

CHMELIK SITKIN & DAVIS P.S.
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Open Government Training— OPMA

Washington Public Ports Association
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Open Public Meetings Act

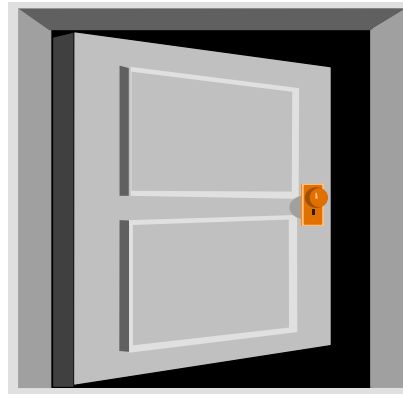
Open Government Training – Why are We Here?

- RCW 42.30.205 and 42.56.152 require members of governing bodies to receive training on Open Public Meetings Act and Public Records Act.
 - Refresher training must occur no later than every 4 years.
 - Training can be taken online, in person, or by other means.
- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General's Office Open Government Training Web Page: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx>



Washington's Open Public Meetings Act (OPMA)

- Passed in 1971.
- Requires meetings to be open to the public, gavel to gavel.
- *Chapter 42.30, RCW*



Purpose

- “The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so they may retain control over the instruments they have created.”
~ *RCW 42.30.010*



OPMA Applies To:

- Port Districts
- Any time a quorum of elected officials discuss Port business, whether or not they are in the same room. Example: Telephone conference, video conference, email.



Governing Body

- All meetings of the ***governing body*** of a public agency **shall be open and public** and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in RCW 42.30.

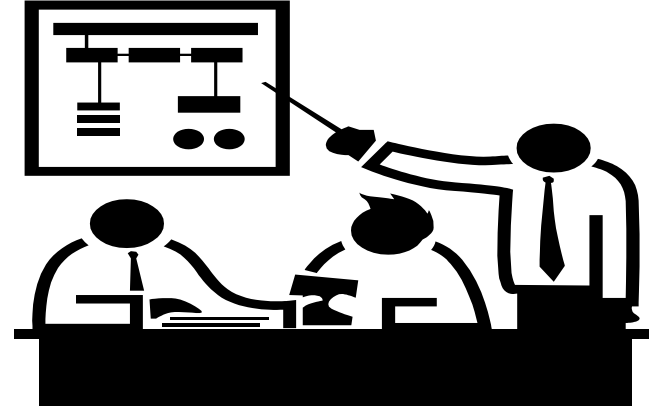
~ RCW 42.30.030 (*emphasis added*)



What is a Governing Body?

- Port Commission, i.e. elected officials OR
- Any **committee** of such public agency *when*:
 - The committee acts on behalf of the governing body (i.e. *exercises actual or de facto decision making authority*); or
 - Takes testimony or public comment.

~ RCW 42.30.020
- *Practice Tip*: Even if not legally required, do you still want to make committee subject to open public meetings?



What is a Meeting?



- “**Meeting**” means meetings at which the public agency takes “**action.**”
~ RCW 42.30.020
- Physical presence not required—can occur by phone or email.
 - An exchange of email could constitute a meeting if, for example, a quorum of the members participate in the email exchange & discuss agency business. Simply receiving information without comment is not a meeting. *Citizens Alliance v. San Juan County*
- Does not need to be titled “meeting” – OPMA also applies to “retreats,” “workshops,” “study sessions,” etc.
- No meeting occurs if the governing body lacks a quorum.



Action

- “**Action**” means the transaction of the official business of the public agency and includes, but is not limited to:
 - Public testimony;
 - All deliberations;
 - Discussions;
 - Reviews;
 - Evaluations.



The requirements of the OPMA are triggered whether or not “final” action is taken. ~ RCW 42.30.020

Final Action

- “**Final action**” is a collective positive or negative decision, or an actual vote, by a majority of the governing body, or by the “committee thereof.”
 - Motions, Resolutions, etc.
- Must be taken in public, even if deliberations were in closed session.
- Secret ballots are not allowed.

~ *RCW 42.30.060, RCW 42.30.020*



Travel and Gathering

- A majority of the members of a governing body may travel together or gather for purposes other than a regular meeting or a special meeting, so long as no action is taken.
- Discussion or consideration of official business would be considered action, triggering the requirements of the OPMA.
- Practical Consideration:
 - Consider the political impact and appearance
 - Post on website attending WPPA

~ *RCW 42.30.070*



“Regular” Meetings



- **“Regular meetings”** are recurring meetings held in accordance with a periodic schedule established by motion or resolution.
- Should have a resolution on file at the beginning of each year.
- Prior to June, 2014, no additional notice required for regular meetings.
 - However, now, new agenda notice requirements took effect with regards to regular meetings under OPMA.
 - Must publish your agenda

~ *RCW 42.30.070, RCW 42.30.075; RCW 42.30.077*

RCW 42.30.077 - Requirements

- Governing bodies are required to make the **agenda of each regular meeting of the governing body available online no later than 24 hours in advance of the published start time of the meeting.**
 - Emphasis added



RCW 42.30.077– Applicability and Limitations

- The law does not apply to *agencies that employ fewer than 10 full-time employees*.
- The law does not:
 - Prohibit agencies from later modifying an agenda;
 - Invalidate otherwise legal actions taken at a regular meeting where an agenda was not posted 24 hours in advance;
 - Provide a basis for a person to recover their attorney's fees or to seek a court order against the agency if an agenda is not posted in accordance with the law.

“Special” Meetings



- A “**special meeting**” is *any* meeting that is not a regular meeting.
- Called by presiding officer or majority of the members.
- **Notice / Timing: 24 hours before the special meeting, written notice must be:**
 - Given to each **member** of the governing body (unless waived);
 - Given to each **local newspaper of general circulation, radio, and TV station** which has a notice request on file;
 - Prominently **displayed at the main entrance** of the Port's principal location and the meeting site, if different.

“Special” Meetings (continued)

- **Notice / Timing (cont'd)**: Posted on the **Port's website unless**:
 - (i) Port does not have a website;
 - (ii) employs fewer than ten full-time equivalent employees; **or**
 - (iii) does not employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the website.
- **Notice / Contents**: The special meeting notice must specify:
 - Time;
 - Place;
 - Business to be transacted (agenda);
 - Final disposition cannot be taken on any other matter not listed on the agenda.





Emergency Special Meetings

- Notice is not required when a special meeting is called to deal with an emergency.
 - Emergency involves injury or damage to persons or property or the likelihood of such injury or damage.
 - Where time requirements of notice make notice impractical and increases likelihood of such injury or damage.
 - ~ *RCW 42.30.080(4)*



Public Attendance

- Public comment period is not required by OPMA.
- An agency may not impose conditions on the public to attend meetings subject to OPMA:
 - For example, it cannot require people to register their names or other information, complete a questionnaire, or otherwise fulfill any condition precedent to attendance. ~ *RCW 42.30.040*
 - What about sign up sheets for public comment?



Reasonable Rules of Conduct

- An agency can establish reasonable rules of conduct for its meetings.
 - These rules can be for the Commission and the Public.
 - Examples:
 - Procedural Rules: Robert's Rules of Order;
 - Time limit on public comment period;
 - All public comments must be respectful.
- Cameras and tape recorders are permitted unless disruptive (signs too). ~ *AGO 1998 No. 15*
- Practice Tip: Adopt business rules



Interruptions and Disruptions

- What do you do if the meeting is disrupted by disorderly persons?
 - Have the disruptive persons removed;
 - Clear the meeting room so that the meeting can continue;
 - Move the meeting to another location (but in this case final disposition can occur only on matters appearing on the agenda);
 - Must allow press to remain;
 - May allow non-disruptive individuals to be readmitted.



Executive Session

- Part of a regular or special meeting that is closed to the public.
- Limited to specific purposes set out in the OPMA.
- Purpose of the executive session and the time it will end must be announced by the presiding officer before it begins; time may be extended by further announcement.
- Practice Tip: Be precise about the purpose and the statutory exemption.

~ RCW 42.30.110



Executive Session Myths

- Executive Sessions cannot be used for:
 - “Personnel” issues;
 - Conference with attorney *unless* there is actual or threatened litigation being discussed;
 - Discuss interlocal agreement negotiation strategy or other contract negotiation strategy with third parties;
 - Interview potential board candidates.

Common Executive Session Purposes

- Buying or selling real estate and public knowledge would likely adversely affect the price from the agency's perspective.
- Washington State Supreme Court held in *Columbia Riverkeepers v. Port of Vancouver*.
 - Executive session discussions related to the sale or lease of real estate must be limited to the minimum acceptable price to sell or lease the property.
 - Any general discussion of factors that are the basis for the minimum price must occur in an open public meeting.
 - After this occurs, the governing body may then discuss, in executive session, how those various factors directly impact the minimum price.
 - Practice Tip: Adopt policy in open session about “price” and keep track in executive session



Common Executive Session Purposes

- To review negotiations on the performance of publicly bid contracts where public knowledge would likely increase the agency's costs.
- Review performance of existing employees.
- Evaluate qualifications of applicant for public employment.
- Meet with legal counsel regarding litigation or potential litigation.

Executive Session to Discuss Litigation or Potential Litigation: Three Requirements

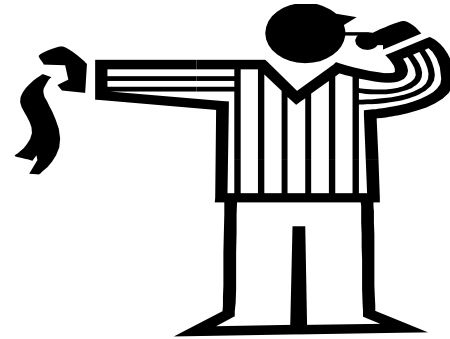
- Legal counsel representing the agency must be present in person or by phone. Practice Tip: Minutes should reflect presence of attorney.
- Purpose is to discuss litigation or potential litigation to which the agency, governing body, or a member acting in official capacity is, or is likely to become, a party; or
- Public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

~ *RCW 42.30.110*



Penalties for Violating the OPMA

- A court can impose a \$100 civil penalty against each member (personal liability).
- Court will award costs and attorney's fees to a successful party seeking the remedy.
- Action taken at meeting can be declared null and void.



~ *RCW 42.30.120; RCW 42.30.130;*
RCW 42.30.060

Minutes – RCW 42.32.030

- Minutes of public meetings must be promptly recorded and open to public inspection.
- Minutes of an executive session are not required.
- No format specified in law.
- Practical Issues:
 - How detailed should minutes be?
 - Tape recording issues.
 - “Draft” minutes.



Special Risks: Email Correspondence Can Constitute a Meeting

- Email exchanges can constitute a meeting.
 - These provide clear evidence of violation because they are documented.
- Serial meetings.
 - How do these occur?
 - What is the appropriate role of the executive director and staff to transmit information to commissioners in advance of a public meeting?

OPMA Assistance

- The Washington State Attorney General's Office may provide information, technical assistance, and training on the OPMA. Contact Assistant Attorney General for Open Government.
- The Attorney General's Office may issue formal opinions about the OPMA for qualified requesters.
- The Attorney General's Office has helpful materials about the OPMA, and other open government topics and resources, on its website at www.atg.wa.gov.
- The Attorney General's Office Open Government Training Web Page with training resources, videos, and other materials is at: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx>.



~ RCW 42.30.210

Summary: Practice Tips

- Do you want to make committees compliant with OPMA rules even if not legally required?
- Adopt business rules
- Don't hit "reply all"
- Remember if 3 member commission, any discussion with another commissioner is an open meeting
- Post or otherwise announce if commission attending training, site visit, etc.
- Executive session purposes should be precisely tied to exemption
- Adopt policy in open session about "price" and keep track in executive session
- Ensure minutes reflect attorney's presence at executive session if using a "legal" exemption

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Public Records Act Chapter 42.56 RCW

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Public Records Act Violations Can Be Expensive

- Most claims against agencies are successful.
- PRA Claims are uninsurable.
- The penalty can be up to \$100/day/record withheld.
- Plaintiff (but not the agency) is entitled to an award of attorneys' fees if successful.
- PRA penalties and attorneys' fees continue to accrue through each level of appeal (risk of reversal on appeal).
- Plaintiffs' attorneys sometimes accept representation on contingency basis: no cost to plaintiff unless successful.



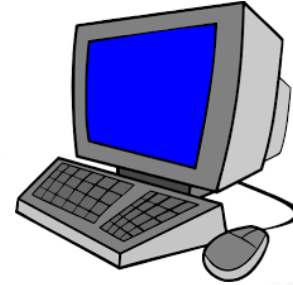
Purpose

- “The people do not yield their sovereignty to the agencies which serve them.”
- “The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know.”
- “The people insist on remaining informed so they may retain control over the instruments they have created.”
- The “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”
- The Act is to be “liberally construed.”

~ *RCW 42.56.030; RCW 42.56.550*

Public Records

“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 characteristics.”



Definition for Public Record (RCW 42.56.010(3))

- Public records definition now excludes records not required to be retained by the agency that are held by volunteers who:
 - Do not serve in an administrative capacity;
 - Have not been appointed by the agency to an agency board, commission or internship; and
 - Do not have a supervisory role or delegated agency authority.

Definition - Writing

“**Writing**” is broadly defined and includes “handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of communication** or representation including, but not limited to, letters, words, pictures, sounds, symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.”

~ *RCW 42.56.010*

Public Records Can Include...

- Records of agency business when they are created or retained by agency employees or officials on home computers or in non-agency email accounts.
- Electronic mail is a public record regardless of where it is sent from.
 - Practice Tips:
 - Use Port email account;
 - Avoid using home computer or personal device (if do, copy Port email);
 - Port should create an email retention policy so that it meets the intent of the law without overburdening Port resources.

Requests for Public Records

- Persons can request identifiable public records from public agencies.
 - Requester can—but in absence of published procedures cannot be compelled—to use agency public records request form.
 - If agency request form is not used, requester must provide “fair notice” that he/she is seeking public records. Tip: Treat as request.
 - Request can be emailed, faxed, or verbal.
 - A request for “information” is not a request for “records” under the Public Records Act.
- Requesters can ask to inspect records, or request copies of records.
- Recommended: Adopt procedures explaining where requests must be submitted and other procedures.

Public Records Procedural Requirements

- Under the Act, agencies must:
 - Appoint a **public records officer**;
 - Publish **procedures** describing certain agency organization, operations, rules of procedure, and other items listed in PRA;
 - Adopt **rules/procedures** to:
 - Provide full public access to public records;
 - Protect public records from damage/disorganization;
 - Prevent excessive interference with other agency functions;
 - Provide fullest assistance to requesters;
 - Provide most timely possible action on requests.

Public Records Procedural Requirements

- If charging actual costs of copies of records, **publish fee schedule**.
- Maintain a **list of laws** the agency believes exempts or prohibits disclosure.
- **Post** regularly requested materials online, e.g. Comp Scheme, Strategic Plan, Marina Policies, Bids, Minutes/Resolutions, etc.
- Make non-exempt records **available for inspection and copying** during **customary business hours** for a minimum of 30 hours per week, excluding holidays.

- Post customary business hours on the agency's website and make hours known by other public means.



RCW 42.56.120

ACTUAL COSTS	STATUTORY DEFAULT FEES	ALTERNATIVE FLAT FEE
<p>Agency can charge its actual costs directly incident to copying including:</p> <ul style="list-style-type: none"> • Paper and per page cost for use of agency copying equipment; • Electronic production or file transfer of the record; • Use of any cloud-based data storage and processing service; • Costs directly incident to shipping including postage or delivery charges and cost of container or envelope; and • Cost of transmitting the records in electronic format including the cost of any transmission charge and use of any physical media device provided by agency. 	<p>Agency can assess costs per the statutory fee schedule:</p> <ul style="list-style-type: none"> • 15 cents/page paper; • 10 cents/page scanned into electronic format; • 5 cents/4 files or attachments and provided by electronic delivery; • 10 cents/gigabyte of electronic records transmission; • Actual cost of storage media, container, envelope; postage/delivery charge; and • Charges can be combined if more than one type of charge applies. 	<p>Agency can charge alternative flat fee of up to \$2 for a request (rather than actual costs or default fees).</p>
<p><u>REQUIREMENTS:</u> (1) Agency must have a statement of the factors and manner it used to determine actual cost.</p>	<p><u>REQUIREMENTS:</u> (1) Agency must have a rule or regulation declaring the reasons calculating the actual costs would be unduly burdensome.</p>	<p><u>REQUIREMENTS:</u> (1) Agency must reasonably estimate and document that the costs are clearly equal to or more than \$2.</p>

Public Records Officer

- Each agency must designate a PRO.
 - May appoint an employee or official of another agency to serve in this role.
- Duties of PRO:
 - Serve as a point of contact for members of the public in requesting disclosure of public records.
 - Oversee the agency's compliance with the public records disclosure requirements of this chapter.
- Agency Duties:
 - Provide name and contact information of the agency's PRO, including posting at the local agency's place of business, posting on its internet site, or including in its publications.

Port Response to Request

- The Port has five *business days* to respond to a public records request.
- The Port can:
 1. **Acknowledge receipt of the request and provide a reasonable estimate for a further response;** or
 2. **Fulfill the request;** or
 3. **Provide an internet address and link to the records on the agency's website (which fulfills part or all of the request);** or
 4. **Seek clarification (seeking clarification **MUST** be coupled with an estimated time response);** or
 5. **Deny the request with an accompanying written statement of the specific reasons.**

A Great Opportunity For Public Service

- Think of the Public Records Act responses as what the Port does as opposed to an interference with what the Port does.
 - Important and time-consuming Port function.
- Opportunity to provide great customer service.
- Built into the budget of each department.
- Create a culture of openness and build trust



What if the Harbor Master said:

“You know, it would be a lot easier for me and my staff to do our job if we didn’t have all these boaters leasing slips in the marina. We could keep everything clean and tidy and we wouldn’t have to answer all these questions.”



Now think about when someone says:

“This Public Records Act request is really a pain. It is interfering with my job here at the Port. That citizen is really making my life miserable. I could get a lot more done if I was not bothered with these requests.”



Overbroad Requests

- A request for all or substantially all public records of an agency is not a valid request for identifiable public records. *RCW 42.56.080 (1)*.
- A request for all records regarding a particular topic or containing a keyword is not considered a request for all agencies records. *RCW 42.56.080 (1)*.
- An agency may deny a “bot request” that is one of multiple request from the requestor to the agency within a 24 hour period if the agency establishes that the responding to the requests would cause excessive interference with other essential functions of the agency. *RCW 42.56.080 (3)*.
 - A “bot request” is a request for public records that the agency reasonably believes was automatically generated by a computer program or script. *RCW 42.56.080 (3)*.

Estimate of Time for Further Response

- An agency can provide an **estimate of time for further response**.
- Estimate is to be **reasonable**.
- Practice Tip: Briefly **explain why** more time is needed to process a request. If challenged in court, it is an agency's burden to show why an estimate of time is reasonable.



Time for Further Response

- **Factors** may include, for example, that time is needed to:
 - Get clarification if necessary.
 - Search for records. More time may be needed if request is large or complex.
 - Assemble and review records.
 - Provide notice to affected third persons/agencies if necessary.
 - Prepare an exemption log if necessary.
 - Perform other essential agency functions, considering agency resources, including staff availability.

Time for Further Response

- An agency can extend the time, if needed, as often as necessary. Again, it is a good practice to explain why.
- Practice Tip: If an agency can't produce all the records at once (particularly for large requests), an agency should provide records in installments.



Searches for Responsive Records

- Before you even begin searching, make sure you know what to look for:
 - Clarify the request if needed.
- Conduct **reasonable search** for responsive records.
 - Consider all formats (paper, electronic, etc.).
 - Consider records of current staff/officials, and former staff/officials, if potentially responsive.
 - Consider possible locations (e.g., file cabinets, agency website, audio files, etc.).

Searches for Responsive Records

- The search must be **reasonably calculated to uncover responsive records**.
- The search must follow **obvious leads** to possible locations where records are likely to be found.
- Practice Tip: **Document** search efforts (locations, search terms used, etc.)
The agency bears the **burden of proof** to show the adequacy of the search.

The Future of Tracking Requests and Records

- Some agencies are currently using software systems to track requests, track time spent on requests and preserve the history of the request.
- Online systems are also used for tracking of previously disclosed records – requester can do a keyword search.
- Consider: all records being uploaded to an online platform with only exempt records being held back by agency.



New Public Records Data Reporting Requirement

- All agencies must log:
 - Identity of requestor (if provided);
 - Date and text of request;
 - Description of records produced in response to request;
 - Description of records redacted or withheld and reasons for redaction/withholding; and
 - Date of final disposition of the request.
- Agencies with \$100,000 or more in annual staff and legal costs associated with records requests must take tracking several steps further.

Public Records Exemptions

- All public records are presumed open.
- Exemptions are “narrowly construed.”
- The Port has the burden of showing why a record should be “exempt.”
- It is absolutely necessary to provide an exemption log if a record is being withheld as exempt.

Public Records Exemptions

- The exemption log must include:
 - Date of record;
 - Type of record;
 - Author and recipient(s);
 - Total number of pages withheld;
 - The exemption and a brief explanation.



Common Exemptions

- Attorney-client privilege.
- Protected health information.
- Pending investigation records (in certain investigations).
- Certain records / information contained in personnel files.
- Deliberative process exemption.
 - Opinions expressed or policies formulated.
 - Only until the decision is made.
 - Practice Tip: Mark deliberative process records as such (not dispositive but helpful to show intent).

Recent Decisions (since May 2019) :

- *Wash Public Emps Ass'n v. Wash State Center for Childhood Deafness & Hearing Loss* (10/24/2019)
 - Employee's full name and date of birth are not exempted from disclosure, either by the Public Records Act or the state constitution.
- *Gipson v. Snohomish County*, (10/10/19)
 - Exemptions are applied at the time a public records request is made. If records are provided in installments, there is no requirement for the agency to provide records exempted at the time of the initial request even though they are no longer exempt at the time an installment is later provided.

Recent Decisions (since May 2019):

- *Service Employees International Union v. Univ. of WA*, (9/5/2019)
 - Not all records on an agency server are public records just because they are on an agency's server.
- *Freedom Foundation v. DSHS*, (8/6/19)
 - State law does not establish the factors to consider in determining a reasonable time for providing records. Providing records to the requesting party can be delayed allowing an affected party to determine whether to seek an injunction against the records release.

Other Decisions:

- *West v. Steve Vermillion, City of Puyallup (2016)*:
 - Records related to government business that are stored on a personal computer are subject to disclosure.
 - There is no constitutional privacy right to public records.
 - You can require someone to sign an affidavit attesting that they conducted a reasonable search of their personal devices.
- *Wade's Eastside Gun Shop v. Department of Labor and Industries (2016)*:
 - Penalty for improperly withholding a public record can be calculated on a per page basis, not necessarily a per record basis.
 - The trial court has discretion to make this determination.

Enforcement & Penalties

- Public records violations are enforced by courts for those claims listed in by the Act.
- A court can impose **civil penalties up to \$100/day/record** (court may group records for penalty purposes).
- No proof of “damages” required.
- A court is to consider certain factors in assessing a penalty.
- A court will award the requester's **attorneys' fees and costs**.
~ *RCW 42.56.550, RCW 42.56.565; Yousoufian v. Sims*



Penalty Factors

- Mitigating factors (factors that can reduce a penalty):
 - A lack of clarity in the PRA request.
 - The agency's prompt response or legitimate follow-up inquiry for clarification.
 - The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.
 - Proper training & supervision of the agency's personnel.
 - The reasonableness of any explanation for noncompliance by the agency.
 - The helpfulness of the agency to the requester.
 - The existence of agency systems to track and retrieve public records.



Penalty Factors



- Aggravating factors (factors that can increase a penalty):
 - A delayed response by the agency, especially in circumstances making time of the essence.
 - Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions.
 - Lack of proper training & supervision of the agency's personnel.
 - Unreasonableness of any explanation for noncompliance by the agency.
 - Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.

Penalty Factors



- Agency dishonesty.
- The public importance of the issue to which the request is related, where the importance was foreseeable to the agency.
- Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency.
- A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.
- The inadequacy of an agency's search for records.

Summary – Practice Tips

- Leadership led effort
- Use Port email account
- Avoid using home computer or personal device (if do, copy Port email)
- Port should create an email retention policy so that it meets the intent of the law without overburdening Port resources
- Explain why additional time is needed
- Use installments as needed
- Mark deliberative process records as such
- Know where records are located, especially if the Port has multiple facilities

Summary – Practice Tips

- Know retention policies
- Have regularly scheduled records retention review days
- Watch multiple records of same record, e.g. emails, draft memos, etc.
- Policy on how to capture retired and other employees who have left
- When a request is received:
 - Pull relevant staff together to review request, set deadline to search, develop common search terms, stress importance and priority, etc. (leadership led)
 - Each member should do a search log
 - Don't forget retired and other employees who may have left

Questions?

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