



Public Records Act, Record Retention, and Open Public Meetings Act Training

WPPA – New Commissioners Seminar

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Public Records Act RCW 42.56



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.”
- 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.”

RCW 42.56.010

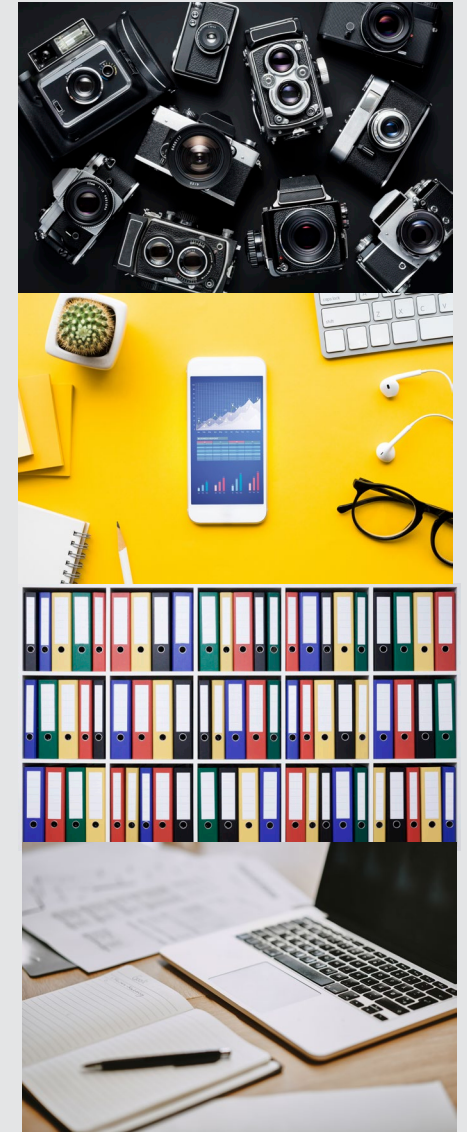


What is a “Writing”

- “**Writing**” is broadly defined and includes “handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of communication...from which information may be obtained or translated.**”

~ RCW 42.56.010

- So, “public record” is **broadly defined.**



What is a “Writing”? Statute includes...

- Letters
- Words
- Pictures
- Sounds, or symbols, or combination thereof
- 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
- Discs
- Drums
- Diskettes
- Sound recordings
- Other documents including existing data compilations from which information may be obtained or translated.

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
 - Always use district email account
 - Try not to use home computer or personal device

Confed'd Tribes of Chehalis Resv. v. Johnson

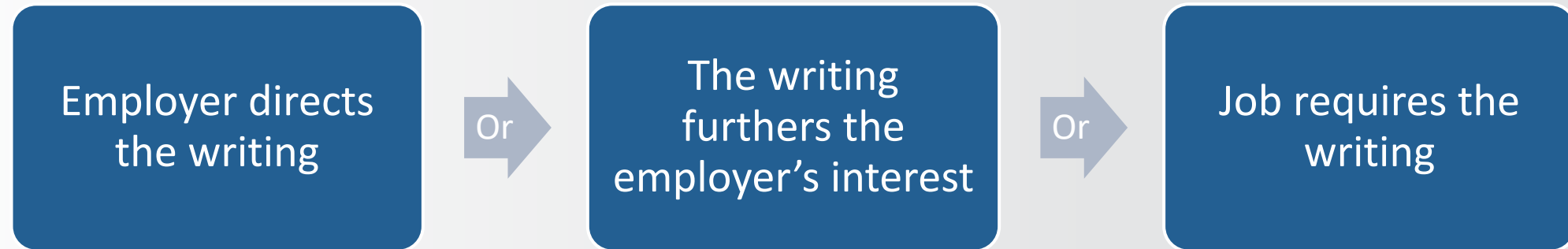
- 135 Wn.2d 734 (1998).
- Public records are very broadly defined by case law.
- Where “records relate to the conduct of ... [a public agency] ... and to its governmental function ... [T]he records are ‘public records’ within the scope of the public records act.”

What is a Public Record?

- May encompass agency-related records on **personal** devices and accounts, including:
- **Agency-Related Emails on Personal Accounts** (*West v. Vermillion*, 196 Wn.App 627 (2016))
- **Agency-Related Text Messages on Personal Phones** (*Nissen v. Pierce Co.*, 183 Wn.2d 863 (2015))
- **Agency-Related Social Media Posts on Personal Accounts** (*West v. Puyallup*, 2 Wn.App. 2d 586 (2018))

Scope of Employment

- If record resides on a personal device or account, apply “scope of employment” test:



Consultant/Contractor Records

- Is the consultant acting as the “functional equivalent” of an agency employee?
- Apply Functional Equivalent Balancing Test (Telford Test):
 - The extent the entity performed a government function
 - The extent public funds paid for the activity
 - The extent of government involvement or regulation
 - Whether the government created the entity

General Public Records Procedures: Overview

- Assign and Publicly Identify a **Public Records Officer (PRO)**
- Adopt a Local Public Records Act **Policy**
- Publish a **List of Exemptions and Prohibitions** Found Outside the PRA
- Maintain an **Index of Public Records**
- Adopt a PRA **Fee Schedule**
- Provide for a **Review Procedure** for any Denial of Records
- Fulfill PRA **Training Requirements**



General Public Records Procedures

- Appoint a **public records officer**.
 - Post PRO's name and contact information at the agency's place of business, on the agency's website (if any), or in any relevant publications. RCW 42.56.580.



General Public Records Procedures

- 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.



General Public Records Procedures

- If charging actual costs of copies of records, **publish fee schedule**.
- Maintain a **list of laws** the agency believes exempts or prohibits disclosure.
- Provide certain **indexes** of records.
- 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

Requests for Public Records

- Persons can request **identifiable public records** from public agencies.
 - Requester can use agency public records request form.
 - If agency request form not used, requester must provide “fair notice” that he/she is seeking public records.
 - A request for “information” is not a request for “records” under the PRA.
- Requesters can ask to ***inspect*** records, or request ***copies*** of records.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.



District Response to Request

- Agencies have **five business days** to respond to a public records request.
- Agencies 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; or,**
 5. **Deny** the request with an accompanying written statement of the specific reasons.

DO NOT DELAY!

- Newspaper industry has asked for a change to the Model Rules, issued by the State Attorney General's Office. The Attorney General is proposing revisions to the Model Rules.
- Newspapers claim that public agencies have too much delay in responding
- The changes requested are difficult to incorporate: Don't be the reason for any changes
 - Would require the Port to prioritize smaller requests over larger ones
 - Would limit third-party notice (to allow affected party to get an injunction)
 - Would require requestor to confirm "intent to abandon" request before request can be closed.

Estimate of Time for Further Response

- An agency can provide an **estimate of time for further response**.
- Estimate is to be **reasonable**.
- It is a good practice to 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.
- **Factors** may include time needed to clarify, search, provide notice to third parties, etc.
- An agency can extend the time if needed. Again, it is a good practice to explain why.
- If an agency can't produce all the records at once (particularly for large requests), an agency can provide records in installments.

Searches for Responsive Records

- The District should **read the request carefully** to understand what records are requested.
- An agency must conduct an **adequate search** for responsive records.
 - Consider formats (paper, electronic, etc.), current and former staff/officials, possible locations (cabinets, website, audio, etc.)
- The search should be **reasonably calculated to uncover responsive records**.
- The search should follow **obvious leads** to possible locations where records are likely to be found.
- **Document** search efforts (locations, search terms used, etc.) The agency bears the **burden of proof** to show the adequacy of the search.

Exemptions

- All public records are presumed open
- Exemptions are “narrowly construed”
- The district has the burden of showing **why** a record should be “exempt”
- Agencies **must** provide an exemption log if a record is being withheld as exempt
- 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
- RCW 42.56.250



Common Exemptions

- Attorney client privilege
- Protected Health Information
- Certain pending investigation records (updated 2025)
- Certain records/information contained in personnel files
- Deliberative Process Exemption
 - Opinions expressed or policies formulated
 - Only until the decision is made
- NEW: the identity of public employees or their dependents who are survivors of domestic violence, sexual abuse, stalking, or harassment

Pending Investigations

- New, 2025 version of RCW 42.56.250(1)(f) exempts agency records of active and ongoing investigations of unfair employment discrimination and harassment
- Previously included only names
- Now provides for redacting images, employee agency job titles, email addresses, and phone numbers of complainants, other accusers, and witnesses
- Voices on any audio recording taken during investigation are altered while retaining inflection and tone

Pending Investigations

- Once the investigation is closed, the records may only be disclosed “if the names of complainants, other accusers, and witnesses are redacted.”
- This is to prevent retaliation and harassment
- If the complainant is an elected government official, their name and title cannot be redacted

Deliberative Process

- Opinions expressed or policies formulated.
- Only until the decision is made – then all drafts, notes, etc. are fair game
 - *Dawson v. Daly*, 120 Wn.2d 782 (1993).
- Factual materials which are being considered as background material on an issue are not exempt. *RCW 42.56.280*.
- Records pertaining to lease negotiations are not under the deliberative process once the lease is executed. *West v. Port of Olympia*, 146 Wn.App. 108 (2008).

Deliberative Process (cont.)

- To rely on the exemption, the Port must show:
 - (1) That the records contain pre-decisional opinions or recommendations of subordinates expressed as part of a deliberative process;
 - (2) That disclosure would be injurious to the deliberative or consultative function of the process;
 - (3) That disclosure would inhibit the flow of recommendations, observations, and opinions; and
 - (4) That all materials covered by the exemption reflect solely recommendations and opinions and not the raw factual data on which a decision is based.
- *PAWS v. UW*, 125 Wn.2d at 256.

Protecting Identity of Survivors of Domestic Abuse

- In 2023, the Washington State Legislature adopted a new exemption to protect the identity of public employees or their dependents who are survivors of domestic violence, sexual abuse, stalking, or harassment (RCW 42.56.250).
- Applies to two types of employees:
 - Employees who can provide a sworn statement
 - Employees who can provide proof of participation in WA Address Confidentiality Program
- Statute does not require alleged perpetrator to be charged or convicted for the employee to seek protection.

Protecting Identity of Survivors of Domestic Abuse (cont.)

- Exempted information includes:
 - Employee's **name** or other personally identifying information.
 - Cite “RCW 42.56.250(1)(i)(i)” to withhold and redact this information.
 - “Any documentation maintained by an agency to administer” this exemption.
 - Cite “RCW 42.56.250(1)(i)(ii)” and the entire document should be withheld.

Protecting Identity of Survivors of Domestic Abuse (cont.)

- Best practices:
 - **Inform** employees about the exemption and its requirements
 - Establish a **process** for when agency receives a request concerning an employee's personally identifying information.
 - Agency director or director's designee must **verify** sworn statement
 - Documentation maintained by the agency is **confidential**
 - **Notify** the impacted employee of requests for their personal information
 - Explore other **ways to assist** employees in preventing their information from appearing in public records in the first place

Privacy

- There is no general “privacy” exemption in the PRA.
- If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
 1. “Highly offensive to the reasonable person”
and
 2. “Not of legitimate concern to the public.”
- This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes.



Financial, Commercial, & Proprietary Info

- Under RCW 42.56.270, this information *can be* exempt under certain circumstances.
- Must actually be financial, commercial, or proprietary info.
- (1) *Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce **private gain and public loss**;*

Financial, Commercial, & Proprietary Info (cont.)

- Under RCW 42.56.270, this information *can be* exempt under certain circumstances.
 - *Financial information pertaining to export services such as Economic Development Finance Authority, Export Trading Companies, etc.*

Servais v. Port of Bellingham

- 127 Wn.2d 820 (1995).
- Washington Supreme Court Case.
- Found that cash flow analysis of port properties prepared by a third party for the Port's sole use in negotiations with prospective joint venture partners was within the research data exemption.
 - “research data” defined as a “body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.”.
- Requesting party was denied the request because he would have profitted and the government would have incurred a loss.

Progressive Animal Welfare Society v. U of W

- 125 Wn.2d 243 (1994)
- Washington Supreme Court case.
- Found that a university's research data relating to intellectual property was exempt from disclosure.
- Requesting party was denied the request because he would have profitted and the government would have incurred a loss.

Spokane Research & Defense Fund v. City of Spokane

- 96 Wn. App. 568, 575-77 (1999), rev. denied, 140 Wn.2d 1001 (2000)
- The appeals court found that documents used by professors and accountants hired by the city, to perform credit and financial analysis for the city's loan guarantee for private shopping center development, were not exempt.
- **The city was unable to show a public loss resulting from the disclosure of the requested research.**

MRSC Guidance: Financial, Commercial, & Proprietary Information

- What about blueprints or other architectural drawings?
 - Exemption likely does not apply because disclosure would not necessarily cause both “private gain and public loss.”
- What about an architect’s copyright interest in the documents?
 - Disclosure is not automatically prohibited.
 - Requestors may be entitled to the records if the facts meet the “fair use doctrine.”
- When there is a disclosure request for these types of materials:
 - **Immediately notify the person who submitted the documents to allow the person with a copyright interest the chance to seek a court order prohibiting disclosure**

MRSC Guidance (cont.)

- In the public bidding process, local governments often obtain information which bidders would not voluntarily divulge to their competitors.
- Such information may be exempt, if the “public loss” factor can be met.
- Promptly notify a bidder if the agency receives a request for such records.

Trade Secrets

- Under RCW 19.108.010 and .020, Trade Secrets may be exempt.
 - "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
 - (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Fees

- Agencies **cannot** charge fees:
 - To allow requesters to **inspect** records.
 - For **searching, reviewing or redacting** records.
 - For **staff salaries, benefits or general overhead or administrative costs**, unless they are directly related to the actual cost of copying records (the charges must be reasonable, and documented).



Fees

- Agencies **can** charge fees:
 - For the **copies** themselves (15 cents per page, or actual costs).
 - The cost of sending records to an outside vendor for copying
 - For costs of **mailing** records (postage, shipping container, etc.)
- Agencies are to make their **fee schedules** available to the public.
- There may be other laws, outside the PRA, that permit an agency to charge fees for records.



Conclude the Request

- **Send a closing letter** to indicate the request has been fulfilled or closed: the “final, definitive response.”
- This triggers the **one-year statute of limitations** for PRA lawsuits.



Conclude the Request

- **Sufficient** closing letters provide:
 - (1) How the request was fulfilled and why the agency is closing the request,
 - (2) That the PRA's one-year statute of limitations to seek judicial review has started to run because the agency does not intend to further address the request, and
 - (3) That the requester may ask follow-up questions within a reasonable time frame, which may be specified by the agency.
- *Cousins v. State* (2024).



Enforcement & Penalties

- Public records violations are enforced by courts for those claims listed in the Act.
 - A court can impose **civil penalties**.
 - 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 (cont.)

- **Aggravating factors (factors that can increase a penalty):**
 - Delayed response, especially when time is of the essence
 - Lack of strict compliance with PRA
 - Lack of proper training & supervision of personnel.
 - Unreasonable explanation for noncompliance
 - Negligent, reckless, wanton, bad faith, or intentional noncompliance
 - Agency dishonesty

FAQS Regarding PRA

- Does an agency need to copy records into the specific electronic format requested? Does it have to deliver records in a specific electronic delivery method requested?
- Can an agency charge for the time it spends redacting records?
- Are agency-related Facebook posts on a public employee's or public official's personal Facebook account public records?
- What are the requirements related to retention of text messages?

Proper Management of Records

- Chapter 40.14 governs the retention, preservation and lawful destruction of public records
- Public records are public property; agencies are the custodians of this public property
- All public records shall be and remain the property of the state of Washington (RCW 40.14.020)
- Mutilating, destroying, concealing, erasing, obliterating or falsifying a public record = felony! (RCW 40.16.010 & RCW 40.16.020)

A Few Comments About Record Retention

- Proper record retention reduces searching time and allows for easier destruction of records
- Examples of public records to be retained:
 - Created in the course of business
 - Received for action
 - Documents business activities and actions
 - Mandated by laws, statute or regulations
 - Communicates business requirements
 - Supports financial obligations or legal claims
 - Final reports or recommendations

Have a Record Destruction Policy AND FOLLOW IT

- Drafts that have been sitting around on your computer for 10 years don't suddenly become non-public records because the passage of time.
- If you have drafts, once it is finalized, please get all drafts to records officer to store and DELETE them from your personal space.

Retention (cont.)

- Examples of records with no retention value:
 - Personal papers not related to conduct of business
 - Convenience copies
 - Published reference materials
 - Announcements of social events, such as retirement parties or holiday celebrations
 - Copies of agency memoranda, bulletins or directions of a general information and non-continuing nature

Retention of Electronic Records

- Electronic records must be retained in electronic format. Printing and retaining a hard copy is not a substitute for the electronic version.
- Electronic records are public records if used for the transaction of government business, even when stored on personal computers or in personal email accounts
 - Blogs
 - Texts
 - E-mails sent from personal accounts
 - All social media

End of Retention Period

At the end of the retention period, there are 2 options*:

1. Destroy the record
2. Transfer the records to archives

❖ Unless there is a litigation hold or an open PRA request encompassing the records

Questions on PRA and Document Retention?

Open Public Meetings Act

RCW 42.30



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's Fundamental Language

- “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 this chapter.”
- “Public agencies are encouraged to provide for the increased ability of the public to observe and participate in the meetings of governing bodies through real-time telephonic, electronic, internet, or other readily available means of remote access that do not require an additional cost to access the meeting.”
- ~ *RCW 42.30.030*

Recording or Online Streaming Encouraged

- Public agencies are encouraged to make audio or video recording of meetings, or to provide an online streaming option for all regular meetings of its governing body
- Agencies are encouraged to make recordings of these meetings available online for a minimum of six months.
- Note: this does not alter a local government's recordkeeping requirements under RCW chapter **42.56**.
 - *RCW 42.30.220*

In General, OPMA Applies To:

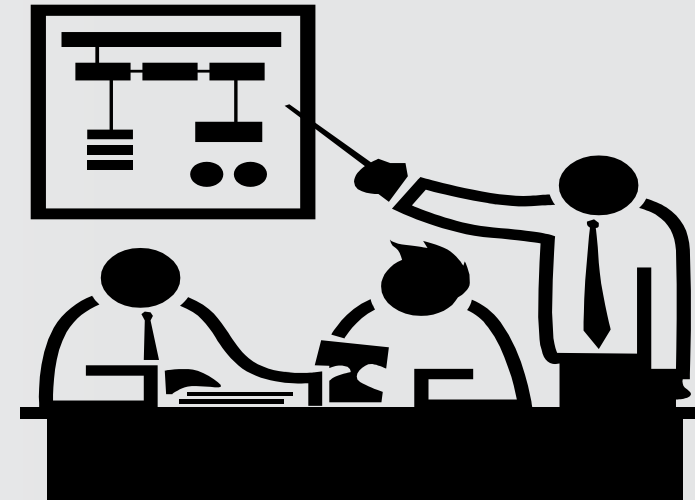
- Any time a *quorum* of elected officials *meet* to discuss Agency business, whether or not they are in the same room. *Example:* Telephone conference, video conference, or email.
- Quorum:
 - 3 person Committee: quorum is two.
 - 5 person Committee: quorum is three.
- Certain Committees of the Commission (discussed later)

OPMA Does Not Apply To:

- Social gatherings at which a quorum may be present, as long as business is not conducted. For example:
 - Awards banquet
 - Attendance at seminar (assuming no discussion of agency business)
- Discussions regarding labor negotiations (closed session)

What is a Governing Body?

- Port Commission 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*);
 - Conducts hearings; or
 - takes testimony or public comment
- ~ RCW 42.30.020



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 and 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:
 - Deliberations, Discussions
 - Considerations, Reviews, Evaluations
 - Receipt of Public Testimony

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*

“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
~ *RCW 42.30.070, RCW 42.30.075*

Regular Meeting Notice Requirements

- Governing bodies must 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.
 - Limited exemptions are listed in RCW 42.30.077.
- 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
- RCW 42.30.077

In an Emergency

- If the governing body must take expedited action to meet the emergency, the presiding officer may:
 - Provide for an alternate site,
 - Provide a remote meeting,
 - Hold a meeting where physical attendance by the public is limited due to a declared emergency
- The notice requirements of this chapter shall be suspended during such emergency ~ *RCW 42.30.070*

“Emergency” must be severe

- The type of emergency contemplated by RCW 42.30.070 (regular meetings) and RCW 42.30.080 (special meetings) to justify meeting without having to comply with the OPMA is a **severe** one that “involves or threatens physical damage” and requires urgent or immediate action.
 - Mead School District No. 354 v. Mead Educ. Ass’n (1975)

“Special” Meetings

- A “**special meeting**” is *any* meeting that is not a regular meeting
- Called by presiding officer or majority of the members

“Special” Meetings

- **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 member of the media (e.g. **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
 - Posted on the **Port’s website** (with some exceptions)

Special Meeting Notice Content Requirements

- 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, but other matters can be discussed



Emergency Special Meetings

- Notice is **not** required when a special meeting is called to deal with an emergency
- During a declared emergency which prevents a meeting from being held in-person with reasonable safety, an agency may post notice of a remote meeting without a physical location **on the website** instead of posting a notice at the agency's principal location and the meeting site.

~ *RCW 42.30.080*

Canceling/Adjourning a Meeting

- If the agency knows the meeting must be canceled in advance, **prepare a notice of cancellation** stating that the meeting is rescheduled to the next regular meeting date.
- If the agency does not know of the need to cancel in advance, then the members present (or the clerk, if no members are present) can **adjourn** the meeting to the next regularly scheduled meeting.
- In both cases, the agency should **post the notice of cancellation or adjournment** on the door of the physical meeting location and on its website.

Cannot Require Conditions to Attendance

- Agencies cannot require a member of the public to register their name, complete a questionnaire, or otherwise fulfill conditions to attend.
- However, an agency may use generally applicable conditions reasonably necessary to protect the public health or safety, or to protect against interruption of the meeting.
 - This includes meetings where physical attendance by some or all members of the public is limited due to a declared emergency.

Reasonable Rules of Conduct

- An agency can establish reasonable rules of conduct for its meetings
- These rules can be for the Council and the Public

Examples:

- Procedural Rules: Robert's Rules of Order
- Limitations on public comment, e.g.:
 - Length of time
 - Speak only once
 - Comments limited to certain issues
 - All public comments must be respectful

Public Comment

- Agencies must provide an opportunity for **public comment** at every regular meeting **before** final action is taken, except in an emergency.
 - May be taken **orally** at a public meeting
 - When feasible, provide for remote comment if physical attendance by a member of the public is difficult because of disability or any other reason
 - **Written testimony** may be submitted before or at the meeting
 - Must be distributed to the governing body at the meeting.
 - Agency may set a reasonable submission deadline.
- An agency may allow public comment on items not on the meeting agenda. *RCW 42.30.240*

Public Comment: Notice, if required

- If an agency is required to solicit public comment for a **statutorily specified period** and provide **notice of public comment**, the agency must specify:
 - The **first and last date and time** by which written public comment may be submitted.
- If the notice violates this section, the agency is subject to the **same fines and procedures as other violations** under RCW 42.30.120.
 - *RCW 42.30.250*

Interruptions and Disruptions

- Cameras and tape recorders are allowable unless disruptive ~
AGO 1998 No. 15.

Interruptions and Disruptions

- What if the meeting is disrupted by disorderly persons?
 - Have the disruptive persons removed.
 - Clear the meeting room and continue the meeting.
 - 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.
 - May stop people from speaking to the governing body when not recognized to speak.
 - *RCW 42.30.050*

Post-COVID Procedures: Emergencies, Remote Meetings, and Limiting Physical Attendance

- If a declared emergency occurs and the agency decides it cannot hold in-person meetings safely, the agency may:
 - Hold a **remote meeting** without a physical location
 - Hold a meeting where **physical attendance by the public is limited**
 - During a remote meeting, **members may appear by phone** or electronic means that allows real-time verbal communication.
 - *RCW 42.30.230*

Post-COVID Procedures: Emergencies, Remote Meetings, and Limiting Physical Attendance

- Agency must provide an **option for the public to listen** to or view the proceedings without extra cost for participation.
 - Broadcast on local TV
 - Other electronic means
- No action may be taken at a remote meeting if the agency has not provided an option for the public to listen in.
 - *RCW 42.30.230*

Post-COVID Procedures: Emergencies, Remote Meetings, and Limiting Physical Attendance

- Same notice rules apply
- Notice of a remote meeting must include instructions on all options for the public to listen or watch live proceedings.
- Remote meetings are still considered open and public meetings subject to OPMA.
 - *RCW 42.30.230*

Post-COVID Procedures: Emergencies, Remote Meetings, and Limiting Physical Attendance

- Members of the agency can still attend remotely without a declared emergency if the agency so decides.
- Any agency which held some of its regular meetings remotely before March 1, 2020, may continue to hold some of its regular meetings provided the public agency provides an option for the public to listen.
 - *RCW 42.30.230*

Executive Session

- Part of a regular or special meeting that is closed to the public
- Limited to specific purposes set out in the OPMA: see RCW 42.30.110
- Before convening, presiding officer must announce the purpose of the executive session and the time it will end, time may be extended by further announcement
- Confidentiality is required
- Practice Tip: Be precise about the purpose and the statutory exemption
~ RCW 42.30.110



Executive Session – Common Mistakes

- Executive Sessions cannot be used for:
 - “Personnel” issues
 - Conference with Attorney *unless* there is actual or threatened litigation being discussed
 - Discussion of interlocal agreement negotiation strategy or other contract negotiation strategy with third parties
 - Interview potential Commission candidates (evaluation MAY be done in executive session)

Most Common Executive Session Purposes

- Buying or selling real estate and public knowledge would likely adversely affect the price from the agency's perspective
- 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

- Legal counsel representing the agency **must** be present in person or by phone. *Practice Tip*: Minutes should reflect presence of attorney.
- Actual or potential litigation **specifically threatened** to the agency or a member acting in an official capacity
- Litigation that agency **reasonably believes** may be commenced against the agency or a member acting in official capacity
- 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

- Personal liability
 - First offense: \$500.00
 - Subsequent offenses: \$1,000.00
- Costs and attorneys' fees
- Action taken at meeting can be declared null and void
- Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of this chapter by members of a governing body.

~ *RCW 42.30.120; RCW 42.30.130; RCW 42.30.060*

Minutes – RCW 42.32.035

- Minutes of public meetings must be promptly recorded and open to public inspection
 - Don't take Minutes of executive sessions, but note the announced purpose in minutes of the regular or special meeting at which executive session is held
- No format specified in law
- Governing body must review, sign, and approve minutes
 - Local policy may require absent members to review audio or recording of meeting to participate in approval of minutes



Minutes – RCW 42.32.035

- How detailed should minutes be?
 - “Action minutes” noting attendees, agenda items, and actions taken are recommended and preferred.
- “Draft” minutes are not minutes
- To correct minutes:
 - Before adoption, by motion to amend draft minutes.
 - After adoption, by motion at a future meeting

Minutes – What about AI?

- What about AI notetakers?
 - AI can help transcribe or summarize meeting notes
 - A good resource for staff responsible for taking minutes & monitoring meetings
 - Humans should **always** review AI-generated minutes to ensure accuracy.
- Consider PRA implications: **Input prompts and resulting texts, images, are other output** used in the conduct **are likely public records for the purposes of the PRA.**
- There is no retention period for generative AI prompts yet, but there is one for internet browser history (transitory & can be destroyed once no longer needed.)

Minutes – What about AI?

- Adopt **policies and procedures** around procurement & use of generative AI.
- Example: City of Seattle's AI Policy
 - 6.1. All records generated, used, or stored by Generative AI vendors or solutions may be considered public records and must be disclosed upon request.
 - 6.2. All Generative AI solutions and/or vendors approved for City use shall be required to support retrieval and export of all prompts and outputs (either via exposed functionality or through vendor contract assurances).
 - 6.3. City employees who use generative AI tools are required to maintain, or be able to retrieve upon request, records of inputs, prompts, and outputs in a manner consistent with the City's records management and public disclosure policies and practices.

Minutes – What about AI?

- All AI-generated content should be **reviewed** and **fact-checked**, especially if used in public communication or decision making
- When consuming AI-generated content, be mindful of the **potential biases** and **inaccuracies** that may be present
- **Disclose & Attribute:** AI-generated content used in official state capacity should be **clearly labeled** and provide details of the **review and editing** process
- **Sensitive & Confidential Data:** do not enter any non-public data or information into publicly accessible generative AI systems (e.g., ChatGPT).

Special Risks: Email Correspondence Can Constitute a Meeting

- Email exchanges can constitute a meeting
 - These provide clear evidence of violation because they are documented
 - Don't reply to messages that have any substance
- Passive receipt of information is ok, but discussion of issues by a majority of governing body can be a meeting.
 - *Citizens Alliance for Property Rights Legal Fund v. San Juan County (2015)*

Special Risks: Email Correspondence Can Constitute a Meeting

- Tips for email correspondence:
 - State “For informational purposes only. Do not reply” in first line.
 - Don’t send an email to most or all a governing body unless it’s for informational purposes only.
 - Don’t use “reply all.”
 - Use the “BCC” email line to prevent reply-all.
 - Have a designated staff member provide documents to members.

Special Risks: Phone calls, Voicemails, and mixed media Can Constitute a Meeting

- A majority of the members of the governing body takes “action” through a series of phone calls or voicemail exchanges, that constitutes a meeting.
 - A “telephone tree” occurs when members call each other to form a majority decision.
 - Calls and messages can constitute a serial or rolling meeting if the members collectively intend to meet and conduct agency business.

Special Risks: Mixed Media Can Constitute a Meeting

- Be on the lookout for mixed media!
 - A conversation need not be held entirely in the same format for a rolling or serial meeting to occur.
 - For example, an in-person conversation might be continued on by email and then transition to text messages or comments on a social media site.
 - Social media can be effective to solicit public comments but shouldn't be used to collectively formulate policy or accept public testimony.

Open Meeting FAQ's

- Meeting locations - can we change them or hold meetings outside our jurisdiction?
- What should you do if you believe a meeting or an Executive Session violates the law?
- Can allowing third parties into Executive Session jeopardize the Executive Session?
- Can you give “direction” to the Executive Director or Port Manager in Executive Session without taking a formal vote in the open portion of the meeting?

Meeting Between Two Port Districts Governed by Federal Law, Not OPMA.

- The Federal Shipping Act of 1984 preempted a provision of the OPMA requiring that meetings of a governing body be open to the public, as to meeting between ports.
- Meetings between ports to discuss competitive activity can fall within exception allowing executive session when public knowledge of the meetings would cause a likelihood of increased costs or decreased income.
 - West v. Seattle Port Commission (2016)

Training – RCW 42.30.205

- Every member of the governing body of a public agency must complete OPMA training within 90 days of:
 - Oath of office
 - Otherwise assumes duties as a public official
- Additional training required at least every four years as long as the individual is a member of the governing body or public agency
- Training may be completed remotely and/or online.

Thank You



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