

Sunshine Laws Overview



May 2024

Prepared by Joshua Osborne-Klein, AAG

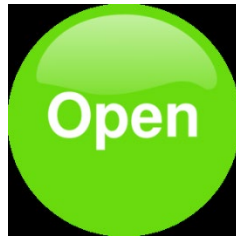
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Public Records Act

RCW 42.56



Touchstone:



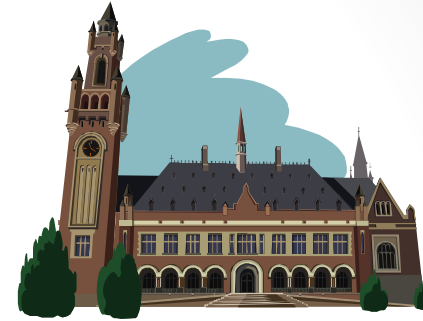
- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



PRA Applies to Records of:

- State government agencies*
- Local government agencies*
- Extent to Legislature – pending



~ RCW 42.56.010

* And to agencies that are the functional equivalent of public agencies.

PRA Does Not Apply to:

- Court records (court files)
- Records of certain volunteers
- Private organizations or persons*



* Unless, for example, the records are used or retained by a government agency.

State Agency

“**State Agency**” includes “every state office, department, division, bureau, board, commission, or other state agency.”

~ RCW 42.56.010(1)



Public Record



“Public record” means:

- 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.”

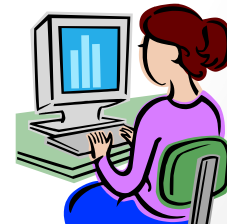
~ RCW 42.56.010

Writing

- “**Writing**” 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, or 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.”

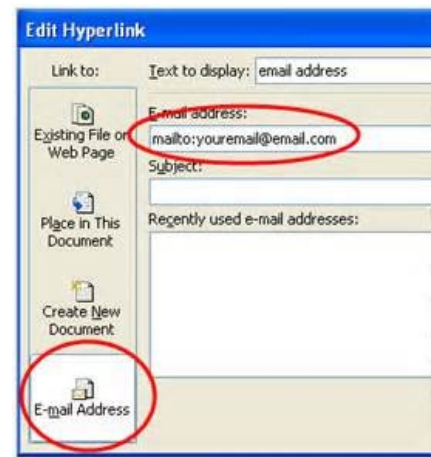
~ RCW 42.56.010

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



Note: Public Records Include...

...records of agency business when they are created or retained by agency employees or officials on **home computers or devices, or in non-agency email accounts or files.**



Text Messages (“Scope of Employment”)

- *Nissen v. Pierce County* (Aug. 2015)

- Text messages sent and received by a public employee in the employee’s official capacity are public records of the employer, **regardless of the public or private nature of the device used to create them.**
- **A record that an agency employee prepares, owns, uses, or retains within the scope of employment* is a record “prepared, owned, used or retained by a state or local agency” under the PRA.** An employee’s communication is “within the scope of employment” when the job requires it, the employer directs it, or it furthers the employer’s interests.
- For a record to be **“used”** by an agency it must bear a nexus with the agency’s decision-making process.

* *The Nissen court equated “official capacity” with “scope of employment” when referring to an elected official. See also West v. Puyallup.*



Post-Nissen v. Pierce County:



- PRA requests for **public records** in a **local elected official's personal residence, on a personal computer, and in a personal email account (2016); and personal Facebook site (2018).**
- Court of Appeals:
 - *West v. Vermillion, Puyallup* (2016): **Public records** must be disclosed. The constitutions do not provide an individual a privacy interest in those public records. State Supreme Court denied review. (*See upcoming slide on "privacy."*)
 - *West v. Puyallup* (2018): Facebook posts on an elected official's personal site are **public records** if they relate to the conduct of government and are prepared within the scope of employment or official capacity.

Searches



- An agency must conduct an **adequate search** for responsive records.
- 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.
- **If responsive public records are on or in employees'/officials' personal devices, personal accounts, or personal files, those must be searched, too.**
- The focal point of the judicial inquiry is the agency's search process, not the outcome of the search.
- The agency bears the burden of proof to show the adequacy of the search.

~ *RCW 42.56.520; Neighborhood Alliance of Spokane v. Spokane County; Hobbs v. State; Block v. City of Gold Bar; Nissen v. Pierce County.*

“Mechanics” of Searching/Producing Public Records Controlled by Employee

- The public **employee** must **obtain, segregate and produce** to the employer those public records that are responsive to a PRA request from the employee’s **personal accounts, files, and devices**.
- Employee may be required to submit affidavit regarding his/her search.

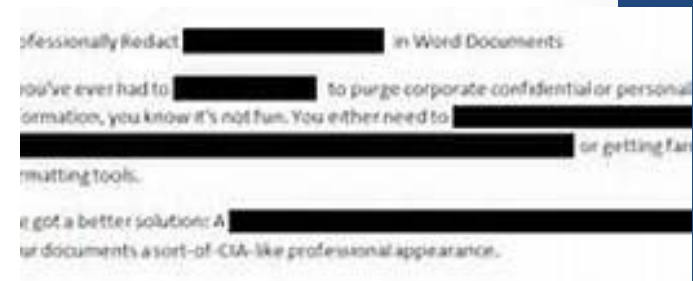
~ *Nissen v. Pierce County*



Exemptions

- Records are presumed open. If a record, or part of a record, is withheld from the public, the agency must cite to an “**exemption**” in law and give a brief explanation.
- Exemptions are **narrowly construed**. The general rule is the agency withholds only the exempt information, and releases the rest.
- Exemptions must be authorized in law -- in PRA or other laws.

~ RCW 42.56.050; RCW 42.56.210 - .510; RCW 42.56.550



Exemptions (Cont.)



- Common exemptions are certain information in student or employment records, attorney-client privileged information, pending investigative records in certain investigations, and protected health care information.
- The agency bears the burden of proof to justify the exemption.
- **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.”**

~ RCW 42.56.050

Enforcement & Penalties



- A court can impose **civil penalties** on agency violating PRA. No proof of “damages” required. Plus, a court will award the prevailing requester’s **attorneys fees and costs**. *RCW 42.56.550, RCW 42.56.565; Yousoufian v. Sims*
- Penalties in Other Laws:
 - There can be criminal liability for willful destruction or alteration of a public record. *RCW 40.16.010*
 - For state employees, penalties can be assessed under the State Ethics Law if an employee intentionally conceals a record that must be disclosed under the PRA, unless decision to withhold was in good faith. *RCW 42.52.050*

Electronic Records Production & Disclosure

– Resources

- **Attorney General's Office.** www.atg.wa.gov. Examples:

- Open Government Training Web Page
- PRA Model Rules, WAC 44-14
- Local Governments Consultation Program



- **Municipal Research & Services Center:** www.mrsc.org.

Examples:

- “New PRA Legislation: To Boldly Go Where the PRA Hasn’t Gone Before”
- “Use of Electronic Devices During Council/Commission Meetings”
- “Establishing Effective Social Media Policies for Your Agency”
- “Text Messaging Policies”
- “Public Records: Tackling The Tough Questions (Including Use of Smart Phones and Other Thorny Issues)”
- Other materials.



- **Washington Secretary of State – State Archives.**

www.sos.wa.gov/archives. Examples:

- In-person trainings on electronic records management – retention.
- Advice sheets & other publications:
 - “Blogs, Wikis, Facebook, Twitter & Managing Public Records”
 - “Capture and Retention of Text Messages”
 - “Digital Audio/Visual – Recommendations and Best Practices”
 - Other materials.



Office of the Secretary of State

Washington State Archives

AGO PRA Assistance

- The Attorney General's Office has provided an explanatory **pamphlet and other materials** about the PRA on its website at <http://www.atg.wa.gov/opengovernment.aspx>
- The AGO has also published PRA **Model Rules**. Updated 2018. See *upcoming slides*.
- The Attorney General has also appointed an Assistant Attorney General for Open Government (**Ombuds**). The AGO can provide technical assistance and training. <http://www.atg.wa.gov/open-government-training>
- The AGO may provide records **consultation** services for **local governments**. In 2018, the Attorney General appointed a Local Government Records **Consultant**. See: <http://www.atg.wa.gov/pr-consulting-program>
- The AGO may also **review a state agency denial** of a record when the agency concludes the record is exempt.

~ RCW 42.56.155; RCW 42.56.570;
RCW 42.56.530; RCW 42.30.210



Open Public Meetings Act

RCW 42.30



Washington's Open Public Meetings Act (OPMA)

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



OPMA Public agencies

“Public agencies” subject to the OPMA include:

- Multi-member public state and local agencies, such as **boards** and commissions.
- Any **subagency** of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies.

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*



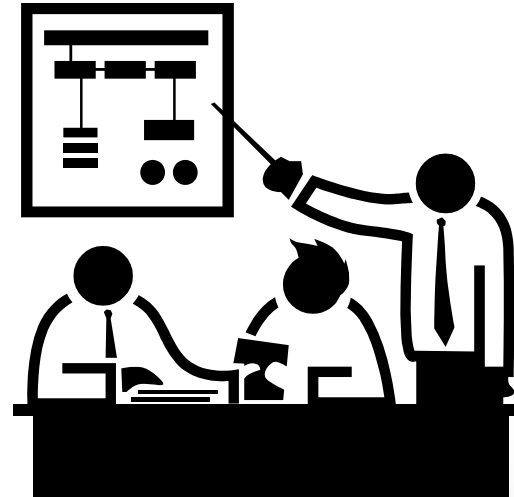
What is a Governing Body?

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

OR

- Any **committee** of 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



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

- 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, 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 action, triggering the requirements of the OPMA.

~ RCW 42.30.070



Types of Meetings



- **“Regular meetings”** are recurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws or other rule. *RCW 42.30.070; RCW 42.30.075; RCW 42.30.077*
- **“Special meetings”** is a meeting that is not a regular meeting (not a regularly scheduled meeting). Called by presiding officer or majority of the members. Notice - timing: 24 hours before the special meeting. *RCW 42.30.080*
- **“Emergency special 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

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

~ 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*

Executive Session to Discuss Agency Enforcement Actions, Litigation, or Potential Litigation: Three Requirements

- Legal counsel representing the agency is present
- Purpose is to discuss agency enforcement action, 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
- Public knowledge regarding discussion likely to result in an adverse legal or financial consequence to the agency

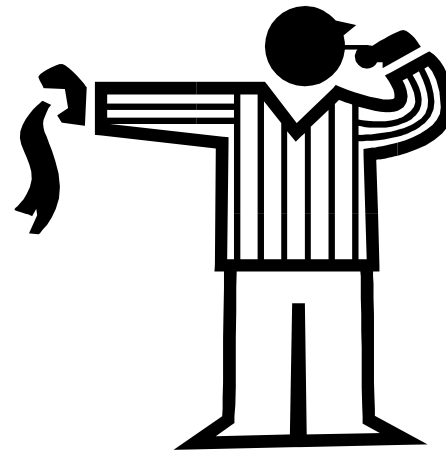
~ RCW 42.30.110



Penalties for Violating the OPMA

- A court can impose a \$500 civil penalty against each member (personal liability) who knowingly attends a meeting in violation of OPMA; and \$1000 for a subsequent knowing violation.
- Court will award costs and attorney 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 42.30.035

- 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 [except for school district boards]



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

Municipal Research & Services Center – Another Resource

OPMA – AGENCY OBLIGATIONS: A STARTING POINT

PRACTICE TIPS

For Local Government Success



The basic requirement of the Open Public Meetings Act (OPMA) is that meetings of governing bodies be open and public. Use these practice tips to guide your agency's OPMA compliance.* For more information and resources visit www.mrsc.org/opmapra.

Basic Requirements

- All meetings open and public. All meetings of governing bodies of public agencies must be open to the public, except for certain exceptions outlined in the OPMA. RCW 42.30.030.
- Quorum. Generally, a meeting occurs when a quorum (majority) of the governing body is in attendance and action is taken, which includes discussion or deliberation as well as voting. RCW 42.30.020(2) & (3).
- Attendees. All persons must be permitted to attend and attendees cannot be required to register their names or other information as a condition of attendance. Disruptive and disruptive persons may be removed from the meeting.
- No secret ballots. Votes may not be taken by secret ballot.
- Adoption of ordinances. Ordinances, resolutions, rules, regulations, or other orders of the governing body must be adopted by a majority vote of the governing body. If the ordinance, resolution, rule, regulation, or other order is invalid. RCW 42.30.060(1).

Position in Agency

- Member of a governing body
 - City or Town Councilmember or Mayor
 - County Commissioner or County Councilmember
 - Special Purpose District Commissioner/Board Member

Member of a subagency created by ordinance or legislative act

- Planning Commission
- Library Board
- Parks Board
- Civil Service Commission

- Member of a committee
 - Committees that act on behalf of the governing body, or public comment

Agency staff

Penalties for Noncompliance

- Actions null and void. Any action taken at a meeting which is null and void. RCW 42.30.060(1).
- Personal liability. Potential personal liability of \$100 for any person who violates the OPMA. RCW 42.30.120(1).
- Agency liability. Any person who prevails against an agency in a lawsuit, including attorney fees, incurred in connection with the lawsuit.

OPMA Training Requirements, Effective July 1, 2014

- Every member of a governing body of a public agency must complete OPMA training before assuming office or taking the oath of office.
- In addition, every member of a governing body must complete OPMA training before they remain in office.

*DISCLAIMER: These practice tips are meant to provide summary information and are not intended to be regarded as specific legal advice. Consult with your agency's legal counsel about this topic as well.

OPMA – EXECUTIVE SESSIONS

CHECKLIST

For Local Government Success



The Open Public Meetings Act (OPMA) requires specific steps be taken in order to hold an executive session. Use this checklist to guide your agency's compliance with the OPMA related to executive sessions.* For more information and resources visit www.mrsc.org/opmapra.

	Requirement	Completed/ Applicable
Meeting	An executive session can only be held as part of a regular or special meeting.	<input type="checkbox"/>
Purpose	The presiding officer announces in open session the purpose of the executive session.	<input type="checkbox"/>
End Time	The presiding officer announces in open session the time the executive session will end.	<input type="checkbox"/>
Legal Counsel	Legal counsel is present during the executive session, if required. (See topics below and on the next page for discussions that require the presence of legal counsel.)	<input type="checkbox"/>
Confidentiality	At the start of the executive session, participants are reminded that discussions are confidential.	<input type="checkbox"/>

Topics	Requirement	Completed/ Applicable
Related to local governments, the following topics set forth in RCW 42.30.110(1) can be discussed in executive session:		

- Matters affecting national security. RCW 42.30.110(1)(a).

OPMA – NOTICE REQUIREMENTS

PRACTICE TIPS

For Local Government Success



Under the Open Public Meetings Act (OPMA), to ensure that agency deliberations and other actions are conducted and taken openly, agencies are required to provide sufficient public notice of their meetings. Use these practice tips as a starting guide for OPMA notice requirements.* For more information and resources visit www.mrsc.org/opmapra.

	Regular Meetings (RCW 42.30.070)	Special Meetings (RCW 42.30.080)
Definition	Held in accordance with a schedule fixed by ordinance, resolution, bylaws, or other rule.	Anything other than a regular meeting. May be called by the presiding officer or a majority of the members of the governing body.
Notice and Agenda	Effective June 12, 2014, agendas must be made available on the agency's website at least 24 hours in advance of the meeting unless the agency: <ol style="list-style-type: none"> Doesn't have a website; or Employs fewer than 10 full-time equivalent employees. There are no other notice requirements for regular meetings in the OPMA. However, other relevant laws apply to some local governments. For example, cities and towns are required to establish a procedure for notifying the public of the preliminary agenda for the forthcoming council meeting (although not necessarily online) as well as regarding upcoming hearings. RCWA 35A.12.160; RCW 35.22.288; RCW 35.23.221; RCW 35.27.300. There are no similar requirements for counties or special purpose districts related to preliminary agendas.	The special meeting notice must specify the date, time, and place of the special meeting, and the business to be transacted. <ul style="list-style-type: none"> Personal notice. Written notice must be delivered personally, by mail, fax, or e-mail at least 24 hours before the meeting to: <ol style="list-style-type: none"> Each member of the governing body, unless the member submits a written waiver of notice in advance with the clerk, or the member is actually present at the meeting; and Each member of the news media who has on file with the governing body a written request for notice of special meetings. Website notice. Notice must be posted on the agency's website 24 hours in advance of the meeting, unless the agency: <ol style="list-style-type: none"> Doesn't have a website; or Employs less than 10 full-time equivalent employees; or Doesn't employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the website. Notice at agency's principal location. Notice must be prominently displayed at the main entrance of the agency's principal location and the meeting site if the meeting isn't held at the agency's principal location.
Emergencies	In an emergency situation (e.g., fire, flood, earthquake, or other emergency), a meeting may be held at a site other than the regular meeting site, and the notice requirements under the OPMA are suspended during such an emergency.	The notices required for special meetings aren't required if a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage.
Holidays	Regular meetings shall not be held on holidays. If a regular meeting falls on a holiday, the meeting must be held on the next business day.	Although not specifically addressed by the OPMA, we recommend that special meetings not be held on holidays out of consideration for public participation.
Business Transacted	There are no restrictions on the type of business that may be transacted at regular meetings.	Final disposition cannot be taken on any matter not listed in the special meeting notice.

*DISCLAIMER: These practice tips are meant to provide summary information on the notice requirements of the OPMA; these tips are not intended to be regarded as specific legal advice. Consult with your agency's legal counsel about this topic as well.
May 2014

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