the Panel's decision, thereby making the issue dispositive.<sup>92</sup> While the court was split

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<sup>82</sup> Decker Motion, *supra* note 5, at 500–01.

<sup>83</sup> *Id.*

<sup>84</sup> Commission's Decision, *supra* note 6, at 526–36.

<sup>85</sup> *Id.* at 529. The Commission made this general conclusion prior to discussing the PMA specifically. *Id.* The Commission seemed to rely on the WAPA in making this conclusion. *See id.*

<sup>86</sup> *Id.* at 530–32. The Commission also stated in the alternative, if the Panel's deliberations were subject to the PMA, an executive session would be allowed. *Id.* at 533.

<sup>87</sup> Decker v. State *ex rel.* Wyo. Med. Comm'n (*Decker II*), 191 P.3d 105, 108 (Wyo. 2008).

<sup>88</sup> *Id.*

<sup>89</sup> *Decker II*, 191 P.3d at 119; *Decker II* Appellant's Brief, *supra* note 5, app. E at 12. The Wyoming Supreme Court stated the Commission's denial of Decker's motion raised no due process concerns because he already had a full opportunity to present and argue his case and was trying to get a second chance that was not required by law. *Decker II*, 191 P.3d at 119.

<sup>90</sup> *Decker II*, 191 P.3d at 113; *Decker II* Appellant's Brief, *supra* note 5, app. E at 12.

<sup>91</sup> *Decker II* Appellant's Brief, *supra* note 5, app. E at 12.

<sup>92</sup> *Decker II*, 191 P.3d at 113; *see* WYO. STAT. ANN. § 16-4-403 (2009). The issue would have been dispositive because a void decision would mean the court had nothing to review. *Decker II*, 191 P.3d at 113.

regarding the PMA violation, it ultimately reversed the denial of Decker's benefits because substantial evidence did not support the Panel's decision.<sup>93</sup>

### *Majority Opinion*

After reviewing the PMA and statutes relating to the Commission, the majority stated many reasons supported a conclusion that open deliberations by the Panel were not required.<sup>94</sup> The court's main rationale was the Panel is not an "agency" as defined by the PMA.<sup>95</sup> The court reasoned the Panel is not a permanent body created by the legislature, but instead a "transitory body," existing solely under the control of the Commission.<sup>96</sup> The court also provided alternative reasons for why the PMA did not apply to the Panel: (1) it is not a "governing body," (2) its quasi-judicial hearing is not a "meeting," and (3) decisions by the Panel are not "action."<sup>97</sup> Finally, the court looked to workers' compensation statutes and stated it would make "no sense" to require the Panel to deliberate in a short open meeting because the Panel is allowed forty-five days to deliberate.<sup>98</sup>

### *Dissenting Opinion*

The dissent argued the Panel violated the PMA by deliberating behind closed doors.<sup>99</sup> The dissent first addressed whether the Panel is an "agency," concluding it fits within the definition because the legislature granted it authority to decide all issues in the case.<sup>100</sup> The dissent further argued that if the Panel is not an agency under the PMA, then it would not be an agency under the WAPA; and this would eliminate the court's basis for judicial review.<sup>101</sup> The dissent said this made the

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<sup>93</sup> *Id.* at 108. Justice Golden authored the majority opinion, which Justice Hill and District Judge Norman E. Young joined. *Id.* Judge Young was sitting for Justice Burke who recused himself. Justice Kite authored the dissent, which Chief Justice Voigt joined. *Id.* at 122 (Kite, J., dissenting). The dissent would not have reached the substantial evidence issue, and it was never discussed whether the dissent agreed with that portion or not. *See id.* at 122–25.

<sup>94</sup> *Id.* at 118 (majority opinion). Justice Golden authored the majority opinion, which was joined by Justice Hill and District Judge Young. *Id.* at 106.

<sup>95</sup> *Id.* at 118.

<sup>96</sup> *Id.* at 118–19 ("[T]he legislature has provided for [the Panel's] potential existence, but their actual existence is governed solely by the Medical Commission."). The PMA requires the agency to be "created by or pursuant to the Wyoming Constitution, statute or ordinance." WYO. STAT. ANN. § 16-4-402(a)(ii) (2009).

<sup>97</sup> *Decker II*, 191 P.3d at 119. The court provided no reasoning for these conclusions. *See id.*

<sup>98</sup> *Id.* (referring to WYO. STAT. ANN. § 27-14-602(b)(ii) (2007), which provides that the panel shall issue a decision within 45 days after the case's record is closed).

<sup>99</sup> *Id.* at 122 (Kite, J., dissenting). Justice Kite was joined by Chief Justice Voigt. *Id.* at 122.

<sup>100</sup> *See id.* at 123.

<sup>101</sup> *Id.* at 123–24. The dissent cited Wyoming Statute § 16-3-114(a) which is the provision allowing for judicial review of agency action. *Id.*; *see also* WYO. STAT. ANN. § 16-3-114 (2009).

majority's opinion "internally inconsistent" because the court reviewed the Panel's decision even though it found it was not an agency.<sup>102</sup>

Next, the dissent had to determine if the Panel constituted a "quorum of the governing body," which required interpretation of "quorum."<sup>103</sup> The dissent accepted that the Medical Commission was the governing body and concluded a quorum exists when there are a sufficient number of members present to transact the body's business.<sup>104</sup> Since three members of the Medical Commission are authorized to make final decisions, the dissent concluded the three-member panels constituted a "quorum."<sup>105</sup> Finally, the dissent dismissed the Commission's argument that Panel deliberations could be closed under the executive session exception because confidential information is discussed.<sup>106</sup> The dissent stated no exception would apply since information disclosed in a hearing is not confidential because the plaintiff waives his or her privilege when a claim is brought.<sup>107</sup>

#### ANALYSIS

In *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, the Wyoming Supreme Court relied on alternative rationales for finding there was no violation of the PMA: (1) the Panel was not a public body subject to the PMA, and, in the alternative, (2) the Panel's deliberations were not covered by the PMA.<sup>108</sup> This section begins by setting forth the basic framework for determining if a public body has violated the PMA.<sup>109</sup> Next, this analysis discusses why the court's first rationale is incorrect, and concludes the Panel is a body subject to the act.<sup>110</sup> Furthermore, this analysis discusses why the court's second rationale supports its decision, and concludes quasi-judicial deliberations are not covered by the PMA.<sup>111</sup> Finally, this analysis will examine the subject matter of quasi-judicial deliberations and argue that policy favors the court's second rationale.<sup>112</sup>

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<sup>102</sup> *Decker II*, 191 P.3d at 123 (Kite, J., dissenting).

<sup>103</sup> *Id.* at 124.

<sup>104</sup> *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1868 (1993)).

<sup>105</sup> *Id.* The court used the following syllogism: (1) issuing final decisions is the business of the Commission, (2) a hearing panel is authorized to issue final decisions, so (3) therefore the hearing panel is a quorum of the governing body. *Id.*

<sup>106</sup> *Id.* at 124–25.

<sup>107</sup> *Id.* at 125. The dissent also stated even if an executive session was allowed, the proper procedures were not followed. *Id.*; WYO. STAT. ANN. § 16-4-405(b)–(c) (2009).

<sup>108</sup> *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105, 118–19 (Wyo. 2008).

<sup>109</sup> See *infra* notes 113–19 and accompanying text.

<sup>110</sup> See *infra* notes 120–46 and accompanying text.

<sup>111</sup> See *infra* notes 147–74 and accompanying text.

<sup>112</sup> See *infra* notes 175–94 and accompanying text.

*Framework of Analysis in PMA Cases*

The PMA does not list with specificity all the bodies subject to its provisions; instead, its scope is determined by whether the body in question fits within the definitions provided.<sup>113</sup> Therefore, the question of whether a particular body is subject to the PMA is one of statutory interpretation.<sup>114</sup> In order for a party to successfully allege a body violated the PMA, the alleged body must: (1) be an “agency,” (2) have held a “meeting,” requiring a quorum of the governing body to be present, and (3) have undertaken “action” in a closed meeting not authorized under executive session privileges.<sup>115</sup> Courts often analyze open meeting violations in two stages.<sup>116</sup> First, courts determine whether the alleged body is subject to the act—in Wyoming this would require the body be an “agency” and a “quorum of the governing body.”<sup>117</sup> Second, courts determine whether the act covers the subject matter of the meeting.<sup>118</sup> While the court in *Decker II* found the Panel did not satisfy any of the requirements, it primarily relied on the first stage of analysis.<sup>119</sup>

*Determining if the Hearing Panel is a Body Subject to the PMA*

The Wyoming Supreme Court’s main theory was that the Panel was not subject to the PMA because it was not an “agency” to which the act applied.<sup>120</sup> The court also held the Panel was not a “governing body” and therefore could not hold meetings.<sup>121</sup> Disagreement with these arguments formed the basis for the dissent.<sup>122</sup> The dissent correctly decided this first stage of the analysis, because the Panel is an “agency” and a “quorum of the governing body.”<sup>123</sup>

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<sup>113</sup> WYO. STAT. ANN. § 16-4-402 (2009). A majority of open meeting laws define “agency” in broad terms. Andrea G. Nadel, Annotation, *What Constitutes an Agency Subject to Application of State Freedom of Information Act*, 27 A.L.R. 4TH 742 (2009).

<sup>114</sup> See *Decker II*, 191 P.3d at 118.

<sup>115</sup> WYO. STAT. ANN. §§ 16-4-402, 403, 405 (2009).

<sup>116</sup> Pupillo, *supra* note 18, at 1168–70 (describing how open meeting laws must first apply to particular bodies and then how the laws govern certain actions); Margaret S. DeWind, Note, *The Wisconsin Supreme Court Lets the Sun Shine in: State v. Showers and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 837–38 (describing qualitative and quantitative prongs in determining whether there is a meeting under the Wisconsin open meeting law).

<sup>117</sup> Pupillo, *supra* note 18, at 1168–70; DeWind, *supra* note 116, at 837–38.

<sup>118</sup> Pupillo, *supra* note 18, at 1168–70; DeWind, *supra* note 116, at 837–38.

<sup>119</sup> *Decker II*, 191 P.3d at 118–19. The following two sections will discuss why the court should have relied more on the second stage. See *infra* notes 120–94 and accompanying text.

<sup>120</sup> *Decker II*, 191 P.3d at 118.

<sup>121</sup> *Id.* at 119.

<sup>122</sup> *Id.* at 122–25 (Kite, J., dissenting).

<sup>123</sup> See *infra* notes 124–46 and accompanying text.

### *Agency Definition*

Since the PMA and WAPA define “agency” similarly, the court has limited ability to determine the hearing panel is not an agency.<sup>124</sup> A finding that the hearing panel is not an agency under the WAPA eliminates the court’s basis for judicial review.<sup>125</sup> The WAPA’s definition of “agency” is narrower than the PMA’s because it does not include “committee” or “subagency.”<sup>126</sup> Therefore when a body is an agency under the WAPA—like the Panel—it must also be an agency under the PMA.<sup>127</sup> The Commission suggested the PMA did not apply to the hearing panel because it was quasi-judicial and therefore fell under the judiciary exemption.<sup>128</sup> However, the WAPA’s definition of “agency” also exempts the judiciary, and therefore the dissent’s argument that there would be no basis for judicial review would also apply to the Commission’s reasoning.<sup>129</sup>

Even if the WAPA did not pose a problem, the court’s interpretation of the statute was incorrect because the hearing panel is an “agency” as the PMA defines the term.<sup>130</sup> The court focused on whether a hearing panel is “created by or pursuant to” a state statute.<sup>131</sup> The court determined the Panel is not created by the legislature, distinguishing between providing for the existence of the hearing panel and actually creating the hearing panel.<sup>132</sup> There are two

<sup>124</sup> *Decker II*, 191 P.3d at 123–24 (Kite, J., dissenting) (describing the majority’s opinion as “internally inconsistent” because it reviews the Panel’s action even though it finds it is not an agency). Agency is defined under the PMA at WYO. STAT. ANN. § 16-4-402(a)(ii). Agency is defined under the WAPA at WYO. STAT. ANN. § 16-3-101(b)(i) (2009).

<sup>125</sup> *Decker II*, 191 P.3d at 124 (Kite, J., dissenting); see WYO. STAT. ANN. § 16-3-114(a) (2009) (“[A]ny person aggrieved or adversely affected in fact by a final decision of an agency in a contested case . . . is entitled to judicial review . . .”).

<sup>126</sup> Compare WYO. STAT. ANN. § 16-4-402(a)(ii), with WYO. STAT. ANN. § 16-3-101(b)(i). According to the PMA, “agency” means “any authority, bureau, board, commission, committee, or subagency of the state . . . which is created by or pursuant to . . . statute.” WYO. STAT. ANN. § 16-4-402(a)(ii). The WAPA does not include “committee” or “subagency” in its definition and adds “department, division, officer or employee of the state.” WYO. STAT. ANN. § 16-3-101(b)(i).

<sup>127</sup> *Decker II*, 191 P.3d at 124 (Kite, J., dissenting). The dissent did not determine specifically what type of body the hearing panel was, but stated “there is simply no question that it is an ‘authority, bureau, board, commission, committee, or subagency of the state.’” *Id.* at 123.

<sup>128</sup> Commission’s Decision, *supra* note 6, at 533. See generally WYO. STAT. ANN. § 16-4-402(a)(ii) (stating that the definition of agency does not include the judiciary). The Commission’s rationale is similar to the approach some state courts have taken when considering if quasi-judicial deliberations are subject to open meeting laws. See, e.g., *Roberts II v. City of Cranston Zoning Bd. of Review*, 448 A.2d 779, 780–81 (R.I. 1982); see also *supra* note 75 and accompanying text (citing and discussing states that find quasi-judicial bodies are similar to the judiciary for the purposes of open meeting laws).

<sup>129</sup> See WYO. STAT. ANN. § 16-3-101(b)(i); *Decker II*, 191 P.3d at 124 (Kite, J., dissenting).

<sup>130</sup> See *Decker II*, 191 P.3d at 124.

<sup>131</sup> *Id.* at 118 (majority opinion); see WYO. STAT. ANN. § 16-4-402(a)(ii).

<sup>132</sup> *Decker II*, 191 P.3d at 118.

problems with the court's rationale.<sup>133</sup> First, this interpretation ignores the plain meaning of the statute because it does not consider the meaning of "pursuant to" as used in the statute.<sup>134</sup> While each individual hearing panel is not created by statute, the Commission creates the Panels pursuant to statute.<sup>135</sup> Second, a public body cannot avoid open meeting laws by delegating power to a committee or subagency.<sup>136</sup> Under the majority's interpretation, the PMA is circumvented anytime the Wyoming Legislature passes a statute that gives bodies the power to create additional bodies; because these additional bodies are only "potential."<sup>137</sup>

### *Quorum of the Governing Body Definition*

In order for there to be a "meeting" under the PMA, a quorum of the governing body is required.<sup>138</sup> Both the Wyoming Supreme Court and Medical Commission determined the hearing panel was not a "quorum of the governing body."<sup>139</sup> The court and commission reached this conclusion by reasoning the governing body was the Medical Commission, and not the hearing panel.<sup>140</sup>

While the term "governing body" is not defined in the PMA, the court could have turned to *Black's Law Dictionary*, which defines it as "a group of officers or persons having ultimate control."<sup>141</sup> This definition is consistent with how other

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<sup>133</sup> See *infra* notes 134–37 and accompanying text.

<sup>134</sup> *Hede v. Gilstrap*, 107 P.3d 158, 163 (Wyo. 2005) (stating the principles of statutory construction).

<sup>135</sup> WYO. STAT. ANN. § 27-14-616 (2009). One of the duties of the Commission is furnish three of its members to serve as a hearing panel. § 27-14-616(b)(iv). The Commission has no control over who the members of the Panel are, because all members are appointed by the governor. § 27-14-616(a). Further, the legislature has recognized in another statute the hearing panel is created "pursuant to statute." WYO. STAT. ANN. § 27-14-602(b)(ii) (2009) ("If the contested case is heard by the hearing panel created pursuant to [§] 27-14-616(b)(iv), the panel shall render a decision within forty-five (45) days after the close of the record . . .").

<sup>136</sup> *Jersawitz v. Fortson*, 446 S.E.2d 206, 208 (Ga. Ct. App. 1994) (holding a committee that "acted as a vehicle" of the Atlanta Housing Authority had to comply with the open meeting law and the housing authority could not "hide behind the committee"); see SCHWING, *supra* note 16, at 51. Further, many open meeting laws, including Wyoming's, explicitly cover subagencies. *E.g.*, IDAHO CODE ANN. § 67-2341(4)(d) (2009); WASH. REV. CODE ANN. § 42.30.020(1)(c) (West 2009); WYO. STAT. ANN. § 16-4-402(a)(ii).

<sup>137</sup> See *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 771 N.E.2d 263, 272 (Ohio Ct. App. 2001) (stating the fact a committee is established informally is immaterial, otherwise public bodies could always informally establish committees to avoid the open meeting law).

<sup>138</sup> WYO. STAT. ANN. § 16-4-402. Prior to 1995 this was not a requirement. 1995 Wyo. Sess. Laws 208.

<sup>139</sup> *Decker II*, 191 P.3d at 119; Commission's Decision, *supra* note 6, at 532–33.

<sup>140</sup> *Decker II*, 191 P.3d at 119; Commission's Decision, *supra* note 6, at 532–33. Since the Commission contains at least eleven members, a three-member hearing panel would not be a quorum. See BLACK'S LAW DICTIONARY 1370 (9th ed. 2009) (defining "quorum" as "[t]he minimum number of members (usu[ally] a majority of all the members) who must be present for a deliberative assembly to legally transact business").

<sup>141</sup> BLACK'S LAW DICTIONARY 764 (9th ed. 2009).

open meeting statutes define governing body because it focuses on the control and authority of the body.<sup>142</sup> The hearing panel is authorized to make final decisions for the Medical Commission regarding the resolution of contested case hearings involving medically contested cases, and therefore is a governing body.<sup>143</sup> The majority's reasoning should only apply if the body has no authority to make final decisions and exists solely as an advisory board.<sup>144</sup> In determining if open meeting laws apply to subordinate bodies, there is a distinction between those bodies that exercise actual decision-making power and those that are purely advisory.<sup>145</sup> The dissent was therefore correct to focus on the authority granted to the hearing panel when determining it was a "quorum of the governing body."<sup>146</sup>

### *Determining if the Panel's Deliberations are Covered by the PMA*

Once a court determines a body is subject to the PMA, it must then examine the subject matter of the meeting to determine if it fits within the definition of "meeting."<sup>147</sup> Neither the majority nor the dissent discussed this aspect of the analysis in any depth.<sup>148</sup> However, the Commission relied heavily on this topic when denying Decker's motion.<sup>149</sup> This part of the analysis provides the strongest support for the court's decision.<sup>150</sup>

### *Terms Defined*

The PMA's definition of "meeting" requires that it be called "for the purpose of discussion, deliberation, presentation of information or taking action regarding public business."<sup>151</sup> Prior to 1995, the PMA did not cover deliberations or

<sup>142</sup> *E.g.*, ALASKA STAT. § 44.62.310 (2009) ("[G]overnmental body' means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity . . ."); IDAHO CODE ANN. § 67-2341(5) (2009) ("Governing body' means the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.").

<sup>143</sup> *See* WYO. STAT. ANN. § 27-14-616(b)(iv) (stating that when hearing a contested case, the hearing panel "shall have exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable").

<sup>144</sup> *See* SCHWING, *supra* note 16, at 94–96 (discussing open meeting laws which apply only to "governing" bodies compared to those that cover advisory committees); Pupillo, *supra* note 18, at 1169 (stating that open meeting statutes typically exempt those boards and committees which perform an advisory role).

<sup>145</sup> SCHWING, *supra* note 16, at 97–98.

<sup>146</sup> *See Decker II*, 191 P.3d at 124 (Kite, J., dissenting).

<sup>147</sup> *See* WYO. STAT. ANN. § 16-4-402.

<sup>148</sup> *See Decker II*, 191 P.3d at 118–19; *id.* at 122–25 (Kite, J., dissenting).

<sup>149</sup> Commission's Decision, *supra* note 6, at 526–36.

<sup>150</sup> *See infra* notes 151–94 and accompanying text.

<sup>151</sup> WYO. STAT. ANN. § 16-4-402(a)(iii).

discussions of a public body and instead only required open meetings when a body took “action.”<sup>152</sup> Like Wyoming, other states amended open meeting laws to include deliberations because they believed citizens required knowledge about more than the final decision.<sup>153</sup> Deliberation is not defined in the PMA, though other states do define the term.<sup>154</sup> Public business is not defined in the PMA, but the Wyoming Supreme Court has stated the term is broad and would encompass how a public agency operates and functions.<sup>155</sup> The court has also said any business of a state agency is public business.<sup>156</sup>

### *Types of Deliberations Covered*

Determining which deliberations are exempt from coverage of the PMA involves a balancing of interests.<sup>157</sup> On one side is the interest of the public in being informed.<sup>158</sup> On the other side is the interest of the body in maintaining privacy and confidentiality.<sup>159</sup> In the context of quasi-judicial deliberations, some courts and commentators argue an agency’s interest in confidentiality outweighs the public’s interest and therefore conclude quasi-judicial deliberations should not be subject to open meeting laws.<sup>160</sup>

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<sup>152</sup> 1995 Wyo. Sess. Laws 208. The previous definition of meeting stated: “Meeting’ means an assembly of the governing body of an agency at which action is taken.” *Id.* While some state open meeting statutes covered deliberations from the beginning, others only covered action. SCHWING, *supra* note 16, at 284. Wyoming was the last state to cover deliberations. *Id.* While the definition of “meeting” changed to add deliberation, the PMA still only states “action” taken in a closed meeting is void. WYO. STAT. ANN. § 16-4-403.

<sup>153</sup> SCHWING, *supra* note 16, at 275 (“Simple knowledge of the final action or the vote is often only the unsatisfactory end of the story—the butler did it—without the deliberations and analysis leading up to the denouement.”).

<sup>154</sup> *See, e.g.*, ALA. CODE § 36-25A-2 (2009) (defining deliberation as “[a]n exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter”); MASS. GEN. LAWS ANN. ch. 30A, § 11A (West 2009) (defining deliberation as “a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction”).

<sup>155</sup> *Shaefer v. State ex rel. Univ. of Wyo.*, 139 P.3d 468, 472 (Wyo. 2006) (citing *Fincher v. State*, 497 S.E.2d 632, 636 (Ga. App. 1998)).

<sup>156</sup> *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 791 (Wyo. 1983).

<sup>157</sup> *See The Press Fights*, *supra* note 16, at 1206 (stating the “most important exemptions” to open meeting laws exist because the interests served by maintaining secrecy are more important than informing the public).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See, e.g.*, *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104, 1115–16 (Pa. 2003); *Common Cause of Utah v. Utah Pub. Serv. Comm’n*, 598 P.2d 1312, 1315 (Utah 1979); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 189–90 (2009) (recognizing the interest an agency has in confidentiality and stating it is necessary to collegial decision making).

The purpose of the PMA supports not requiring all types of deliberations to be within the scope of the PMA.<sup>161</sup> The legislature expressed its intent by declaring, “[A]gencies of Wyoming exist to conduct public business. *Certain* deliberations and actions shall be taken openly as provided in this act.”<sup>162</sup> Neither the majority nor the dissent discussed the PMA’s statement of purpose adopted by the legislature.<sup>163</sup> Since every word in a statute must have meaning, when the legislature used “certain” it must have meant the PMA would not apply to all types of deliberations.<sup>164</sup>

The Wyoming Supreme Court’s application of the PMA also suggests there are types of deliberations not covered by the act.<sup>165</sup> In a case after the legislature added deliberations to the definition of meeting, the court continued to follow cases which allow bodies to hold “informal meetings” prior to making a decision.<sup>166</sup> The reasoning accepted in those cases is similar to a case considered prior to the adoption of the PMA, where the Wyoming Supreme Court recognized public bodies—including quasi-judicial agencies—should be allowed to conduct some deliberations in private.<sup>167</sup> While the legislature has adopted and amended the PMA since then, the underlying policy has not changed because the rationale is similar to recent cases decided by the court.<sup>168</sup>

### *Business of Quasi-Judicial Deliberations*

The district court found the hearing panel’s deliberations were “not a matter of public business,” and therefore no “meeting” was held.<sup>169</sup> The business before the Panel, and other quasi-judicial bodies, primarily involves an individual or

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<sup>161</sup> See *infra* notes 162–68 and accompanying text. As the court noted in *Decker II*, the primary focus when interpreting statutes is the legislature’s intent. 191 P.3d. at 118.

<sup>162</sup> WYO. STAT. ANN. § 16-4-401 (2009) (emphasis added).

<sup>163</sup> See *Decker II*, 191 P.3d at 118–19; *id.* at 122–25 (Kite, J., dissenting).

<sup>164</sup> See *id.* at 118 (majority opinion); *Hede v. Gilstrap*, 107 P.3d 158, 163 (Wyo. 2005) (“Each word of a statute is to be afforded meaning, with none rendered superfluous . . . .”); *Coal. for Quality Health Care v. N.J. Dept. of Banking*, 791 A.2d 1085, 1103 (N.J. Super. Ct. App. Div. 2002) (interpreting “certain” in a statute to mean “not all”); Brief of Appellee at 36, *Decker II*, 191 P.3d 105 (S-07-0051) (emphasizing the legislature’s use of “certain”).

<sup>165</sup> See *Mayland v. Flitner*, 28 P.3d 838, 849 (2001); *Ward v. Bd. of Trs. of Goshen County Sch. Dist. No. 1*, 865 P.2d 618, 622 (Wyo. 1993); *Emery v. City of Rawlins*, 596 P.2d 675, 680 (Wyo. 1979).

<sup>166</sup> *Mayland*, 28 P.3d at 849.

<sup>167</sup> See *Sch. Dist. No. 9 v. Dist. Boundary Bd.*, 351 P.2d 106, 110 (Wyo. 1960); see also *supra* notes 40–43 and accompanying text (explaining facts and holding of *Sch. Dist. No. 9*).

<sup>168</sup> See Commission’s Decision, *supra* note 6, at 533.

<sup>169</sup> *Decker II* Appellant’s Brief, *supra* note 5, app. E at 12. The Wyoming Supreme Court and commission also summarily determined there was no “meeting,” though neither provided a rationale similar to the district court’s. See *Decker II*, 191 P.3d at 118–19; Commission’s Decision, *supra* note 6, at 526–36.

small group of individuals.<sup>170</sup> It is true quasi-judicial bodies sometimes conduct business that relates to the general public when they issue decisions.<sup>171</sup> However, this type of public business is distinguishable from what the PMA covers because opening quasi-judicial deliberations to the public does not satisfy the policy and purpose of the act.<sup>172</sup> One of the main purposes of open meeting laws is to hold government bodies and officials accountable.<sup>173</sup> However, this purpose conflicts with the purposes of a quasi-judicial body deciding a contested case because it must act independently and be fair—to do this requires the decision-makers to be free from criticism.<sup>174</sup>

### *Implications of the Wyoming Supreme Court's Decision*

A holding that quasi-judicial deliberations are not within the scope of the PMA's definition of "meeting" would be similar to the approach taken by Utah and Ohio courts.<sup>175</sup> The approach would also be consistent with a Wyoming district court's interpretation of the Wyoming Public Records Act—construing the act to include a deliberative-process privilege.<sup>176</sup> Since the court in *Decker II* relied on alternative rationales, it is not entirely clear whether Wyoming will continue to follow this approach with regard to all quasi-judicial bodies.<sup>177</sup> However, the court

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<sup>170</sup> See *AFSCME v. Dept. of Cent. Mgmt. Servs.*, 681 N.E.2d 998, 1005 (Ill. App. Ct. 1997); *KOCH*, *supra* note 44, § 2.11 ("In general, adjudication is the decision making process for applying preexisting standards to individual circumstances.").

<sup>171</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *KOCH*, *supra* note 44, § 2.11 ("[P]olicy articulation is often a necessary part of adjudication.").

<sup>172</sup> See *Common Cause of Utah*, 598 P.2d at 1315; Christopher B. McNeil, *The Public's Right of Access to "Some Kind of Hearing": Creating Policies that Protect the Right to Observe Agency Hearings*, 68 LA. L. REV. 1121, 1128 (2008).

<sup>173</sup> See *The Press Fights*, *supra* note 16, at 1201; Pupillo, *supra* note 18, at 1166.

<sup>174</sup> See Carolyn M. Van Noy, Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 556 (1986) (explaining that public officials face a conflict in values when they act as decision makers). This would be especially true at local government levels, for example the county commissioners. See *id.*

<sup>175</sup> See *Common Cause of Utah*, 598 P.2d at 1315–16; *Angerman v. State Med. Bd. of Ohio*, 591 N.E.2d 3, 7 (Ohio Ct. App. 1990).

<sup>176</sup> Decision Letter at 1–7, *Cheyenne Newspapers, Inc. v. Freudenthal (Cheyenne Newspapers PRA Case)*, Docket No. 173-978 (Laramie County Dist. Ct. Aug. 4, 2009).

<sup>177</sup> See *Cheyenne Newspapers PMA Case* Appellant's Brief, *supra* note 29, at 14–28 (arguing quasi-judicial bodies must deliberate in the open following contested case hearings). The plaintiffs in *Cheyenne Newspapers PMA Case* claimed the Cheyenne Board of Appeals violated the PMA by deliberating in private. *Id.* at 5. The Board of Appeals held a contested case hearing to review the denial of demolition permits by Cheyenne's Historic Preservation Board. *Cheyenne Newspapers PMA Case* Appellee's Brief, *supra* note 63, at 2. After the hearing the board deliberated the case in private and later adopted a written decision in an open meeting. *Id.* The district court held the PMA did not apply to quasi-judicial deliberations following contested case hearings. *Id.* at 11. *But see* Editor's note *supra* p. 203.

should continue to hold quasi-judicial deliberations are not subject to the PMA because of strong policy considerations.<sup>178</sup>

When discussing these policy concerns, most courts recognize privacy is necessary to ensure an effective decision-making process in quasi-judicial deliberations.<sup>179</sup> Many courts, including the United States Supreme Court, recognize the importance of keeping a court's decision-making process closed.<sup>180</sup> There is no right of the public, or parties, to witness jury deliberations.<sup>181</sup> This should apply equally to administrative adjudications.<sup>182</sup>

As one court recognized, it is “unnatural” to think members of an agency will not deliberate about the case in private.<sup>183</sup> An agency member will frequently use his mind and think about the case, whether in the privacy of his home or at the office.<sup>184</sup> In the context of the hearing panel, it would effectively mean that even two members of the panel could not talk to each other about any matter of the case outside of a public meeting.<sup>185</sup> Since the agency can deliberate for several days, the agency would either have to condense deliberations into one open meeting, or hold multiple open meetings anytime the PMA applied.<sup>186</sup> The body's written decision, which contains findings of fact and conclusions of law, is sufficient to show the deliberative process of the quasi-judicial body.<sup>187</sup>

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<sup>178</sup> See *infra* notes 179–94 and accompanying text.

<sup>179</sup> See *Canney v. Bd. of Pub. Instruction*, 278 So.2d 260, 265 (Fla. 1973) (Dekle, J., dissenting) (stating that if an administrative body is deprived of “free deliberation” it will prohibit open discussion which is necessary to reach a “fair and just result”); *Kennedy*, 834 A.2d 1104, 1115 (Pa. 2003) (describing how public deliberations are incompatible with the decision-making process).

<sup>180</sup> *E.g.*, *United States v. Morgan*, 313 U.S. 409, 422 (1941) (stating because the mental processes of judges cannot be scrutinized, it follows that the Secretary of Agriculture's decision-making process should not be scrutinized); *Kennedy*, 834 A.2d at 1115–17; *Commonwealth v. Vartan*, 733 A.2d 1258, 1263–64 (Pa. 1999); *Common Cause of Utah*, 598 P.2d at 1315.

<sup>181</sup> See *The Press Fights*, *supra* note 16, at 1206.

<sup>182</sup> See *McNeil*, *supra* note 172, at 1128 (discussing how the “mental processes” of judges, including administrative adjudicators, should be kept private).

<sup>183</sup> *Common Cause of Utah*, 598 P.2d at 1315.

<sup>184</sup> *Id.*

<sup>185</sup> Two members would be a quorum, therefore requiring an open meeting. See WYO. STAT. ANN. § 16-4-402; *supra* note 140 and accompanying text.

<sup>186</sup> See *Decker II*, 191 P.3d at 119.

<sup>187</sup> See *Canney*, 278 So. 2d at 265 (Dekle, J., dissenting) (“The basic concept of the ‘right of the public to know’ is fulfilled upon reaching such a fair and just result which is then publicly conveyed.”); *Stockmeier v. Nev. Dept. of Corrs. Psychological Review Panel*, 135 P.3d 220, 224 (Nev. 2006) (stating the ability to appeal the decision holds the public body accountable); *Kennedy*, 834 A.2d at 1115; SCHWING, *supra* note 16, at 348–49; *Funk*, *supra* note 160, at 191.

Furthermore, requiring agencies to hold deliberations of contested case hearings in the open would have many negative implications.<sup>188</sup> The Commission noted in its decision that the “practical effect” of requiring deliberations to be open would cause “chaos” among the agencies in Wyoming that conduct contested case proceedings.<sup>189</sup> One reason for chaos would be that decisions reached by any quasi-judicial agency that has not conducted its deliberations in the open would be void if challenged by a party.<sup>190</sup> Another form of chaos will result from the delicate types of discussions adjudicators must have when deciding cases.<sup>191</sup> For example, a Pennsylvania court noted that case decisions frequently rely on the credibility of witnesses and the weight an agency puts on a witness’s testimony, and therefore such discussions evaluating witness testimony should be held privately.<sup>192</sup> Another problem would be created because members of the hearing panel cannot engage in *ex parte* communication, which would result if only one party showed up to the deliberations.<sup>193</sup> Finally, chaos may also result because quasi-judicial bodies subject to the PMA could try to avoid its requirements by appointing a single hearing officer to decide the case.<sup>194</sup>

#### CONCLUSION

The Wyoming Supreme Court’s decision in *Decker II* relied on alternative rationales.<sup>195</sup> First, the court concluded the hearing panel formed by the Medical

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<sup>188</sup> See Commission’s Decision, *supra* note 6, at 535.

<sup>189</sup> *Id.*

<sup>190</sup> See WYO. STAT. ANN. § 16-4-403(a) (“Action taken at a meeting not in conformity with this act is null and void and not merely voidable.”); Commission’s Decision, *supra* note 6, at 535 (“Such would also have the effect of undermining all past decisions in all contested case proceedings before virtually all agencies.”). The PMA does not provide a statute of limitations. See WYO. STAT. ANN. § 16-4-401 to -408 (2009). After an action is voided by the court, the body is usually required to start its procedure from the beginning, this time complying with the law. See SCHWING, *supra* note 16, at 516–17 (discussing how various states address the effect of a void action). Wyoming has not considered how a void act can be cured, because it has never found a violation of the act. See *supra* note 35 and accompanying text.

<sup>191</sup> *Kennedy*, 834 A.2d at 1115–17. In the context of medically contested cases, the hearing panel would be discussing whether doctors are credible. See *Decker v. State ex rel. Wyo. Med. Comm’n (Decker I)*, 124 P.3d 686, 697 (Wyo. 2005) (“As with any hearing examiner, the Commission is charged with weighing the evidence and determining the credibility of witnesses.”).

<sup>192</sup> *Kennedy*, 834 A.2d at 1115–17.

<sup>193</sup> See WYO. STAT. ANN. § 16-3-111 (2009); Commission’s Decision, *supra* note 6, at 528; see also WYO. EXEC. ORDER NO. 1981-12 (1981) (requiring agencies “to guard against *ex parte* contacts and biased decision making”). When the quasi-judicial body begins deliberations the case would be closed, so a party may not show up because it could not advocate its position any longer. See 025-240-009 WYO. CODE R. § 2 (Weil 2008).

<sup>194</sup> See SCHWING, *supra* note 16, at 99–100 (concluding that most states find one individual does not constitute a public body).

<sup>195</sup> See *supra* notes 94–98 and accompanying text.

Commission was not a body subject to the PMA.<sup>196</sup> However, this rationale was incorrect because the panel is an “agency” as defined by the PMA.<sup>197</sup> Second, the court concluded the deliberations of the hearing panel were not subject to the PMA.<sup>198</sup> This rationale provides the strongest support for the court’s decision.<sup>199</sup> Reliance on both rationales creates uncertainty about whether quasi-judicial deliberations are subject to the PMA—making it unclear if other agencies in the state which preside over contested case hearings must hold their deliberations in the open.<sup>200</sup> The PMA does not directly answer the question, and, like many other states, it is left to the court’s interpretation, absent legislation.<sup>201</sup> The court should continue to hold that quasi-judicial deliberations are not subject to the PMA because the conclusion is supported by the purpose of the act and policy arguments.<sup>202</sup> Without such a holding, chaos could be created among the many state agencies that preside over contested cases.<sup>203</sup>

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<sup>196</sup> See *supra* notes 94–96 and accompanying text.

<sup>197</sup> See *supra* notes 120–46 and accompanying text.

<sup>198</sup> See *supra* note 97 and accompanying text.

<sup>199</sup> See *supra* notes 147–74 and accompanying text.

<sup>200</sup> See *supra* note 177 and accompanying text.

<sup>201</sup> See *supra* note 63 and accompanying text.

<sup>202</sup> See *supra* notes 175–87 and accompanying text.

<sup>203</sup> See *supra* notes 188–94 and accompanying text.