



Open Government Laws in Washington State

THE SHORT COURSE ON LOCAL PLANNING
WASHINGTON STATE DEPARTMENT OF COMMERCE

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Relevant Open Government Statutes

- Open Public Meetings Act (“OPMA”) (1971)
RCW 42.30
- Public Records Act (“PRA”) (1972 initiative)
RCW 42.56
- Preservation and Destruction of Public Records
RCW 40.14
- Open Government Trainings Act (2014)
RCW 42.30.205
RCW 42.56.150

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Open Government Trainings Act

RCW 42.30.205 requires

- every member of a “governing body”
- to take a training on the OPMA
- within 90 days of assuming the office
- and every four years thereafter

RCW 42.56.150 requires

- every local elected official
- to take training on the PRA
- and records retention statute (RCW 40.14)
- within 90 days of assuming office
- and every four years thereafter

Open Government

- OPMA passed in 1971
- This OPMA preamble (RCW 42.30.010) clearly articulates the rationale behind our open government laws:

“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their 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 that they may maintain control over the instruments that they have created.”

“This chapter shall be **liberally construed** and its exemptions **narrowly construed** to promote this public policy and to [ensure] that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.”

Open Public Meetings Act (“OPMA”)

- Important terms:
 - “Public agency”
 - “Governing body”
 - “Meeting”
 - “Action”
- >> as defined in RCW 42.30.020.
- Don’t rely on the normal English definitions of these terms!
- The OPMA violates almost every rule of plain language legal writing.

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OPMA: Public Agency

- OPMA only applies to a “public agency.”
- “Public agency” means:
 - (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature. This does not include a comprehensive cancer center participating in a collaborative arrangement as defined in RCW 28B.10.930 that is operated in conformance with RCW 28B.10.930;
 - (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;
 - (c) 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;
 - (d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

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OPMA: Governing Body

- OPMA only applies to the “governing body” (broadly defined) of a public agency
- “**Governing Body**” means:
 - a multimember board
- or—
- any committee thereof when it
 - acts on behalf of the governing body;
 - conducts hearings; or
 - takes testimony or public comment
- Includes, e.g.:
 - City Council
 - Planning Commission
 - Lodging Tax Advisory Committee
- Does NOT include:
 - courts
 - Legislature
 - single-member executives
 - staff meetings
 - private organizations

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OPMA: Meetings

- “**Meeting**” means
 - a meeting where “action” is taken
 - includes **retreat**, conference, workshop, **study session**, etc.
 - physical presence not required
 - can occur via email, telephone, or serially
- A meeting does not occur in the absence of a quorum (except see committee exception)
- Traveling together (without discussion of agency business) is not a meeting.
- “**Regular meeting**” means recurring meetings held in accordance with an adopted schedule.
- “**Special meeting**” means any other meeting.

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OPMA: Action

- **“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.
- **“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.

OPMA: putting it all together...

Quorum of
Governing Body
or other multi-member
board, cmsn, etc

—or—

a Committee of the
governing body when it:

- acts on behalf of the governing body;
- conducts hearings;
- takes testimony or public comment



“Action”
which includes discussion,
deliberations,
taking public comment,
or final action



Meeting



must be NOTICED & OPEN

OPMA: Public Notice

Regular meetings require:

- Post agenda online 24-hours in advance (exceptions for small agencies)

Special meetings require:

- Written notice
- Including agenda
- 24-hours in advance
- Distributed to
 - Members of the governing body
 - Local newspapers, radio, and TV with a request on file
 - Posted on the agency's website
 - Posted at the agency's main location AND the meeting site
- Final action is limited to topics on the agenda
- Exceptions for emergency special meetings

OPMA: Meetings Must be Open

- Generally, meetings must be open to the public: the public must be allowed to attend a meeting, except as provided under the OPMA for a declared emergency.
- **Remote meetings** or **remote participation** is allowed.
- **Secret ballots** are prohibited.
- Cannot put conditions on the public's attendance, such as requiring sign in.
- Unless there's an exception, any action taken at a meeting that is not open is **null and void**.
- **New in 2022:** any **regular** meeting at which "final action" is taken must allow public comment, either orally or in writing.

OPMA: Executive Sessions

- “Executive session” is a closed session where the public is excluded.
- Allowed only for the purposes listed in RCW 42.30.110, which are narrowly construed.
 - Not allowed for “litigation” nor “personnel” nor “real estate” broadly.
- Must state the (1) purpose of the executive session, and (2) the time it will end before entering executive session. (Can extend the time, but don’t come back early.)
- No final action (no voting) may be taken in executive session.
- Remember, **YOU** are responsible for your compliance with these rules. Don’t rely exclusively on staff—they are not subject to the OPMA.

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OPMA: Closed Meetings

- The following meetings are **exempt** under RCW 42.30.140:
 - Certain licensing activities
 - Quasi-judicial decisions between named parties
 - Matters governed by the Administrative Procedure Act
 - Certain collective bargaining activities
- These exceptions are not executive sessions, so the executive session rules do not apply.

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OPMA: Cautions

- Site visits
- Email/texting among a quorum or more
- Serial meetings
- After-meeting hangs

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OPMA: Serial Meetings

- **Serial meeting:** when a quorum has a series of smaller meetings or communications that results in a quorum collectively taking action, even if a quorum is never part of any single communication.
- Don't reply-to-all to a message sent to a quorum or more of the group
- Email/texting among a quorum or more
- Serial meetings: communication among a quorum or more, even if it not at the same time or in the same thread
- Requires a "collective intent to meet"
- Polling: not allowed!

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OPMA: Violations

- Any member of the public may sue to enforce the OPMA
- Decision is voided
- Plaintiffs may be awarded costs and attorneys fees
- \$500 civil penalty against each member of the board that knowingly violates the OPMA
- \$1000 penalty for subsequent violations
- Simple attendance is a violation

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Public Records Act (“PRA”)

The “Public Disclosure Act” passed in 1972 by voter initiative with 72% of the vote; included campaign financing rules and what is now referred to as the Public Records Act.

Overview of the PRA:

- Records must be disclosed unless exempt
- Interpreted in favor of disclosure
- Exemptions narrowly construed
- Applies to **state** and **local agencies** but not courts

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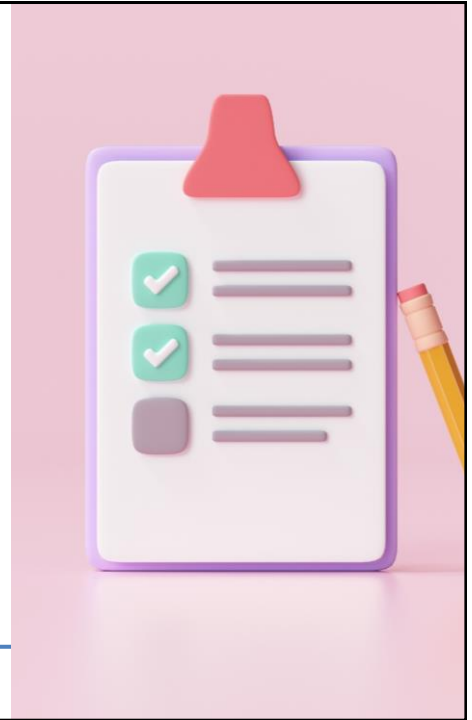


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PRA: Requirements

- Agencies must appoint a **public records officer**
- Agencies must adopt **procedural rules**
 - to provide “fullest assistance”
 - most timely possible action on requests
- Agency must publish a fee schedule for copy or mailing costs (no fees for searching, reviewing, redacting)

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What is a public record?

- Any writing relating to the conduct of government
- Prepared, used, owned, or retained
- Regardless of form or characteristics, including:
 - email (official or personal accounts)
 - text message
 - audio/video recording
 - map
 - metadata
 - social media posts

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PRA: Records Requests

- Any person may submit a request
- Using an agency's form is encouraged, but is not required
- Requests must be for **identifiable records**
 - A request for all records is not a request for identifiable records
 - A request for information is not a request for records
 - An agency has no duty to create records—but sometimes it's a good idea

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PRA: Responses

- Agency must respond in 5 days by
 - Acknowledging receipt + reasonable estimate of time to respond
 - Fulfilling the request
 - Seeking clarification + reasonable estimate of time for response if request is not clarified
 - Denying the request + written explanation of reasons for denial

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PRA: Adequate Search

- Public agency must perform an **adequate search**
- **Reasonably** calculated to find responsive documents
- Can require employee or official to search their personal devices
- Agency should document its search
 - Locations
 - Search terms used
 - Personnel consulted

PRA: Delivery

- Make available during business hours
- Provide copies by mail or pickup
- Provide electronic records
 - including by pointing to records on the agency's website
 - agencies are encouraged to provide records online

PRA: Broad Requests

- Requests may not be considered “overly broad” solely because they are broad
- Agency may explain the scope of the request and suggest clarification
- Agency may provide responsive records in batches
- Agency may require a deposit (not greater than 10%) for the total cost of responsive records
- Agency may charge for each batch of records; if a batch is not paid for, agency doesn’t have to continue response

PRA: be reasonable!

- Estimates for time to respond must be reasonable
- Search must be “adequate”—read: reasonable

PRA: Exemptions

- More than 700 exemptions exist in state law, e.g.:
 - *limited* attorney-client privilege
 - employment records
 - records of pending investigations
- If an agency withholds or redacts a record, agency must cite to an exemption and explain why
- Use an exemption log (format not prescribed) identifying
 - Identification of record
 - statutory authority for exemption
 - explanation of how exemption applies

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PRA: Fees

- Inspection of records is free
- Use statutory default fee schedule OR
- Create schedule based on actual cost
 - Fees for copies, including actual cost of staff time for copying/scanning
 - Actual costs for mailing
- No fees allowed for agency's searching, reviewing, redacting

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PRA: Violations

- Requestor may sue for **denial OR delay**
- Court can impose civil penalties up to \$100 per **day** per **record** plus **attorneys fees and costs**
- Court will consider **mitigating** or **aggravating** factors in determining the penalty
- Knowingly “concealing” public records could also lead to criminal penalties under RCW 40.16.020 or intentionally concealing a record required to be released is a violation of RCW 42.52.050 (Ethics in Public Service Act).
- Willful destruction or alteration of a public record is a class C felony (RCW 40.16.010).

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Records Retention (RCW 40.14)

- Records must be retained per the Local Government Record Retention Schedule from the Washington State Archives.
- After retention period has expired, records should either be:
 - **Transferred** to state archives to protect state history, e.g.:
 - project files (after 6 years)
 - maps and photographs, press releases, public opinion polls, speeches (after they have served local use).
 - **Destroyed** after they meet retention to reduce PRA workload, e.g.:
 - calendars (2 years)
 - citizen complaints (3 years)
 - contracts (6 years after completion)
 - foreclosures (10 years after resolution)

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Questions?