



OPEN GOVERNMENT TRAINING

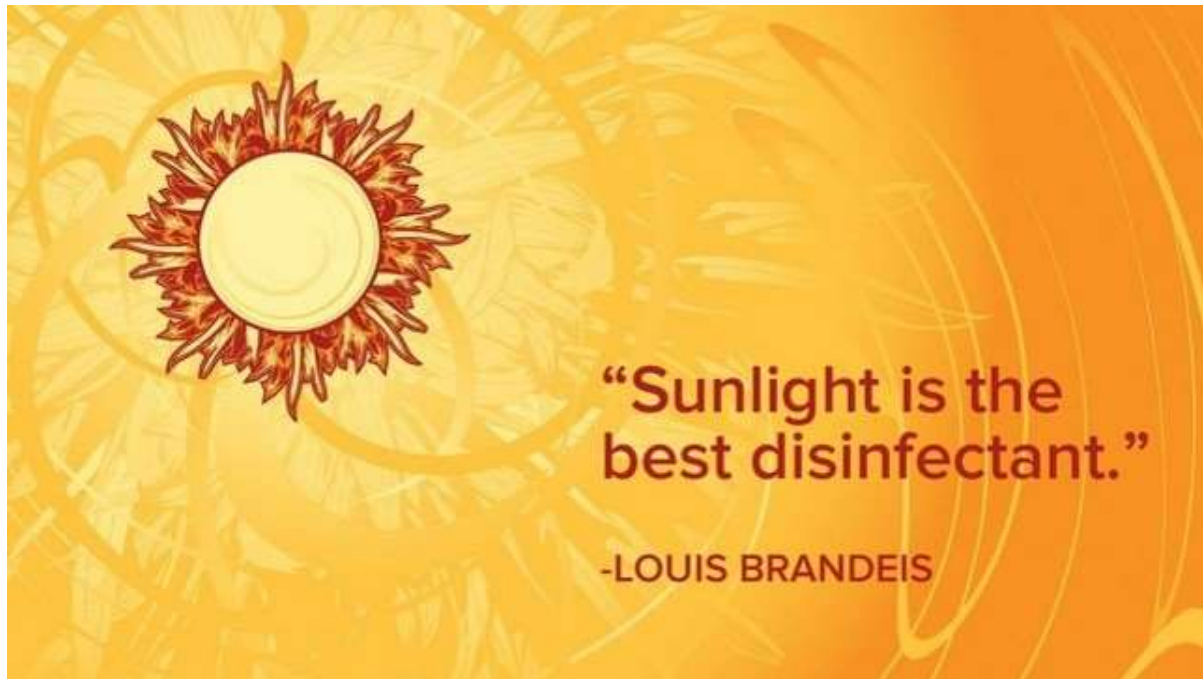
SIMON I. VICKERY

DAVIS ARNEIL LAW FIRM, LLP

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SUNSHINE LAWS



**“Sunlight is the
best disinfectant.”**

-LOUIS BRANDEIS

OPEN GOVERNMENT TRAININGS ACT: BACKGROUND

- 2012 Auditor's Office Report noted more than **250** “**open government-related issues**” among local governments
- Recent years, courts have imposed significant **monetary penalties** against public agencies due to non-compliance with Public Records Act (“PRA”)
- Attorney General's Office advisory Model Rules on the PRA have recognized that the **PRA training is best practice**
- Legislature passed ESB 5964 in March 2014 which is designed to **foster open government** and to **reduce liability** by educating officials and staff on “open government requirements”

OPEN GOVERNMENT TRAININGS ACT: REQUIREMENTS

Individuals Required To Take Training

- Public records officers and
- Certain local/state officials

Training Must Cover Three Topics

- Public Records
- Records Retention
- Open Public Meetings

Mandatory “Refresher” Training

- At least every four years



LESSON 1: THE PUBLIC RECORDS ACT

PUBLIC RECORDS ACT: PURPOSE

People do not yield their sovereignty to the agencies that serve them.

People do not give their public servants the right to decide what is good for people to know and what is not good for them to know.

People insist on remaining informed so that they may maintain control over the instruments that they have created.

GENERAL REQUIREMENTS



PROVIDE FULL ACCESS TO
PUBLIC RECORDS



PROTECT RECORDS FROM
DAMAGE/DISORGANIZATION



DISCLOSE EXISTENCE OF
PRIVILEGED OR EXEMPT
RECORDS



PROVIDE TIMELY
RESPONSES TO REQUESTS

WHAT IS A PUBLIC RECORD?

- 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. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW [40.14.100](#) and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

WHAT IS A WRITING?

Any 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(4)

CAUTION!!!

- Home Computers
- Non-Agency Email Accounts
- Social Media
- Cell Phone
- Metadata



EXAMPLES

- *West v. Vermillion, Puyallup* (2016): **Public records in personal residence, on personal computer, in personal email account** must be disclosed. The constitutions do not provide an individual a privacy interest in those public records. State Supreme Court denied review.
- *West v. Puyallup* (2018): **Facebook posts** on an 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.

THE REQUEST

No statutorily required format

Can be made by email, fax, or verbally

- If done verbally the person receiving the request should reduce it to writing and then confirm the request with the requestor

May have a request form

- May not require the form to be completed
- Encouraged to make form available on website
- Inspection of Records v. Copies of Records

Cannot require the disclosure of the purpose of the request



Shall not distinguish among persons requesting records



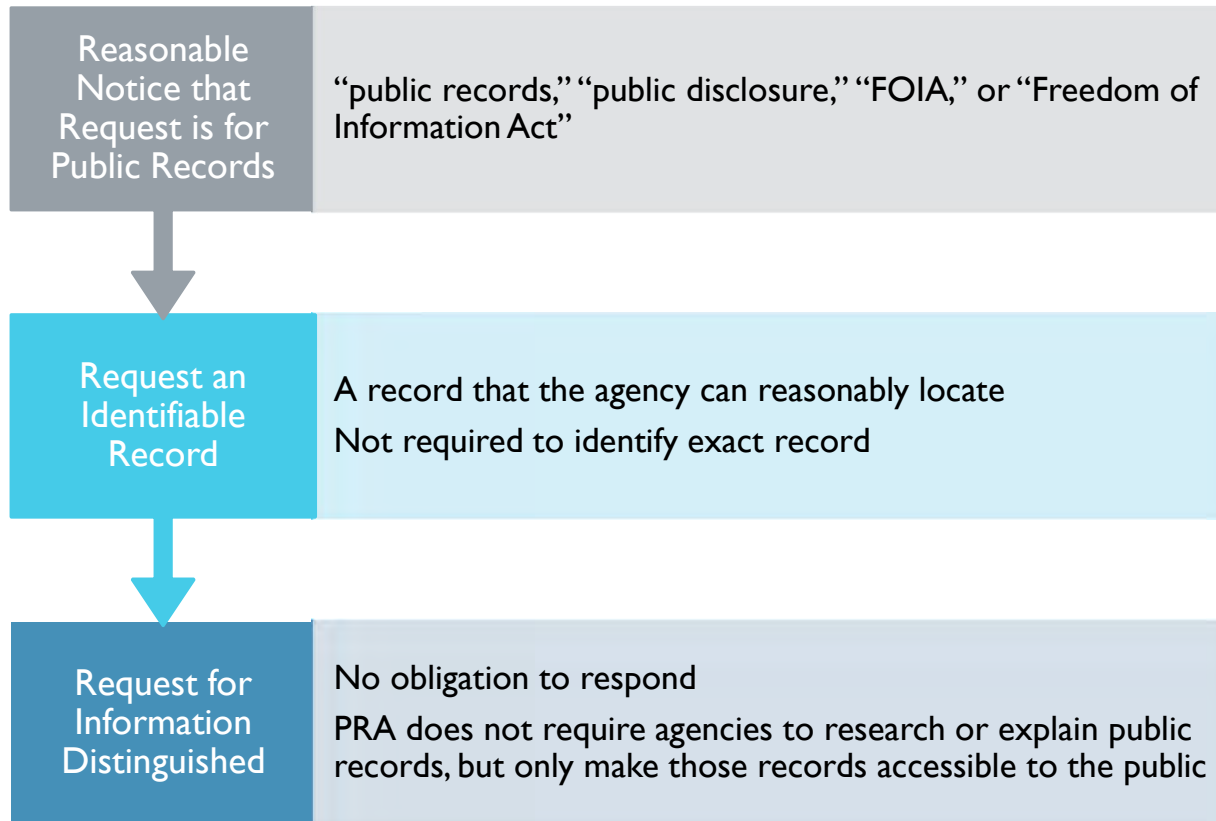
Exceptions

If request is for a list of individuals, may ask if requestor intends to use the records for a commercial purpose

May seek information sufficient to allow agency to determine if another statute prohibits disclosure

Prisoner Injunction: Harass or Intimidate Agency

THE REQUESTOR



REQUESTOR OBLIGATIONS

IDENTIFIABLE RECORD

A request for all or substantially all records, prepared, owned, use or retained by an agency is not a valid request for identifiable records under this chapter.

Provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records.

AGENCY OBLIGATIONS



COMPLY WITH
GENERAL
PROCEDURES



TIMELY RESPOND



TIMELY DISCLOSE



RETAIN RECORDS



NO DUTY TO
CREATE RECORDS

AGENCY RESPONSE



Five Business Days to Respond



Response must
acknowledge receipt
of the request and:

Provide Records

Deny the Request

Request a reasonable time
for a further response

PROVIDING THE RECORDS: PRESUMPTION

Public records are presumed open to the public

- PRA is to be liberally construed

Public records may only be withheld when there is a statutory exemption

- Narrowly construed
- Redact exempt information and provide remainder of the public record

SEARCHING FOR RECORDS



- Must conduct an “adequate search” for responsive records
 - Type of Format (paper, electronic, etc.)
 - Records of current and former staff/officials
 - Possible locations (file cabinets, website, audio, home computers, smartphones, etc.)
- Search should be reasonably calculated to uncover responsive records
- Search should follow obvious leads to possible locations where records are likely to be found
- Search Terms
 - May ask the Requestor to suggest search terms
- Document Search Efforts

“MECHANICS” OF SEARCHING OR 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 their search.



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.

SEARCHING FOR RECORDS

DENYING THE REQUEST OR REDACTING RECORDS

Project Description

[REDACTED]
[REDACTED]
[REDACTED] to [REDACTED] the [REDACTED] of [REDACTED] for
[REDACTED] and [REDACTED]. [REDACTED]
[REDACTED], and [REDACTED] to [REDACTED] the [REDACTED] of
[REDACTED] in [REDACTED] the [REDACTED] of [REDACTED]. The [REDACTED]
[REDACTED] a [REDACTED] and [REDACTED]
[REDACTED] for [REDACTED] a [REDACTED]

EXEMPTIONS

Cite to a statutory exemption and provide a brief description on how the exemption applies

Hundreds of different exemptions listed in various statutes

Exemptions are narrowly construed

Only withhold exempt information in the record and release remaining portion of the record

Provide an Exemption Log

Permissive v. Mandatory Exemption

Agency bears the burden of proof that an exemption applies

EXEMPTION LOG



- Also known as a Withholding Index
- Contents
 - Type of Record
 - Date of Record
 - Number of Pages of Record
 - Author/Recipient of Record
 - Statute that is the Basis of the Exemption (**Mandatory**)
 - Explanation on How the Exemption Applies (**Mandatory**)
- Does not need to be elaborate, but should allow requestor to make a threshold determination if the exemption was properly invoked

FEES

- No fees for searching, reviewing, or redacting records
- No fees for inspection of records
- Fees for copying records
 - 15¢ per page or actual costs (can include staff salaries, benefits, general overhead or administrative costs)
 - Charges must be reasonable and documented
- Fees for electronic records
- Fees for mailing records
- Deposit of up to 10%
- Payment prior to release of records

Fees & Charges



ENFORCEMENT AND PENALTIES



**May have internal
administrative review
process**



Court Review



Civil Penalties within PRA



**Other Penalties Outside of
PRA**

PENALTY FACTORS: MITIGATING

-
- Factors that can **reduce** a penalty:
 - A lack of clarity in the PRA request.
 - The agency's prompt response or legitimate follow-up inquiry for clarification.
 - The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.
 - **Proper training & supervision of the agency's personnel.**
 - The reasonableness of any explanation for noncompliance by the agency.
 - The helpfulness of the agency to the requester.
 - The existence of agency systems to track and retrieve public records.

PENALTY FACTORS: AGGRAVATING

-
- Factors 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.

GOOD FAITH

If attempted to comply in good faith with the PRA but:

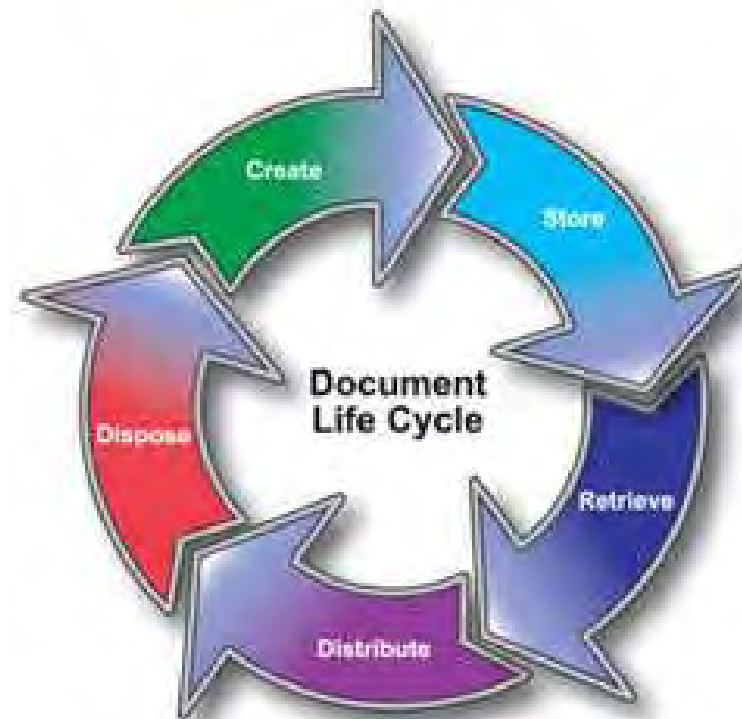
- **Failed to disclose** a public record then public agency is liable to the requestor for the civil penalties. (per page, per day)
- **Disclosed** a public record then public agency is not liable.
 - There are exceptions

Examples of Public Records Act penalty orders, judgments and settlements following lawsuits by requesters alleging PRA violations by a public agency.
(Does NOT include attorneys fees and costs in all cases).

- **\$600,000** – Snohomish County
 - **\$575,000** – Snohomish County
 - **\$550,000** – Clallam County
 - **\$502,827** – L & I (*upheld by State Supreme Court*)
 - **\$500,000** – Board of Accountancy (*global settlement of 7 lawsuits and 15 PRA disputes*)
 - **\$488,000** – Bainbridge Island (*\$350,000 penalty, remainder is attorneys fees/costs*)
 - **\$371,340** – King County
 - **\$192,000** – LCB (*included other open government claims*)
 - **\$187,000** – Port of Olympia
 - **\$175,000** – Mesa
 - **\$174,000** – Seattle
 - **\$150,000** – Jefferson County
 - **\$100,000** – Shoreline (*with attorneys fees, total amount was more than \$500,000*)
 - **\$100,000** – Spokane County
 - **\$85,000** – San Juan County
 - **\$50,000** – City of Tacoma
 - **\$45,000** – Kennewick
 - **\$45,000** – Everett
 - **\$45,000** – Port of Vancouver
-
- **\$723,290** – UW (*reversed on appeal*)
 - **\$649,896** – DSHS (*reversed on appeal*)



LESSON 2: RECORDS RETENTION



LAWS FOR RECORDS MANAGEMENT

40.10 Essential
Records

40.14 Preservation
and Destruction of
Public Records

40.16 Penal Provisions
for the Intentional
Destruction of Public
Records

40.20 Reproduced
Records

42.56 Public Records
Act

REGULATIONS FOR RECORDS MANAGEMENT

434-600
Promulgation

434-610
Definitions

434-615 Custody
of Public Records

434-620 Powers
and Duties (State
Archivist)

434.624 Powers
and Duties (State
Records
Committee)

434-626 Powers
and Duties (State
Agency Records
Officers)

434-630 Powers
and Duties (Local
Records
Committee)

434-635 Local
Records
Disposition
Authority

434-640 Methods
of Records
Disposal

434-660
Standards for
Public Records

434-662
Preservation of
Electronic
Records

434-663 Imaging
Systems
(Standards)

434-670 Local
Records Grants
Program

434-677 Security
Microfilm
(Standards)

434-690 Archives
(Public Records
Access)

WHAT IS A PUBLIC RECORD?

Any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO specifications, or other document, regardless of physical form or characteristics, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business, and legislative records as described in [RCW 40.14.100](#).

RCW 40.14.010

RECORDS RETENTION SCHEDULES

Public records must be retained in accordance with records retention schedules approved by the State Records Committee (state agencies) or the Local Records Committee (local agencies)

- Once timeframe has been met, agency can destroy or transfer records to the Washington State Archives as outlined in the records retention schedule

PRIMARY AND SECONDARY COPIES

Primary Copy

- Generally is the original record sent or received
- Serves as the official record
- Must be retained in accordance with the retention schedules

Secondary Copy

- Copies/duplicates of primary records which may be discarded when no longer needed for agency business

RETENTION VALUE

Record with Retention Value

- Must be retained for specified retention period
- Public records requests – retain for 2 years after fulfilled
- Work Orders
 - Major Maintenance - retain for 6 years after asset no longer owned by agency
 - Minor Maintenance – retain for 3 years after end of fiscal year

Record with Minimal Retention Value

- Retain until no longer needed for agency business then destroy
- Convenience copies
- Transitory Records
 - Short term value, not needed as evidence of a business transaction, not covered by a specific record schedule
 - Junk emails
 - Cookies in the kitchen notices

VIOLATIONS OF RECORDS RETENTION SCHEDULES

- Audit Findings
- Lawsuits
- Criminal Sanctions
- Recall Petition

CASE STUDY

- Former county auditor accused of shredding public documents
- Charged initially with two felony counts of injury to public records
- Admitted to asking staff to shred documents, which included vouchers related to unauthorized personal expenses
- Pled guilty to attempted injury of public records and sentenced to 168 hours of community service and ordered to pay county \$62,000 in restitution

RECORDS RETENTION OVERVIEW



Which public records to retain

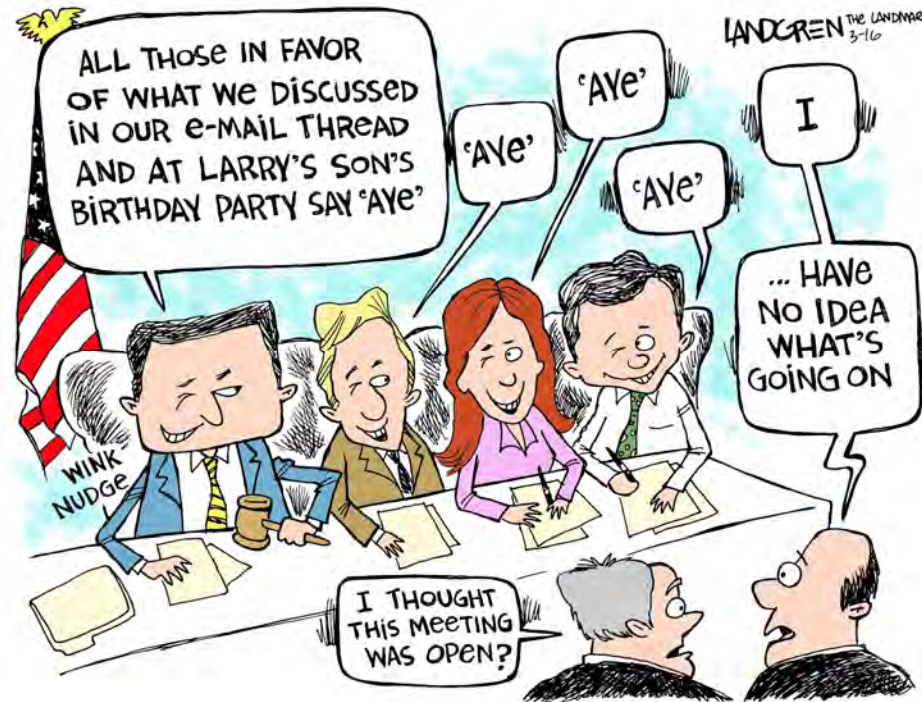


How long to retain the public records



Once retained for required period,
determine if public record must be
destroyed or transferred

LESSON 3: OPEN PUBLIC MEETINGS ACT



OPEN PUBLIC MEETINGS ACT: PURPOSE

- Public entities are agencies of the public that exist to aid in the conduct of the people's business. Their actions are to be taken openly and deliberations conducted openly.
- Allows public view of the “decision-making process”
- Act is to be “liberally construed”

OMPA APPLIES TO PUBLIC AGENCIES AND GOVERNING BODIES

- Public Agencies
- Applies to Sub-Agencies
 - Created by or pursuant to statute, ordinance, or other legislative act
 - Possesses some aspect of policy or rule-making authority
- Applies to Governing Bodies
 - A multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment
 - Unclear when a committee acts on “behalf of” the governing body
 - AGO Opinion: exercises actual or de facto decision-making authority for the governing body, rather than providing advice or information to the governing body

OPMA DOES NOT APPLY TO:

These Entities:

- Courts
- Legislature
- Agencies not defined as “public agency” in OPMA, such as agencies governed by a single individual
- Private organizations

These Activities:

- Licensing/permitting for businesses, occupations or professions or their disciplinary proceedings (or proceedings to receive a license for a sports activity, or to operate a mechanical device or motor vehicle)
- Quasi-judicial matters
- Matters governed by the Washington Administrative Procedure Act, RCW 34.05
- Collective bargaining

MEETINGS DECLARED OPEN AND PUBLIC

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.

RCW 42.30.030. (There are exceptions.)



WHAT IS A MEETING?

“Meeting” means meetings at which **action** is taken.

Generally, a meeting can only occur when there is a quorum present as that is when action may be taken.

WHAT IS ACTION?

“Action” means the transaction of the official business of a public agency by a **governing body**.

Public testimony, deliberations, discussions, considerations, reviews, evaluations, and **final actions**.

WHAT IS FINAL ACTION?

“Final action” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

- Must be taken in public even if deliberations were in closed session (e.g. executive sessions)
- Secret ballots are not allowed

MEETING WHERE ACTION IS TAKEN



Physical presence is not required

Email or phone



Gathering may not be titled “meeting”

Retreats, workshops, study sessions



Exceptions

Quasi-judicial matters, matters governed by APA, collective bargaining, disciplinary proceedings

TRAVEL AND GATHERINGS



- No meeting occurs if there is no quorum
- 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.

CAUTION: SERIAL MEETINGS

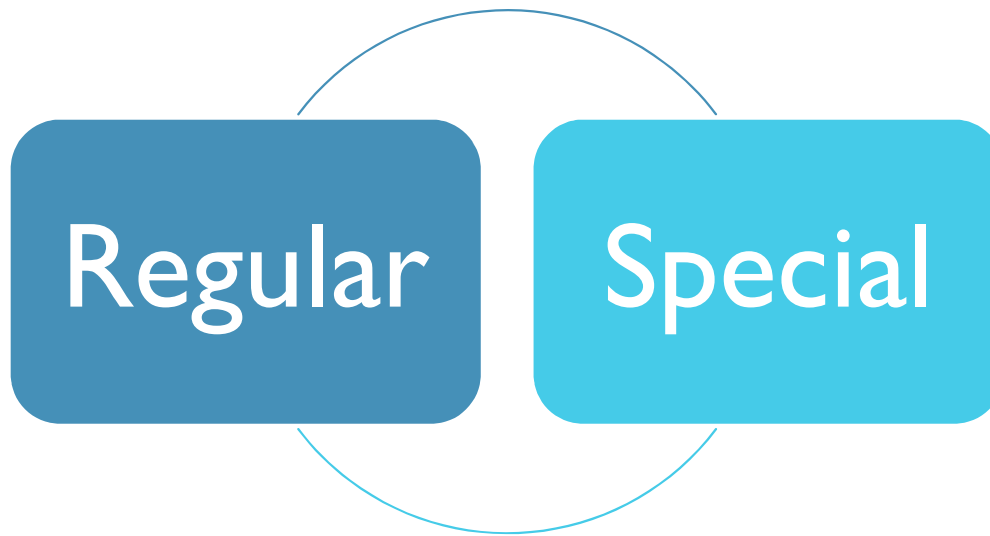


Serial meetings are also referred to as “rolling” or “chain” meetings.



Occurs when a majority of members of a governing body have a series of smaller gatherings or communications that results in a majority of the body collectively taking action even if a majority is never part of any one communication

TYPES OF MEETINGS



REGULAR MEETINGS

“Regular” meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or 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

REGULAR MEETINGS: AGENDA

Agenda to be made available online no later than 24 hours in advance of the published start time of meeting



This law does not:

Apply to agencies that do not have websites.

Apply to certain agencies

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.

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 this law.

SPECIAL MEETINGS

“Special” meeting is any meeting that is not a regular meeting.

Called by presiding officer or a majority of the members

SPECIAL MEETINGS: NOTICE

Written notice to **each member** of the governing body

- Waived if a member submits a written waiver of notice or member is present at the time the meeting convenes

Notice delivered to each **local newspaper** of general circulation and **local radio or television station** that has on file with the governing body a written request to be notified of such special meeting or of all special meetings

Notice **posted** on the agency's web site

Notice **prominently displayed** at the main entrance of the agency's principal location and the meeting site

Such notice must be delivered and posted and at least **twenty-four hours** before the time meeting unless there is an emergency

Notice must specify the **time and place** of the special meeting and the **business to be transacted**

SPECIAL EMERGENCY MEETINGS

No Notice Required

- **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.
- **Reason of fire, flood, earthquake,** or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency.

ATTENDANCE AT MEETINGS

A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his or her name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.
RCW 42.30.040.

- Can set reasonable rules of conduct
- Can't limit to members of public within the governing body's jurisdiction
- Can't restrict cameras and tape recorders unless disruptive

PUBLIC COMMENT



- Public comment at regular meetings of a **governing body** of a public agency where **final action** is taken is required.
- May impose rules
 - Speaker identify themselves
 - Limiting time per speaker
- Verbal and written public comment
- Note that a governing body includes not just the city or county council or board of commissioners, but also planning commissions, civil service commissions, and other policy or rule-making bodies, and committees that act on behalf of the governing body, conduct hearings, or take testimony or public comment.

INTERRUPTIONS AND DISRUPTIONS

Render the orderly
conduct of such
meeting unfeasible



Order those
creating disruption
to be removed



Order the meeting room cleared and
continue in session or may adjourn the
meeting and reconvene at another
location selected by majority vote of the
members

- Representatives of the press or other news media,
except those participating in the disturbance, shall
be allowed to attend any session

EXECUTIVE SESSION



- Part of a regular meeting or special meeting that is closed to the public
- Limited to specific purposes set forth in OPMA
- Announce purpose of executive session and time it will end (may be extended)
- No minutes required
- RCW 42.30.110

MEETING MINUTES

- Minutes of public meetings must be promptly recorded and open to public inspection
- Minutes of an executive session are not required
 - Effective June 9, 2022, the OPMA now requires the announced purpose of the executive session be entered into the meeting minutes
- No required format of minutes

ADJOURNMENT OF MEETINGS



- Under the OPMA, a regular or special meeting can be “adjourned,” or rescheduled, to a different time and place, so long as appropriate notice is provided.
- If an in-person meeting is adjourned (i.e., rescheduled), a copy of the order or notice of adjournment must be posted immediately after adjournment on or near the door where the meeting was held. If the meeting was held remotely, no notice of adjournment is required.

PENALTIES FOR VIOLATING OPMA

\$500 civil penalty against each member (personal liability) (subsequent violations are \$1,000)

Costs and attorney fees

- Agency may obtain also if action was frivolous and advanced without reasonable case

Action taken at meeting can be declared null and void

- Must retrace steps

OPMA VIOLATION EXAMPLES

In 2017, Black Diamond residents filed recall vote charges against two city councilmembers.

In 2018, Port of Vancouver agreed to pay \$500,000 to settle an OPMA violation.

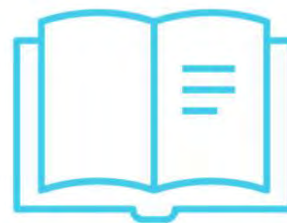
In 2020, the City of Seattle agreed to pay \$35,000 to settle a lawsuit alleging that the City Council violated OPMA laws.

In 2022, Yakima County Commissioners agreed to a \$60,000 settlement for an OPMA violation.

MUNICIPAL RESEARCH AND SERVICES CENTER: MRSC.ORG



Checklists



Guidance

QUESTIONS?

