

WASHINGTON

**Open Public Meetings Act  
Open Public Records Act  
Training**

WPPA New Commissioners Seminar

November 18, 2015

Renaissance Hotel, Seattle WA

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# Training Requirement

- Passed in 2014
- Applies to all local government elected officials and public agency records office
- Must receive training within 90 days after taking oath of office or assuming duties
- Must be completed at least once every 4 years

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## Open Public Meetings Act (OPMA) RCW 42.30



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## Purpose

- Passed in 1971
- “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”

- *RCW 42.30.010*



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## Purpose (cont.)

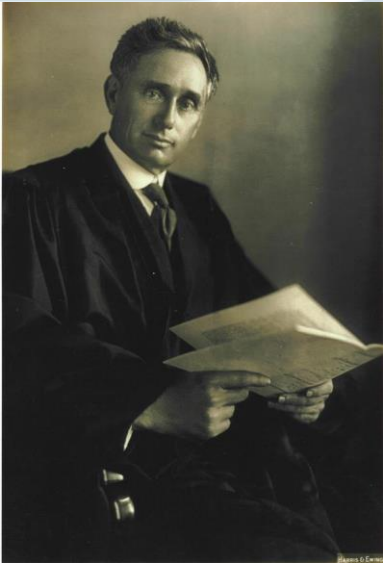
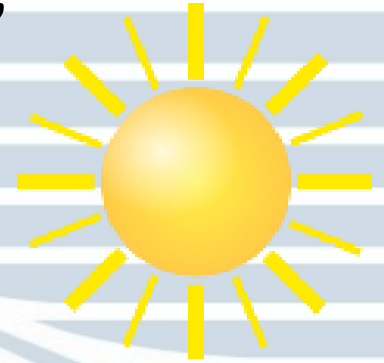
- Public commissions, boards, councils, etc. listed in OPMA are agencies of this state that exist to aid in the conduct of the people's business.
- Their actions are to be taken openly and deliberations conducted openly. *-RCW 42.30.010*
- Act is to be "liberally construed" *-RCW 42.30.910*
- The purpose of the OPMA is to allow the public to view the "decision-making process"

*-Washington State Supreme Court*

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Open Government Laws Like the OPMA are Often Called “Transparency Laws” or “Sunshine Laws”



This is because they “shine light” on government. U.S. Supreme Court Justice Louis Brandeis famously said “Sunlight is the best disinfectant.”

# REPORTS

# OPMA Applies To:

- All multi-member public state and local agencies, boards, and commissions, including ALL Port Commissions.
- Any sub-agency of a public agency which is created by or pursuant to statute, ordinance or other legislative act.
- Any time a quorum of elected officials discuss Port District business, whether or not they are in the same room. Example: Teleconference or Videoconference



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## OPMA Does NOT Apply to:

- Social gatherings at which a quorum may be present.
- Awards banquets
- Pancake feeds
- Similar events where no Port District business is conducted.
- Discussions regarding labor negotiations (Collective Bargaining)





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## 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

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## What is a Governing Body?

- Port Commissions **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



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## What is a Meeting?

- “**Meeting**” means meetings at which the public agency takes “**action**” – *RCW 42.30.020*
- Physical presence not required – occur by phone or even e-mail. 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.
- Does not need to be titled “meeting” – OPMA also applies to “retreats,” “workshops,” “study sessions,” etc.
- Serial Meetings – what are they? Do they violate OPMA?
- No meeting occurs if the governing body lacks a quorum



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## 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
  - Final actions )*the requirements of the OPMA are triggered whether or not “final” action is taken.*



- RCW 42.30.020-



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## Final Action



- **“Final action”** is a collective positive or negative decision, or an actual vote, by 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

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## Travel and Gathering



- A majority of the members of a governing body may travel together for purposes other than a regular meeting or special meeting, so long as no action is taken.
  - Discussion or consideration of official business would be action, triggering the requirements of 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.
- New agenda notice requirements went into effect in June 2014 for “regular” meetings (These requirements are in addition to those that may be applicable in other laws outside the OPMA for particular agencies.)

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## “Regular” Meetings (cont.)

- Draft agendas for each regular meeting of the governing body must be made available on the agency’s website no later than 24 hours in advance of the published start time of the meeting.
- The new law does NOT:
  - Apply to agencies that do not have websites
  - Apply to agencies with less than 10 full-time employees
  - Restrict agencies from later modifying an agenda
  - Satisfy public notice requirements established under other laws
  - Provide a basis to award attorneys fees or seek court order under OPMA if agenda is not posted in accordance with the new law





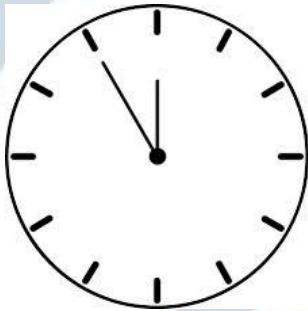
# “Special” Meetings



- A “special meeting” is a meeting that is not a regular meeting
- Called by presiding officer or a majority of the members
- Notice – timing: 24 hours before the special meeting  
written notice must be:
  1. Given to each **member** of the governing body (unless waived)
  2. Given to each **local newspaper of general circulation, radio, and TV station** which has a notice request on file
  3. Posted on the agency’s website – unless the agency (a) does not have a website, (b) employs fewer than 10 full-time employees, (c) does not employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the website
  4. Prominently **displayed at the main entrance** of the agency’s principal location and the meeting site (if not in the same location)

# “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” 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 increase the likelihood of such injury or damage



- RCW 42.30.080(4)

# Public Attendance



- A public agency can't place conditions on the 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
- Reasonable rules of conduct can be set
- Cameras and tape recorders are permitted unless disruptive
- OPMA does NOT require “public comment”



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## 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)*
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## Executive Session

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



# Executive Sessions

Specified purposes set out in OPMA:



- **National Security**
- **Real Estate**
  - Site Selection or acquisition of real estate
    - Lease or Purchase
    - Public Knowledge would increase price
  - Sale or Lease
    - Public knowledge would likely decrease price
    - Final action selling or leasing public property must be taken in open meeting
- **Publicly bid contracts**
  - Review negotiations on performance
  - Public knowledge would likely 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**

# Executive Session to Discuss Agency Enforcement Actions, Litigation or Potential Litigation

- This executive session is not permitted just because legal counsel is present
- This executive session must address:
  - Agency enforcement action
  - Agency litigation or
  - Potential litigation

~ 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 \$100 civil penalty against each member (personal liability)
- 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*



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## Minutes – RCW 42.32.030

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



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## Miscellaneous Issues

- Attendance of quorum at a WPPA Conference
- Meeting locations – can we change them or hold meetings outside our jurisdiction?
- Engagement with members of public during meeting
- What should you do if you believe a meeting or an Executive Session violates the law?



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**Questions on OPMA?**

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# Open Public Records Act

## RCW 42.56



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# 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”





# 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** 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 42.56.030
- So, “public record” is **broadly defined**



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## 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
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## General Public Records Procedures



- 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.

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## Procedures (cont.)

- Under the Act, agencies must:
    - 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
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# 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

- The district has five business days to respond to a public records request.



- The District 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.**

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## 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, for example, time 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.
  - 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.
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# Searches for Responsive Records

- The District should **read the request carefully** to understand what records are requested.
  - Clarify the request if needed.
  - An agency can also ask the requester to suggest search terms.
- An agency must conduct an **adequate 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.)
- 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.
- It is a good idea to **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”
- It is absolutely necessary to 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



## Common exemptions

- Attorney client privilege
- Protected Health Information
- Pending investigation records (in certain investigations)
- Certain records/information contained in personnel files
- Deliberative Process Exemption
  - Opinions expressed or policies formulated
  - Only until the decision is made

# 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.

# Fees



- Agencies cannot charge fees to allow requesters to **inspect** records.
- Agencies cannot charge fees for **searching, reviewing or redacting** records.
- Agencies cannot charge a requester 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).
- Agencies can charge fees for the **copies** themselves (15 cents per page, or actual costs). Agencies can pass along to the requester the cost of sending records to an outside vendor or service so the records can be copied.
- Agencies can charge 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.



# 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*

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## 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):**
  - 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.
  - 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.

# 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



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## 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



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**Questions on PRA?**

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## OPMA and PRA Assistance

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



# OPMA and PRA Training

- Training can be taken online, in person, or by other means.



- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General’s Office Open Government Training Web Page:

<http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

# Certificates for Completion of Training

- WPPA has certificates ready for those who have completed the training.
- If you did not pre-register for the Commissioner's Seminar, you will be sent your certificate.
- Please make sure your records and finance officers at your port have copies of the certificate.



## Thank You

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