

“Predatory Litigation”, the Open Public Meetings Act and Public Records Act

Washington Public Ports Association

Commissioners' Conference

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The “American Rule” on Attorney Fees

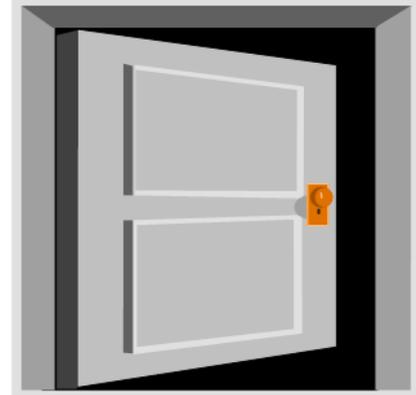
- The American Rule is a rule in the U.S. justice system that says two opposing sides in a legal matter must pay their own attorneys fees, regardless of who wins the case
- Exceptions:
 - Contractual agreement
 - Recognized grounds in equity
 - Statute
 - These are usually one-way applications against government

Litigation as a Predatory Practice

- Definition: Litigation brought to achieve a result other than the request for relief
 - Impose costs and attorney fees on another party
 - Drive a settlement to impose practices on another party
 - Pursue an agenda of a client
 - Recover attorney fees

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 – RCW 42.30.010

- “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.”
- Effective June 9, 2022, ESHB 1329 added “informing the people’s public servants of their views.”
- Added “encouragements” in ESHB 1329
 - Encourage public comment
 - Encourage telephonic and video participation



OPMA Applies To:

- Port Districts
- Any time a quorum of elected officials discuss Port business, whether they are in the same room, on the phone, exchanging emails or acting through an executive director or lawyer

Penalties for Violating the OPMA

- A court can impose a \$500 civil penalty against each member (personal liability) for the first violation. The penalty increases to \$1000 for any subsequent violation(s)
- Action taken at a meeting where the violation occurred shall be null and void

RCW 42.30.120

AND



Penalties for Violating the OPMA

(4) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorneys' fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency which prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause



Define Our Terms

Who Is the Governing Body

- The elected officials of the government.
 - Also, a committee that acts on behalf of the governing body (i.e. exercises actual or de facto decision-making authority); or takes testimony or public comment on behalf of the governing body



What is an 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
 - Site visits
 - Work study sessions



What is a 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 a closed session
- Secret ballots are not allowed
- Public comment required before any “final action”
 - New in 2022



What is a Meeting?

- “Meeting” means meetings at which the public agency takes “action”
- 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



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



“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, setting forth the meeting dates for the year
- Must publish the agenda at least 24 hours in advance of your meeting and be posted on a website
 - But not limited to items on the agenda
- Requires a physical location

“Special” Meetings

- A “special meeting” is *any* meeting that is not a regular meeting
- Called by presiding officer or majority of the members
- Requires a physical location
- 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
 - Agenda posted on the website and limited to items 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 the likelihood of such injury or damage



New 2022 – Remote Meetings

- “Remote meetings” may occur after a declaration of emergency by a local, state or federal agency
 - If, the public agency determines that it cannot hold a meeting of the governing body with the public in attendance, in person, with reasonable safety because of the emergency
- Then:
 - Hold a remote meeting of the governing body without a physical location
 - Hold a meeting of the governing body at a physical location where attendance of some or all of the public is limited
- But, the public agency must:
 - Provide an option for the public to listen telephonically or “readily available alternative” at no cost. (Otherwise, no action may be taken at the remote meeting)

Requirements for All Meetings

- A physical location where the public can attend – except “remote meetings”
- 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



RCW 42.30.077– Applicability and Limitations

- The law does not:
 - Prohibit agencies from later modifying a regular meeting agenda
 - Provide a basis for a person to recover their attorneys' fees or to seek a court order against the agency if an agenda is not posted in accordance with the law

Public Attendance and Public Comment

- Public comment period is not required by OPMA except (new in 2022) before a “final” action is taken
 - So, public comment is now required at all meetings where any vote will be taken
- Excludes site visits and work-study sessions
- 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.
 - 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



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
- New in 2022: The announced purpose of excluding the public must be entered into the meeting minutes
- Practice Tip: Be precise about the purpose and the statutory exemption

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 applicants for public employment
- Meet with legal counsel regarding litigation or potential litigation

Best Practices to Avoid Litigation

- Do not try and circumvent the OPMA
 - Emails and other forms of serial communications
 - 1:1:1
- Do not abuse the executive session
- For controversial or significant projects consider the process
- When in doubt, consult with the port's attorney
- Conduct “do-overs”

Washington's Public Records Act

- Passed in 1973 as an initiative
- Chapter 42.56 RCW



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*

Washington Public Records Act

- RCW 42.56.550
 - (4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect, or copy said public record

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



Enforcement & Penalties

- Public records violations are enforced by courts for those claims listed in 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

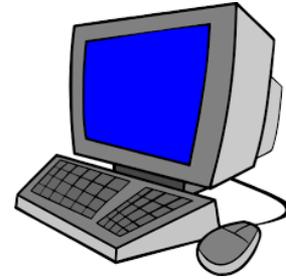
Penalty Factors



- 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

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 - Writing

“**Writing**” is broadly defined and includes “handwriting, typewriting, printing, photostatting, 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(4)

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



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 5 *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 requests from the requestor to the agency within a 24-hour period if the agency establishes that responding to the requests would cause excessive interference with other essential functions of the agency.

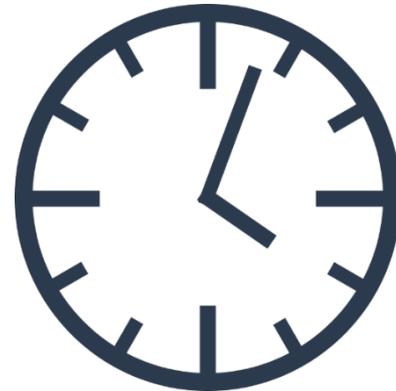
RCW 42.56.080 (3)

- 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



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
 - 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 or redacted as exempt

Public Records Exemptions

- First, it may be exempt, but so what?
 - Typically, a very bold bet
- The exemption log must include:
 - Date of record
 - Type of record
 - Author and recipient(s)
 - Total number of pages withheld/redacted
 - The exemption citation and a brief explanation



Summary – Best Practices to Avoid Litigation

- 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
- Always answer within 5 business days
- Explain why additional time is needed
- Use installments as needed

Best Practices to Avoid Litigation

- Mark deliberative process records as such
- Know where records are located, especially if the Port has multiple facilities
- 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
 - Have a good working relationship with your lawyer
- When a lawsuit arrives – get a clear-eyed evaluation

Questions?

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