

Open Public Meetings Act

RCW 42.30

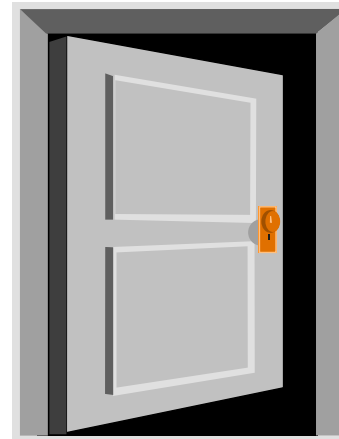


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Washington's Open Public Meetings Act (OPMA)

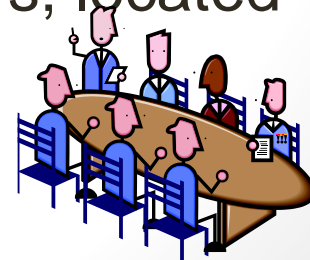
- Passed in 1971
 - “The legislature enacted the OPMA as part of a nationwide effort to make government affairs more accessible and transparent. LAWS OF 1971, 1st Ex. Sess., ch. 250.” ***West v. Wash. Assoc. of County Officials***
- Requires meetings to be open to the public, gavel to gavel
- RCW 42.30 (formerly RCW 42.32 – minutes still in RCW 42.32)
- Patterned after California “Brown Act” and a Florida law



OPMA Applies To:

Multi-member public state and local agencies,
including:

- Any **state** board, commission, committee, department, educational institution, **or other state agency which is created by or pursuant to statute**, other than courts and the legislature. RCW 42.30.020
- RCW 43.21A.731 creates the Chehalis Board of seven voting members and five ex officio members; located within Dep't of Ecology



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



What is a Governing Body?

- The **multimember* board or other policy or rule-making body**

OR

- Any **committee thereof** such public agency *when*:
 - the committee acts on behalf of the governing body,
 - conducts hearings, or
 - takes testimony or public comment

~ *RCW 42.30.020*
- Chehalis Board responsible for: (1) oversight of long-term strategy for the Chehalis River Basin; (2) overseeing the implementation of that strategy; and (3) developing budget recommendations to the Governor
~ *RCW 43.21A.731(5) & (6)*

When is a Committee of a Governing Body Not Subject to the OPMA?

- When it **lacks actual or *de facto* decision-making authority**, and does only things like:
 - Gather information
 - Conduct internal discussions
 - Provide information to the governing body
 - Give advice to the governing body
 - Perform an administrative staff support role
- ***Citizens Alliance for Property Rights Legal Fund v. San Juan County***, see also AGO 1986 No. 16.

What is a Meeting?

- “**Meeting**” means meetings at which the public agency takes “**action**” ~ *RCW 42.30.020*
- “**Action**” means the **transaction of the official business of the public agency** and includes but is not limited to:
 - Public testimony
 - All deliberations
 - Discussions
 - Considerations
 - Reviews
 - Evaluations
 - Final actions





The requirements of the OPMA are triggered whether or not “final” action is taken. See upcoming slide on “final action.”

- A “meeting” of a governing body occurs when a **majority of its members (quorum) gathers with the collective intent of transacting the governing body’s business.**

~ Citizens Alliance for Property Rights Legal Fund v. San Juan County

“Meeting” (Cont.)



- Physical presence not required – a meeting can occur by phone or email.  
- An exchange of e-mail could constitute a meeting if, for example, a quorum of the members participate in the e-mail exchange & discuss agency business. Simply receiving information without comment is not a meeting.
 - ~ ***Wood v. Battle Ground School District; Citizens Alliance for Property Rights Legal Fund v. San Juan County***
 - ~ *Note: Some boards, as a policy matter, may restrict emails among board members so as not to create potential OPMA issues.*
- 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.

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”
- Must be taken in public.
- Secret ballots are not allowed.

~ RCW 42.30.060, RCW 42.30.020

* Does not need to be a formal vote. Can be an informal proposal resulting in a negative or positive decision. In addition, a “consensus on a position to be voted on at a later council meeting would qualify as a collective positive decision and a ‘final action.’” **Miller v. City of Tacoma.**

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 action, triggering the requirements of the OPMA.

~ RCW 42.30.070



“Regular” Meetings



- “**Regular meetings**” are recurring meetings held in accordance with a **periodic schedule** by ordinance, resolution, bylaws or other rule.
- A state public agency must:
 - Yearly, file with Code Reviser a schedule of regular meetings, including time and place
 - Publish changes to regular meeting schedule in state register at least 20 days prior to rescheduled date

~ RCW 42.30.070, RCW 42.30.075; RCW 42.30.077

“Regular” Meetings (Cont.)

- RCW 42.30.077 requires governing bodies 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.



- This law does not:
 - Restrict agencies from later modifying an agenda.
 - Invalidate otherwise legal actions taken at a regular meeting where agenda was not posted 24 hours in advance.
 - Provide a basis to award attorneys fees or seek court order under OPMA if agenda is not posted in accordance with the law.

AGO 2017 No. 4: Regular meetings may be held by phone if call is broadcast at set location such that the public can attend and listen w/o difficulty and testify as needed

“Special” Meetings



- A “**special meeting**” is a meeting that is not a regular meeting (not a regularly scheduled meeting).
- Called by chair 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
 - Posted on the **agency’s website** Prominently **displayed at the main entrance** of the agency’s principal location and the meeting site (if not that same location)

~ RCW 42.30.080

“Special” Meetings (Cont.)

- Notice - contents: The special meeting notice must specify:
 - Time
 - Place
 - Business to be transacted (agenda)
 - Final disposition shall not be taken on any other matter at such meeting

~ RCW 42.30.080



Emergency Meetings

- Notice is not required when special meeting 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 increase likelihood of such injury or damage

~ *RCW 42.30.080(4)*



Public Attendance

- A public agency can't place conditions on public to **attend** meeting subject to OPMA:
 - For proceedings governed by OPMA, 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



- Reasonable rules of conduct can be set
- Cameras and tape recorders are permitted unless disruptive
~ AGO 1998 No. 15
- No “public comment” period required by OPMA. OPMA does not provide a right to speak.

Interruptions and Disruptions

- The OPMA provides a procedure for dealing with situations where a meeting is being interrupted so the orderly conduct of the meeting is unfeasible, and order cannot be restored by removal of the disruptive persons.
- Meeting room can be cleared and meeting can continue, or meeting can be moved to another location, but final disposition can occur only on matters appearing on the agenda. More details set out in the OPMA.

~ RCW 42.30.050



DISRUPTION

Executive Session



- Part of a regular or special meeting that is closed to the public
- Limited to specific purposes set out in the OPMA. *Miller v. City of Tacoma*.
 - But also see a few other specific statutes authorizing executive sessions. Examples:
 - RCW 70.44.062(2) - hospital quality improvement committee and meetings of public hospital's board to review reports or activities of committee are confidential and may be conducted in executive session, although board's final actions on report shall be in public.
 - RCW 48.62.101(1) - meetings of self insurance programs to consider litigation and claims settlements may be conducted in executive session.
- 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.

~ RCW 42.30.110



Executive Sessions

Specified purposes set out in OPMA.

Includes, for example:



- National security
- Real estate
 - Site selection or acquisition of real estate
 - Lease or purchase
 - Public knowledge would likely increase price
 - Sale or lease
 - Public knowledge would likely decrease price
 - Final action selling or leasing public property must be take at open meeting
- Publicly bid contracts
 - Review negotiations on performance
 - Public knowledge would like increase costs
- Evaluate qualifications of applicant for public employment
- Meet with legal counsel regarding enforcement actions, litigation or potential litigation
- Other purposes listed in RCW 42.30.110

~ RCW 42.30.110

NOTE: No general “personnel” discussions provision.



Violations - Elements

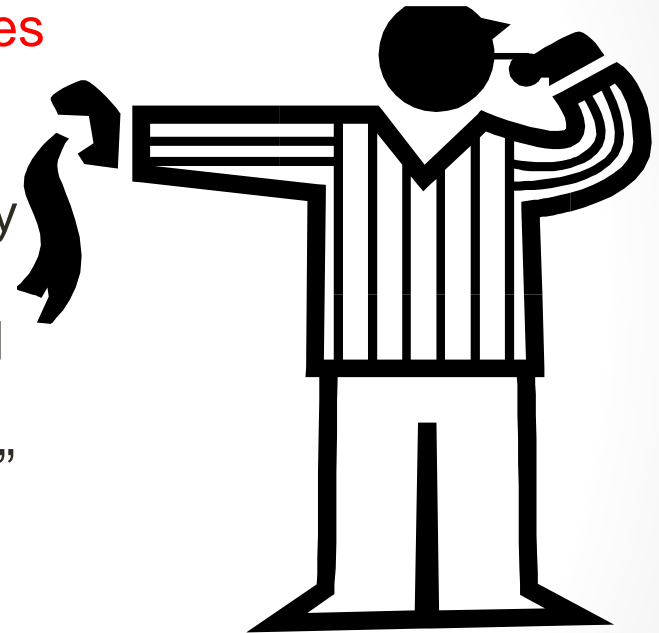


- To prevail on an OPMA claimed violation, a plaintiff must demonstrate:
 1. Members of a **governing body**
 2. Held a **meeting**
 3. Where the governing body took **action** in violation of the OPMA
 4. And (for penalties), the members had **knowledge** that the meeting violated the statute.

Eugster v. City of Spokane.

Violations - Penalties & Fees

- A court can impose a \$500 civil penalty against each member (personal liability) who knowingly attends a meeting in violation of OPMA. **The penalty increases to \$1,000 for a subsequent violation.**
- Court will award costs and attorney fees to a successful party seeking the remedy (knowledge of violation is not a factor.)
- Action taken at meeting can be declared null and void
 - Cannot be cured by “rubber stamping” in public a decision made in private



~ 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. See also ***Port of Seattle v. Rio***.
- If minutes of such a session are kept, and become a basis for judicial review, they may lose their confidentiality. See ***Cohen v. Everett City Council***.
- No format specified in law.

~ RCW 42.32.030



Recent Cases



- ***Columbia River Keeper et al. v. Port of Vancouver.*** SUPREME COURT. Issue: OPMA violations by port commissioners when discussing oil terminal lease in **executive session**. Commissioners could discuss minimum price for lease but not factors contributing to minimum price.
- ***West v. Pierce County Council.*** COURT OF APPEALS. Issue: Alleged OPMA violation with **discussion among a quorum** with prosecutor's office **via email and phone**, discussing agency business regarding a plan to build a county headquarters in Tacoma. Court held that there needs to be a collective intent to engage in meeting to transact official business and that such intent was lacking in this case.

Examples of Today's Possible OPMA Issues – Many Are Technology Based

- OPMA passed in **1971**. No Internet, email, cell phones, social media, live-streaming of government meetings, agency websites.
- Examples of **today's** possible OPMA issues/concerns:
 - Exchange of emails among a quorum, discussing agency business. *Wood v. Battle Ground School District; Citizens Alliance for Property Rights Legal Fund v. San Juan Co.; pending cases.*
 - Group texts among a quorum, discussing agency business.
 - Facebook or other social media postings among a quorum, discussing agency business.
 - Members texting during meetings --- each other, others.
 - Serial communications.
 - Adequate website postings of meeting agendas.



Recent Headlines



- “Tacoma council violated open meetings laws on anti-Walmart moratorium, developer alleges in lawsuit,” *The News Tribune* (9/10/14)
- “Confidential port meetings may violate state open meetings act,” *The News Tribune* (9/23/14)
- “Port commission approves open meetings defense costs,” *The News Tribune* (10/28/14)
- “UW broke state open meetings law 24 times, judge rules,” *The Seattle Times* (4/24/15)
- “North Shore school board violated open meetings law audit says,” *The Seattle Times* (8/3/15)
- Editorial: “Lawmakers make welcome hike in penalties for violating open meetings law,” *Chinook Observer* (4/12/16)
- Editorial: “Public ignored by Kennewick hospital board majority,” *Tri City Herald* (4/17/16)
- “UW Regents sued over ‘sham public process’ in picking school’s president,” *Seattle Times* (8/9/16)

Risk Management Tips



- Establish a culture of compliance with the OPMA.
- Receive training on the OPMA. (*See next slide*).
- Review available resources (*see upcoming slides*); institute best practices.
- Keep updated on current developments in OPMA; correctly apply law. Remember:
 - The OPMA can change through amendments or develop through case law.
 - *Example of amendment: 2016 increase in penalty.*
 - *Examples of pending cases.*
 - Other laws can also govern an agency's meeting procedures.
- Keep updated on technology developments/uses by governing body members. Consider adopting governing body policies. See MRSC website.
- Agency should consult with agency's legal counsel.



OPMA Training

- The “Open Government Trainings Act” requires OPMA training for every member of a governing body within 90 days of taking their oath or assuming their duties. RCW 42.30.205.
- Refresher training occurs 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 Webpage: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx>
- AGO OPMA **free** training video has been viewed more than 12,700 times.
- Upcoming **free** in-person trainings (“Open Government” sessions covering Public Records Act, records retention, and OPMA):
 - **November 14 – Tri Cities** (two sessions)
 - **November 15 – Spokane** (two sessions)
 - **November 28 – Tumwater** (two sessions)

**Register on
State Archives Training
Webpage**

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 on other open government topics and resources, on its website at <http://www.atg.wa.gov/open-government>.



~ RCW 42.30.210

Questions?

