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OPEN GOVERNMENT: Meetings & Records

Association of Washington Cities

Elected Officials Essentials

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Open Public Meetings Act (“OPMA”) Chapter 42.30 RCW

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Open Public Meetings Act

RCW 42.30.030

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, except as otherwise provided in this chapter.

[Laws of 1971, Ex. Sess., ch. 250 § 3]

It's all about the definitions . . .

What is a Governing Body?

- “**Governing body**” means...
 - the 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, [or] conducts hearings, or takes testimony or public comment.

▪ RCW 42.30.020(2)

Governing Body: Scenarios to Consider

- Membership: Councilmembers? Majority? (“Negative quorum” not enough)
- Decision-Making: Acting on behalf of Council? Rubber stamp?
- Public Fact Finding: Gathering evidence, holding hearings, taking testimony, receiving public comment?
- Advisory Role: Merely providing advice or information to the City Council?
- *Look at substance, not form, to determine requirements*

Note: can always open a meeting to the public as a policy choice

What is a “Meeting”?

- “Meeting” means meetings at which action is taken.
- “Action” means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.
 - RCW 42.30.020(3)-(4)

Examples: Business Meetings, Workshops, Study Sessions, Committee Meetings, Public Hearings, Retreats, etc. *The OPMA applies to all of these.*

Did We Just Have a Meeting?

- Meetings may take place in person, by phone, by email, by text, etc.
- Travel & social gatherings excepted only if no “action” is taken
 - RCW 42.30.070; AGO 2010 No. 9
- Limit informal discussions to an exchange of information
 - *OPAL v. Adams County*, 128 Wn.2d 869 (1996)
- A “straw poll” is agency action at a meeting
 - *Miller v. City of Tacoma*, 138 Wn.2d 318 (1999)

Serial Communications

- Serial communications or chain meetings can be meetings under the OPMA
- A “chain meeting” occurs when a quorum of the Council exchanges emails that “involve the active exchange of information and opinions” as opposed to “mere receipt of information”
 - *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550 (2001)



Serial Communications

- Avoid “Reply All” (BCC helps avoid this)
- Group text threads
- “Phone trees”
- Drop Box, Google Docs, and other tools used for shared commenting or editing
- Social media posts
 - But isn’t social media already public?



Timing, Notice, and Minutes

- Regular Meetings: established by ordinance, resolution, bylaw, or other rule
 - Post agenda online at least 24 hours in advance
- Special Meetings: any meeting that isn’t a regular meeting
 - 24-hour notice to Councilmembers and media (include time, location, agenda)
 - Final action may be taken only on items listed in the notice
- Meeting Minutes:
 - Required to be taken for all but executive session; no required format
 - Not required to record public meetings, but OPMA encourages audio/video recording and posting online

Executive Session

- The portion of the meeting where the public may be excluded
- Commonly invoked reasons for executive session:
 - Discuss legal risk or potential litigation with attorney
 - Acquisition or sale of real estate
 - Evaluate charges against a public officer or employee
 - Review employee performance / evaluate applicant qualifications

Final action must be taken in open meeting

Information Learned in Executive Session

- [Attorney General Opinion 2017 No. 5 \(August 3, 2017\)](#)
- Legal obligation to not disclose information discussed in properly convened executive session
- Disclosure would violate Code of Ethics of Municipal Officers
 - RCW 42.23.070(4); RCW 42.23.020(2)
- Could also constitute:
 - Misdemeanor offense under RCW 42.20.100 or
 - Official misconduct under RCW 9A.80.010
- May seek to enforce via mandamus or injunction



Executive Session Reminders

- Presiding officer announces executive session, stating:
 - Topics and purpose (best practice: cite statutory authority)
 - When the session will end, and if session will be extended
- Attendees:
 - Councilmembers
 - Others by invitation
 - Attorney must attend if discussing litigation or potential litigation
- **Public records reminder:** there is no exemption for records just because they are created in executive session

Executive Session Reminders

- Court will apply **narrowest construction** to executive session provisions
 - *Columbia Riverkeepers v. Port of Vancouver USA*, 188 Wn.2d 421(2017)
- Ensure you meet **all elements** of the exception
- Caution regarding **context**

It is everyone's job to help ensure compliance

Public Attendance

- Physical location for public to attend is required, unless emergency (remote option encouraged)
- Attendance may not be conditioned on, for example:
 - Requiring attendees to register their names
 - Requiring attendees to complete a questionnaire
- **HOWEVER**, the OPMA allows for generally applicable conditions determined by the governing body to be reasonably necessary to protect public health or safety or to protect against interruption of the meeting (e.g., masking requirements)

▪ [RCW 42.30.040](#)

Public Comment

- **Public comment is now required at regular meetings where final action is taken**
 - OPMA does not specify when in the meeting oral comments must occur
 - Must provide option for remote comment if requested, when feasible
 - Can be written comments instead of oral comments (if written, can set reasonable deadline and must distribute to the governing body)
- Exceptions:
 - Not required during emergencies
 - Not required for special meetings (though recommended)
- Reminder that this may apply beyond your Council meetings (e.g., any committees that are subject to the OPMA)

Managing Your Meeting

- “Limited public forum”
 - Cities can regulate the time, manner, and place of speech
 - Regulate speech through rules of procedure and conduct
 - Must be viewpoint neutral
- First Amendment considerations
 - Person must **actually disrupt** a meeting before removal is allowed. *Acosta v. City of Mesa*, 718 F.3d 800 (9th Cir. 2013)
 - Do not simply ban “hate speech”
 - Rules of conduct can also be enforced against Councilmembers (also recall *Bethel School District*: 1st Amendment doesn’t immunize from political fallout)

Managing Your Meeting

- Topic limitations
 - Limits comments to a particular subject matter
 - Likely permissible – assuming viewpoint neutral – but still exercise caution
 - Option of limiting comments to items on the agenda
 - Consider opportunities to address the governing body
- Remote meeting considerations
 - Easier to “remove” commenters who are truly disruptive or violate rules
 - Problem of anonymity
 - Potential limitations on remote commenters when identity cannot be verified
 - Potential elimination of remote public comment (subject to requested accommodations – RCW 42.30.240(2))

Curing an OPMA Violation

- Later action in OPMA compliance will “cure” the violation
- But, the subsequent action must be open, otherwise conform to the OPMA, and **not simply be a “summary approval”** of the earlier discussions
- Approval in “consent agenda” insufficient
 - *Feature Realty v. Spokane*, 331 F.3d 1082 (9th Cir. 2003)
- Must provide opportunity for community / opposing party input
 - *OPAL v. Adams County*, 128 Wn.2d 869 (1996)

Penalties for a Past OPMA Violation

- Unintentional violation?
 - Nullification of action (RCW 42.30.060)
 - Attorney’s fees and costs (but, agency that prevails can recover fees if frivolous lawsuit) (RCW 42.30.120(4))
- Knowing violation?
 - Add personal liability (RCW 42.30.120)
 - Fines
 - \$500 civil fine for first violation
 - \$1,000 civil fine for any subsequent violation
- Failed to cure?
 - Potential nullification of later actions

Public Records Act (“PRA”)

Chapter 42.56 RCW

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Adoption of the Public Records Act in 1972



NOTE: New special toll-free telephone service offered to voters requesting in-depth information on state measures. See page 5 for details.

Disclosure—Campaign Finances— Lobbying—Records

AN ACT relating to campaign financing, activities of lobbyists, access to public records, and financial affairs of elective officers and candidates; requiring disclosure of sources of campaign contributions, objects of campaign expenditures, and amounts thereof; limiting campaign expenditures; regulating the activities of lobbyists and requiring reports of their expenditures; restricting use of public funds to influence legislative decisions; governing access to public records; specifying the manner in which public agencies will maintain such records; requiring disclosure of elective officials' and candidates' financial interests and activities; establishing a public disclosure commission to administer the act; and providing civil penalties.

INITIATIVE 276
Disclosure—Campaign Finances—
Lobbying—Records

FOR	AGAINST
<input type="checkbox"/>	<input type="checkbox"/>

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Cities Must Make Public Records Available

- An agency must make available for public inspection and copying all public records, unless covered by a specific exemption.
 - [RCW 42.56.070](#)

*Do you remember
what this is?*



What is a “Public Record”?

- Broadly defined at [RCW 42.56.010](#)
- Three elements:
 - 1) “any [writing](#) . . . regardless of physical form or characteristics”
 - 2) “containing information [relating to the conduct of government](#) or the [performance of any governmental or proprietary function](#)”
 - 3) “[prepared, owned, used, or retained](#) by any state or local agency”
- Questions about whether something is a “public record” are usually about (2) or (3), not (1)

Responding to Public Records Requests

- Must promptly respond (RCW 42.56.520)
 - Initial response within **5 business days**
 - Provide records, provide reasonable estimate of time, seek clarification, or deny
- Installments for larger requests
- Exemptions and exemption logs
 - Construed narrowly
 - Use redaction where it can make the record disclosable (e.g., by de-identifying the record)
 - Briefly explain *how* the exemption(s) apply to the record

Some General Principles to Remember

- Do not distinguish among requesters, except in specific instances where necessary (e.g., request by employee to view file)
- Purpose of request is not generally not relevant
- No particular form of request is required (more on this later)
- “Overbroad” requests – City cannot deny a request just because it is broad (RCW 42.56.080)
- PRA covers requests for *records*, not information
- Provide “fullest assistance” to requesters

Diligence: Hidden and Ambiguous Requests

Can you see me?



- Remember, no specific form of PRA request is required
- Examples
 - Embedded requests otherwise irrelevant to the communication
 - Comment cards at community forum
 - Verbal request

*Immediately forward all potential requests to your Public Records Officer!
(Not sure? Forward it anyway.)*

Help Your Public Records Officer Help the Requester (and Your City)



Jerry Maguire (1996), in case you haven't seen it....

Privacy Under the Public Records Act

- Elected officials and public employees are subjected to greater transparency and scrutiny than in the private sector
- There is no general “privacy” right/exemption in the PRA
 - Note: RCW 42.56.050 is not an exemption; it explains when a right to privacy is invaded (see next slide)
- Redaction will often resolve the issue from a court’s perspective, even if someone else may be able to figure out the record is about you
- You may get a “third-party notice” from your public records officer about disclosure of records about you (RCW 42.56.540)

Privacy Under the Public Records Act

- Certain PRA exemptions apply to the extent disclosure would violate a person’s right to privacy
- This generally applies only to the intimate details of one’s personal and private life
- RCW 42.56.050:
 - Highly offensive to a reasonable person and
 - Not of legitimate concern to the public

It is not enough that the disclosure may cause embarrassment to you or to others – RCW 42.56.550(3)

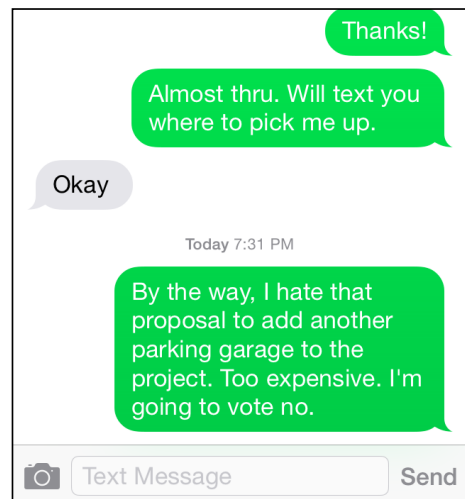
Technology: Separating City Business

- Problems arise when City officials, employees use personal email or electronic devices for City business
- Can potentially subject your personal devices/accounts to search

“Government employees and public officials who conduct business on private computers cannot reasonably expect those records to be classified as private; business conducted in . . . official capacities is not the personal property of that employee and is not subject to protections afforded to private property.” *Paulson v. City of Bainbridge Island*, Kitsap County Cause No. 13-2-01839-1 (Memorandum Opinion, November 1, 2013).

Text Messaging

- Text messages can be public records
 - *Nissen v. Pierce Cnty.*, 183 Wn.2d 863 (2015)
 - It's not about the format, it's the **content**
- Texts pose retention challenges
- Turn off any auto-delete feature for texts on your devices
- Consider documenting in a different format (sending screenshot to email for better preservation) or, preferably, email the message in the first instance – then it is saved on City's server



Reminders About Electronic Records

- They're public records just like a paper record would be
- Metadata ("data about data")
 - You cannot properly preserve an electronic record by printing it
 - Moving, copying, forwarding, etc., changes certain metadata
 - Follow instructions from the public records officer about how to properly provide electronic records for a records response – can vary based on what is requested
- Don't overuse "reply all"
 - Creates multiple copies of records that may be unnecessary
 - Also helps avoid inadvertent OPMA violation

Technology and Records: Manage Risk

- Dedicated e-mail accounts and devices for City business whenever possible
- Central servers and other electronic document sharing solutions
- Email, text, and telecommute policies
- Be consistent in your practices
- Use records retention schedules and City policies to appropriately delete records in timely manner
 - Unless you can't (e.g., litigation hold, pending PRA request for the record)

Enforcement and Penalties

- Court can order City to pay statutory penalties to a requester if PRA is violated
 - Up to \$100 **per day, per record**
 - Even per page – *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270 (2016)
- Court will order payment of requester's attorney's fees & costs
- Court can also order disclosure of all or part of withheld record, or non-disclosure of part or all of record
- The PRA is liberally construed for disclosure; exemptions narrowly construed
- The burden will fall on your City to justify its conduct

Records Management

Chapter 40.14 RCW

Records Retention Schedules



1.10 MEETINGS AND HEARINGS

The activity of the agency assembling groups of people for the purpose of information-sharing, discussion, planning and/or decision-making. Includes all meetings organized by or on behalf of the agency including open public meetings, executive sessions, public and/or appeals hearings, community meetings, and internal agency meetings. May involve governing and advisory bodies, executive management, general staff, volunteers, general public.

DISPOSITION AUTHORITY NUMBER (DAN)	DESCRIPTION OF RECORDS	RETENTION AND DISPOSITION ACTION	DESIGNATION
GS2016-007 Rev. 0	<p>Meeting Materials – Members’ Copies/Notes</p> <p>Individual members’ meeting materials from participating in advisory, governing/executive, internal/external committees (including national/external bodies), and staff meetings, <u>provided</u> the Committee’s records are retained by the secretary/responsible agency/member.</p> <p>Includes, but is not limited to:</p> <ul style="list-style-type: none"> • Copies of agendas, meeting packets, minutes, etc.; • Working notes/drafts, etc.; • Related correspondence/communications. 	<p>Retain until no longer needed for agency business <i>then</i> Destroy.</p>	<p>NON-ARCHIVAL NON-ESSENTIAL OFM</p>
GS2012-027 Rev. 0	<p>Meetings – Advisory</p> <p>Records documenting all meetings of the local government agency’s advisory bodies.</p> <p>Includes:</p>	<p>Retain for 6 years after end of calendar year <i>then</i></p>	<p>ARCHIVAL (Appraisal Required) NON-ESSENTIAL OFM</p>

Records Obligations

- All public records are the property of the State.
- Public records “shall be delivered by outgoing officials and employees to their successors and shall be preserved, stored, transferred, destroyed or disposed of, and otherwise managed, only in accordance with the provisions of this chapter.” [RCW 40.14.020](#).
- Unlawful destruction is a Class C felony, punishable by up to five years in prison, a fine of up to \$1,000, or both. [RCW 40.16.010](#).



Records With Minimal Retention Value (“Transitory Records”)

- Most of your email falls in this category
- Unless covered by a more specific record series, generally retain until no longer needed for agency business and then destroy
- Common examples:
 - Copies (primary vs. secondary)
 - Informational messages (“I’m running late to the meeting”)
 - Publications/reference materials from external sources
 - Preliminary drafts (not needed as evidence of external consultation or due diligence in the drafting process)
 - Notices of social gatherings, traffic, weather, etc.

But, You Can’t Always Delete

- Litigation Holds
- Active Public Records Request
 - If a request is made for an existing record that is scheduled for destruction in the near future, the agency “*shall retain possession of the record, and may not destroy or erase the record until the request is resolved.*” [RCW 42.56.100](#)
 - If you receive a hold notification, do not delete anything potentially responsive until you confirm that you can do so.
- Learn – and follow – your City’s policies on records management and retention
- Be prepared to sign “Nissen declarations” regarding personal devices

Contact Information



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