



WASHINGTON FIRE COMMISSIONERS ASSOCIATION

June 2014

MANDATORY COMMISSIONER TRAINING

Attached to this memo please find one document with five separately titled sections as follows: 1) *Elected Officials' Open Government Trainings Act*, 2) *Overview of Open Government in Washington State: Open Public Records and Open Public Meetings*, 3) *Open Public Records Act (RCW 42.56)*, 4) *Open Public Meetings Act (RCW 42.30)*, and 5) *Certificate of Training* to be completed and retained by you.

These documents constitute a training manual for fire commissioners' compliance with the Open Government Trainings Act of 2014. If you prefer to complete this training on-line, please visit the following website: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx#.U5tvv3nn9D9>.

The Open Government Trainings Act mandates that public officials receive training in order to correctly implement and comply with state law. According to the Attorney General's Office, public officials' training is an important risk management tool, helps establish a culture of compliance within an agency and helps avoid/reduce litigation and its costs.

Once you have reviewed the attached guide, please complete and sign the *Certificate of Training* which indicates your understanding and compliance with the law; the training is valid for four years or until your next election, whichever comes first. We advise that you place the certificate in a safe place, such as a "personnel" or "employment" file.

The information attached to this memo was provided by the Washington State Attorney General's Office. Many other training options are available to elected officials and we advise that training be completed prior to December 31, 2014.

If your district/RFA would prefer to receive a hard copy of the attached information by mail, please call the WFCA office at 800.491.9322 or email wfca@wfca.wa.gov and a copy will be forwarded to you.

Should you have any questions or concerns regarding the Open Government Trainings Act or the attached guide, please call WFCA Executive Secretary Roger Ferris at 800.491.9322 or email rogerf@wfca.wa.gov.

Thank you.



WASHINGTON FIRE COMMISSIONERS ASSOCIATION

Elected Officials' Open Government Trainings Act

*A guide for fire commissioners to comply with the Open
Government Elected Officials' Training Act of 2014.*

The Washington Fire Commissioners Association wishes to thank the Washington State Attorney General's Office for providing the information contained in this document.

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Chapter 1

PUBLIC RECORDS ACT – GENERAL AND PROCEDURAL PROVISIONS

Last revised: January 2007 - Currently under review; updates forthcoming

(Note: On July 1, 2006, the citations to the Public Records Act changed from chapter 42.17 RCW to chapter 42.56. Therefore, this Internet Manual uses the new chapter 42.56 RCW citations. A conversion table showing the old chapter 42.17 RCW and new chapter 42.56 RCW citations is available on the [Attorney General's web site.](#))

1.1 The Public Records Act Is Interpreted in Favor of Disclosure

The Public Records Act ("PRA" or "Act") was enacted by initiative to provide the people with broad rights of access to public records. The Act declares that it must be "liberally construed" to promote the public policy of open government:

Statutory Provisions: 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. RCW 42.56.030.

Courts shall take into account the policy of this chapter that 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. RCW 42.56.550(3).

See generally Chapters 2 and 6, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase). See also WAC 44-14-01003 (Attorney General's non-binding model rules on public records summarizing how Act is interpreted by courts). In any "gray areas," a court will look to the requirement to interpret the Act in favor of disclosure and will decide a dispute in favor of open government.

1.2 What Is A "Public Record"

The PRA adopts the definitions in chapter 42.17 RCW, the older version of the PRA. RCW 42.56.010.

Statutory Provisions: "Public record" includes 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. RCW 42.17.020(41).

"Writing" means 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 42.17.020(48).

The definition of a public record (other than a record of the Legislature) contains three elements. *See generally WAC 44-14-03001.* First, the record must be a "writing," which is broadly defined in RCW 42.17.020(48) to include any recording of any communication, image or sound. A writing includes not only conventional letters and memoranda, but also emails, videos, photos and computer data.

Second, the writing must relate to the conduct of government or the performance of any governmental or proprietary function. Virtually every document a government agency has relates in some way to the conduct of government business or functions.

Third, the writing must be either prepared, owned, used or retained by the agency. A writing may include data compiled for the issuance of a report (as well as the report itself), even though the agency had not intended to make the underlying data public. *See Yacobellis v. City of Bellingham, 55 Wn. App. 706, 780 P.2d 272 (1989), rev.*

denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990), on remand, 64 Wn. App. 295, 825 P.2d 324 (1992). An agency need not possess a record for it to be a "public record." See *Concerned Ratepayers v. Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 959-60, 983 P.2d 635 (1999) (records held by out-of-state private vendor nonetheless "public records" because they were "used" by agency). Although this element is broad, it is not limitless. Compare 1983 Att'y Gen. Op. No. 9 (list of customers of public utility district is public record) with 1989 Att'y Gen. Op. No. 11 (registry of municipal bondholders is not public record because list was compiled by trust company and never prepared, possessed or used by county).

The determination of whether or not a document is a "public record" is a critical first step to decide whether the PRA applies. *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 565 n. 1, 618 P.2d 76 (1980). The definition of "public record" is to be liberally construed to promote full access to public records. *Id.* at 566. If documents are sent to an agency by mistake, and later returned, they are probably not public records because they probably were not "used" by the agency.

Case Example: A public agency hires a consultant to help resolve a specific problem. The consultant prepares a report and transmits the report to the agency. After reviewing the report and before receiving a public records request for the report, the agency returns all copies to the consultant. Is the report a public record?

Resolution: Yes, because the agency "used" the report. A record outside the possession of the agency can be a "public record." The agency should require the consultant to return the report to the agency for public records processing (reviewing for exempt information, redacting, copying, etc.).

1.3 What Is An "Agency" Subject to the Act

Statutory Provision: "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency. RCW 42.17.020(1).

As noted above, only the records of an "agency" are covered by the Act. The Act's definition of "agency" in RCW 42.17.020(1) is broad. See generally WAC 44-14-01001. Courts have interpreted that definition to include a city's design and development department, *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 810 P.2d 507 (1991), appeal after remand, 70 Wn. App. 789, 855 P.2d 706, review denied, 123 Wn.2d 1009, 869 P.2d 1084 (1994); a county prosecutor's office, *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993), and a city's parks department, *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989), appeal after remand, 64 Wn. App. 295, 825 P.2d 324 (1992). Some non-government agencies (such as an association of counties) which nonetheless performs governmental or quasi-governmental functions can be considered an "agency" if they meet a four-part test. See 2002 Att'y Gen. Op. No. 2.

The PRA does not apply to court case files; but those files are available through common law rights of access. *Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54 (1986); see also *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981). However, one court of appeals held that a request for judge's oaths to the superior court administrator was a disclosure request to be answered under the PRA. *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000). Accordingly, there is authority for the proposition that the Act does not apply to the judicial functions of the courts and only to its administrative functions, but there is no clear decision on that point.

(Note: The Act applies to an "agency," which can be a state agency or a local government. Accordingly, this Internet Manual will use the term "agency" to apply to both state and local government entities.)

1.4 Record Retention Duties Of Agencies

State laws require state and local agencies to retain certain records for varying lengths of time depending on the content of the record. See generally Ch. 40.14 RCW, the local and state retention schedules, and WAC 44-14-03005. However, if an agency keeps a record longer than required—that is, if the agency still possesses a record that it could have lawfully destroyed under a retention schedule—the record is still a "public record" subject to disclosure. See RCW 42.17.020(41) ("public record" includes writing "retained" by agency).

Statutory Provision: Agencies shall adopt and enforce reasonable rules and regulations, and the office of the secretary of the senate and the office of the chief clerk of the house of representatives shall adopt reasonable procedures allowing for the time, resource, and personnel constraints associated with legislative sessions, consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency, the office of the secretary of

the senate, or the office of the chief clerk of the house of representatives. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. Nothing in this section shall relieve agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives from honoring requests received by mail for copies of identifiable public records. If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives shall retain possession of the record, and may not destroy or erase the record until the request is resolved. RCW 42.56.100.

The first paragraph of RCW 42.56.100 requires agencies to adopt and enforce reasonable rules to protect public records from damage or disorganization. These rules must provide for the "fullest assistance to" requesters and the "most timely possible action" on requests. An agency may not use its rules to create either an exemption or other basis to withhold a record. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129-30, 580 P.2d 246 (1978). Agencies should have in place reasonable practices to allow them to promptly locate and produce requested documents if they are reasonably identifiable. The Attorney General's Office adopted model rules for compliance with the PRA. See chapter 44-14 WAC. Agencies are encouraged to adopt the Attorney General's model rules.

The second paragraph addresses the situation when a record scheduled for destruction is the subject of a pending request. The agency must suspend its retention schedule for affected records until the public records request is resolved. Presumably, the reasonable rules required in the first paragraph for the "protection of public records from damage" include rules relating to the agency's application of its record destruction policy.

1.5 Procedures To Make A Request

The Attorney General's model rules for public records provide detailed information on the public records request process. See ch. 44-14 WAC.

A. No Statement Of Reason Is Necessary

Statutory Provision: Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons. RCW 42.56.080.

A person making a public records request is not required by the Act to give a reason for the request, except in the rare instances where the agency needs to know the purpose to determine if the request would violate a statute (such as the ban on requests of lists of individuals for commercial purposes, discussed below). See WAC 44-14-04003(1). Except for commercial uses, release of information may not be limited by the purpose of the request. *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 710, 780 P.2d 272 (1989), review denied, 114 Wn.2d 1002 (1990). In some cases, agencies may require additional information, such as an authorization for health care records, to show why the requester is entitled to the record if the record is normally exempt and can only be disclosed to certain persons.

B. Requests for Lists of Individuals for Commercial Purposes

Statutory Provisions: This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act. RCW 42.56.070(9).

The only time when the purpose of a request can be considered is the limit from using the Act to obtain "lists of individuals requested for commercial purposes." RCW 42.17.260 (9). See also 1988 Att'y Gen. Op. No. 12 (access to list of individuals may be conditioned upon non-commercial use). The limitation on commercial-use requests has three elements: (1) "list of individuals," (2) for a "commercial purpose," (3) where the disclosure of the information is not "specifically authorized or directed by law." See WAC 44-14-06002(6). A "list of individuals" can have other fields in it (such as addresses) and still be a "list of individuals." 1980 Att'y Gen. Op. No.

1. "Commercial purpose" has its ordinary meaning. See 1998 Att'y Gen. Op. No. 2; 1975 Att'y Gen. Op. No. 15. An agency may require a requestor to sign a declaration that he or she will not use the requested records for a commercial purpose. 1988 Att'y Gen. Op. No. 12. An example of a disclosure "specifically authorized or directed by law" is RCW 82.40.020, which requires a count assessor's real property tax rolls to be available for public inspection. See 1980 Att'y Gen. Op. No. 1.

C. No Particular Form Of Request Is Required

Statutory Provisions: Agencies shall honor requests received by mail for identifiable public records unless exempted by provisions of this chapter. RCW 42.56.080
Nothing in [the PRA] shall relieve agencies. . .from honoring requests received by mail for copies of identifiable public records." RCW 42.56.100.

No particular form of request is required by the Act. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). See also WAC 44-14-03006. Although an agency may make its own reasonable rules for providing records, its rules must give the "fullest assistance to" requesters and require the "most timely action" in response to requests for records. RCW 42.17.290. The PRA specifically allows persons to make requests by mail, which includes email under current technology.

Oral requests are permitted, but a written request is advisable for several reasons. It confirms the date on which the record is requested, and it also clarifies what is being requested. Identification of the requesting party, with address and telephone number, will also facilitate a request for clarification by the agency of any ambiguous request or allow the agency to determine if a person has the right to a record that would normally be exempt. See WAC 44-14-03006. Some laws outside the PRA require written requests.

D. Agencies Must Establish Procedures For Assistance

Statutory Provisions: (1) Each state agency shall separately state and currently publish in the Washington Administrative Code and each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public:

(a) Descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain copies of agency decisions;

(b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(e) Each amendment or revision to, or repeal of any of the foregoing. RCW 42.56.040.

An agency is required to adopt its own rules and regulations to assist the public in obtaining information from that agency. See WAC 44-14-01002. The Attorney General's Office provides a model rule for agencies to adopt for their procedures. See ch. 44-14 WAC.

E. Indexes Available to the Public

Statutory Provision: (3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes. RCW 42.56.070(3) - (5).

The requirement to keep indices of public records set forth in RCW 42.56.070(3) is excused if a local agency makes an affirmative finding that maintaining such an index would be "unduly burdensome." RCW 42.56.070(4). A state agency must have a rule on its system for indexing certain types of records as listed in RCW 42.56.070(5), including records it indexed before 1990. However, a public record may be "relied on, used, or cited as precedent by an agency against a party" only if that record has been included in an index available to the public or if the affected party has timely actual or constructive notice of that record. RCW 42.56.070(6). See also WAC 44-14-03003.

F. Only "Identifiable Records" Must Be Provided

Statutory Provision: Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person. RCW 42.56.080.

The PRA requires a request for "identifiable public records." See WAC 44-14-04002(2). A requestor satisfies the "identifiable record" requirement when he or she provides a "reasonable description" of the record "enabling the government employee to locate the requested records." *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999). Accordingly, an agency does not have broad duties under the PRA to respond to questions, do research, or to give information that is not the subject of an identifiable public record. However, the requirement that a record be "identifiable" indicates that the requestor need not identify the record with precision. A member of the public may not know the name of a specific record, but may be able to ask to inspect documents on a specific topic. An agency has a duty to "provide for the fullest assistance to inquirers," RCW 42.17.290, which may include assisting persons to clarify requests to fairly identify the documents requested.

Case Example: *A person sends an email to an agency asking how it handles employment discrimination claims. A second person requests a copy of the agency's policy for handling employment discrimination claims. Which of these requests are for "identifiable public records"?*

Resolution: *The second request is a request of "identifiable records" (the written policy). The first request is not for "identifiable records" but rather for information.*

1.6 Agency Duties In Responding To Requests

An overview of an agency's duties to process and respond to requests is available in WAC 44-14-04003 and WAC 44-14-04004, respectively.

A. Agencies Must Make Documents Available

Statutory Provision: Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [RCW 42.56.070(6), the PRA], or other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1).

The PRA states broadly that an agency shall make available for inspection and copying all public records, unless a specific exemption applies. A requester has a right to inspect and copy, but is not required to do both. See WAC 44-14-07001(4). For example, a person may choose to inspect all public records on a certain subject but copy only a portion of those records. (The exemptions from disclosure mentioned in RCW 42.56.070(6) are discussed below in Chapter 2.)

B. Facilities Shall Be Made Available for Copying

Statutory Provision: Agency facilities shall be made available to any person for the copying of public records except when and to the extent that this would unreasonably disrupt the operations of the agency. RCW 42.56.080.

An agency must make public records available for copying. Limits on the time and extent of copying are allowed when the request would "unreasonably disrupt the operations of the agency." Requestors may ask to bring in their own copying equipment which an agency may allow if its business is not disrupted and if redaction of records is not needed. Typically, an agency promptly processes the request for copies and notifies the requestor when the documents are ready. If the amount of requested documents is not voluminous, the agency often may copy the documents while the requester waits.

C. Times For Inspection And Copying

Statutory Provision: Public records shall be available for inspection and copying during the customary office hours of the agency ...: PROVIDED, That if the entity does not have customary office hours of at least thirty hours per week, the public records shall be available from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the person making the request and the agency ... agree on a different time. RCW 42.56.090.

Public records must be made available for inspection and copying during the normal business hours of the agency. An agency which does not maintain regular business hours of at least 30 hours per week must make its records available from 9 a.m. to noon and from 1 p.m. to 4 p.m., unless the requester and the agency agree on a different time. The time available for copying documents is also affected by RCW 42.56.080, which states that copying should not "unreasonably disrupt the operations of the agency."

D. Charges For Copying Records

Statutory Provisions: No fee shall be charged for the inspection of public records. No fee shall be charged for locating public documents and making them available for copying. A reasonable charge may be imposed for providing copies of public records and for the use by any person of agency equipment ... to copy public records, which charges shall not exceed the amount necessary to reimburse the agency ... for its actual costs directly incident to such copying. Agency charges for photocopies shall be imposed in accordance with the actual per page cost or other costs established and published by the agency. In no event may an agency charge a per page cost greater than the actual per page cost as established and published by the agency. To the extent the agency has not determined the actual per page cost for photocopies of public records, the agency may not charge in excess of fifteen cents per page. An agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. RCW 42.56.120.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor. RCW 42.56.070(7) and (8).

No one may be charged a fee for the mere inspection of public records. See WAC 44-14-07001(1). Consequently, no agency may charge a person for the time to search for records for inspection. Expenses for copying records must be limited to "actual" costs as set by the agency. *Id.* These costs may include the paper, ink and cost per page for the use of copying equipment, together with staff salary expense incurred in copying. The agency may also charge the actual cost of postage and any shipping or mailing container. General administrative or overhead charges may not be included in copying costs. If an agency has not calculated its actual copying cost per page, it is limited to a charge of 15 cents per page. See WAC 44-14-07001(2). An agency is not required to charge a fee for copying records but may waive its fees either on its own initiative or at the invitation of the requester. WAC 44-14-07005.

Case Example: *A person requests the opportunity to inspect and copy certain documents from an agency. The agency responds that some of the information in the records is exempt. The agency offers to allow inspection of redacted documents (with the exempt information deleted) if the requester will pay the costs of copying the redacted documents and the cost of the employee who must locate, redact and copy the documents. Is the agency's offer consistent with RCW 42.56.120 and .070(7) and (8)?*

Resolution: *No agency may charge for the right to inspect a document. Accordingly, it cannot ask the requester to pay the costs of locating, redacting and copying records for inspection.*

E. Prompt And Specific Written Responses Are Required

Statutory Provisions: Responses to requests for public records shall be made promptly by agencies Within five business days of receiving a public record request, an agency ... must respond by either (1) providing the record; (2) acknowledging that the agency ... has received the request and providing a reasonable estimate of the time the agency ... will require to respond to

the request; or (3) denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency ... may ask the requestor to clarify what information the requestor is seeking. If the requestor fails to clarify the request, the agency ... need not respond to it. Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies ... shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action ... for the purposes of judicial review. RCW 42.56.520

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld. RCW 42.56.210(3)

An agency must respond to a request for public records within five business days of receipt of the request. Under RCW 1.12.040, the time allowed excludes the day of receipt from the computation. The agency must produce the record, acknowledge receipt of the request and give a reasonable estimate of the time needed for response, or deny the request. The agency must estimate the additional time needed to respond based upon time needed to: (1) clarify a request; (2) locate records to respond to the request; (3) contact a third party affected by the request (see RCW 42.56.540, rights of third parties to ask court to prevent disclosure); or (4) determine whether any records are covered by an exemption and should not be disclosed in whole or in part. RCW 42.56.520. See also WAC 44-14-04002 and WAC 44-14-04003. A request for voluminous records does not excuse an agency response within five days, even if it may take longer to produce the records.

The failure to respond within the five days is an automatic violation of the Act and entitles the requestor to an award of attorneys' fees and statutory penalties. See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000).

If an agency response seeks clarification of a request, the requestor must clarify the intent or scope of the request. A requestor's failure to respond to a request for clarification excuses the agency from responding to the unclarified request. RCW 42.56.520.

Agencies must deny requests in writing and specify the reasons for the denial. RCW 42.56.520. The written response must identify the specific statutes relied upon by the agency to exempt the record or part of a record from disclosure and must briefly explain how the exemptions apply to the records requested. RCW 42.56.210(3). In order to comply with the Act and to create an adequate record for a reviewing court, the agency's response to a request for documents must include a way to identify any individual records withheld in their entirety. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("PAWS II"). See also WAC 44-14-04004(4)(b)(ii). If challenged, an agency is not limited by the grounds in its initial written denial but it may argue additional reasons for nondisclosure on judicial review. PAWS II, 125 Wn.2d at 253.

F. Duty To Redact Exempt Portions of Records

Statutory Provision: Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons. RCW 42.56.210(1).

Agencies are not relieved of their duties to respond to requests for public records because a part of the document is covered by an exemption. An agency must delete or redact only the exempt information and disclose the rest of the document. See *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978). See also WAC 44-14-04004(4)(b)(i).

G. No Liability to Third Parties for Good Faith Response

Statutory Provision: No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter. RCW 42.56.060

A good faith decision by a public agency to release a public record relieves the agency or any public official or employee from liability arising from the disclosure. This immunity applies to claims by third parties for damages arising from the release of the records. For example, a third party named in a public record cannot sue a public agency for a good faith release of that record on the basis that the disclosure violated the subject's privacy. Whether an agency acts in "good faith" may be at issue, however, if an agency releases an arguably exempt record with clear privacy implications but fails to attempt to contact the person implicated by the record.

The protection from liability by RCW 42.56.060 does not apply to the failure to disclose information. A court may award penalties and attorneys' fees under RCW 42.56.550(4) to a prevailing party even if the agency acts in good faith. See *Amren v. City of Kalama*, 131 Wn.2d 25, 36, 929 P.2d 389 (1997).

1.7 Review Of Agency Decision

A. Review By Agency Of Its Own Denial

Statutory Provision: Agencies ... shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action ... for the purposes of judicial review. RCW 42.56.520

Final agency action that grants a requestor the right to seek judicial review is determined to be completed at the end of the second business day after an agency's denial of the right to inspect any portion of a record. This statute means that a requestor may file a court case two business days after the initial denial regardless of whether the agency has completed its internal review. See WAC 44-14-08001.

B. Attorney General Review Of Denial By State Agency

Statutory Provision: Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the attorney general to review the matter. The attorney general shall provide the person with his or her written opinion on whether the record is exempt. RCW 42.56.530.

When a state agency denies a requesting party the opportunity to inspect or copy a record by claiming an exemption from disclosure, the party may request a review by the state attorney general. The Office of the Attorney General will respond in writing whether the record is exempt. The right of review by the Attorney General does not extend to a delay in producing records or failure to provide a response to the request but only when a state agency denies records based on an exemption. RCW 42.56.530 does not allow the Attorney General to review denials of requests by local agencies.

C. Third-Party Action To Prevent Disclosure

Statutory Provision: The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice. RCW 42.56.540.

A third party who is named in a record, or who is the subject of a record, may seek an injunction to prevent the disclosure of a record. The court action to prevent disclosure may be filed in the superior court where that party resides or where the record is kept. *Id.* The burden of proof is on the party seeking to block disclosure. *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

The agency may choose to notify the affected persons that the record has been requested under the Act. RCW 42.56.540 and give the person the option to seek court relief. See also WAC 44-14-04003(11). However if an agency is required by law or contract to give such notice, then notice is mandatory. Despite its general language that disclosure of a record can be prevented if a court finds that disclosure is "not in the public interest," RCW 42.56.540 is not a substitute for a statutory exemption. Instead, the party seeking to prevent disclosure under RCW 42.56.540 still must prove that a specific exemption from disclosure applies to the record or portion of a record. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 257-8, 884 P.2d 592 (1994).

D. Filing Suit to Enforce the Act

A records requestor may go to court to obtain the requested records, or to challenge a response to a request or the reasonableness of an agency's estimate of the time to provide the records. *See generally* WAC 44-14-04004(4) and -08004(5).

Statutory Provisions:

(1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

(2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

(3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that 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. Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(5) For actions under this section against counties, the venue provisions of RCW 36.01.050 apply.

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.56.550

A person who has been denied the opportunity to inspect or copy a record requested under the Act may file a suit in the superior court of the county in which a record is kept (or, if the case is against a county, in the adjoining county). RCW 42.56.550. *See also* WAC 44-14-08004. The agency has the burden to prove that a specific exemption applies to the record or part of the record withheld from disclosure. *Id.*; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978). A court will interpret exemptions narrowly and in favor of disclosure (RCW 42.56.030) and will order the disclosure of a non-exempt record "even though such examination may cause inconvenience or embarrassment to public officials or others" (RCW 42.56.550(3)).

A person may also go to superior court and ask a judge to determine whether the agency's estimate of time to provide the records is indeed "reasonable." RCW 42.56.550(2). The burden of proof is on the agency to prove its estimate is "reasonable." *Id.* *See also* WAC 44-14-08004(4).

The court's review of the agency's decision is *de novo* (meaning that the court reviews the matter on its own, without regard to the decision of the agency). RCW 42.156.550(3).

The procedure for judicial review is set forth in RCW 42.56.550. It is a speedy and often informal process for quickly determining if the agency improperly withheld records or gave an unreasonable time estimate. *See* WAC 44-14-08003(1). The PRA provides for a "show cause" hearing. *See* WAC 44-14-08004(3). A requestor usually starts the case by filing and serving a complaint stating the facts (the request, the agency's response, why the requestor thinks the agency is wrong). The requestor also files a motion asking the court to order the agency to appear and show cause why it can lawfully withhold the record or part of a record, or why its time estimate is reasonable. At the same time, a requestor seeking access to withheld records will often file a motion to "lodge" records, asking the judge to order the agency to file the disputed records (unredacted) with the court under seal so the judge can review them in private (called "in camera" review). There is authority to allow the requestor's attorney, but not the requestor, to review the disputed documents under a protective order. *Seattle Firefighters v.*

Hollister, 48 Wn. App. 129, 131, 737 P.2d 1302 (1987). The motion to show cause and motion to lodge records are almost always issued "ex parte," which means the requestor presents it to a judge without the agency present. In the show cause order, the court sets a date for the show cause hearing. The parties can file a brief on legal issues and declarations on factual issues. The judge reviews the unredacted disputed records if lodged in camera and the briefs and affidavits before the show cause hearing. See WAC 44-14-08004(6). Because RCW 42.56.550(3) provides that the court may conduct the hearing "based solely on affidavits," courts almost always decide show cause hearings based on argument and any declarations presented; live testimony is very rare. See *Cowles Publishing Co. v. City of Spokane*, 69 Wn. App. 678, 683, 849 P.2d 1271, review denied, 122 Wn.2d 1013 (1993). See also WAC 44-14-08004 (6). After the parties argue their case at the show cause hearing, the judge decides whether the records or portions of records should be disclosed. If the judge orders any record or part of a record released, or determines that the time estimate was not "reasonable," or that the agency has otherwise violated the Act by failing to provide a sufficient response of the agency's "fullest assistance" (see *Citizens for Fair Share v. Department of Corrections*, 117 Wn. App. 411, 431, 72 P.3d 206 (2003)m and *Doe I v. State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996)), the requestor is the "prevailing party" entitled to reasonable attorney's fees, costs, and penalties (discussed below). When that occurs, the judge typically schedules another hearing to determine the amount of attorney's fees, costs, and penalties. Both sides may provide briefs and declarations on these issues before that hearing. See WAC 44-14-08004(3).

Requestors must start these actions against agencies within a year of when it claims an exemption or when it last produces records under the request. RCW 42.56.550(6). This amendment effective in July 2005 clarified that the statute of limitations of five years under campaign disclosure and finance laws in Ch. 42.17 did not apply to public records lawsuits.

E. Attorneys' Fees, Costs, and Daily Penalty

Statutory Provision: Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record. RCW 42.17.550(4)

A party who "prevails" against an agency in a lawsuit seeking either to disclose a record or to receive an appropriate response within a reasonable time may recover costs and reasonable attorneys' fees. RCW 42.56.550(4). In addition, the court must also award a statutory penalty of between \$5 and \$100 per day for each day that the agency denied the requestor the right to inspect or get a copy of a public record. *Id.* See also WAC 44-14-08004(7).

A requestor is the "prevailing party" if the final court hearing the matter determines that the record or portion of a record "should have been disclosed on request." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) ("*Spokane Research IV*") or that some other violation of the Act occurred. *Citizens for Fair Share v. Department of Corrections*, 117 Wn. App. 411, 431, 72 P.3d 206 (2003), and *Doe I v. State Patrol*, 80 Wn. App. 296, 908 P.2d 914 (1996). The requestor is also the "prevailing party" if the agency "voluntarily" provides the records after being sued. *Id.* at 102-104.

The award of reasonable attorneys' fees and the award of the statutory penalty are mandatory, although the amount is within the court's discretion. *Progressive Animal Welfare Soc'y v. University of Wash.*, 114 Wn.2d 677, 683-84, 790 P.2d 604 (1990); *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 302, 908 P.2d 914 (1996); *Lindberg v. Kitsap Cy.*, 82 Wn. App. 566, 574, 919 P.2d 89 (1996); *Amren v. City of Kalama*, 131 Wn.2d 25, 36-37, 929 P.2d 389 (1997). The principal factor to be considered in setting the amount of the statutory daily penalty is whether the agency acted in bad faith, *Amren*, 131 Wn.2d at 37-38, *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 303, 825 P.2d 324 (1992), but bad faith is not required. The requester need not show actual loss. See *Yacobellis*, 64 Wn. App. at 303. The penalty is for each day the record was withheld and need not be per record, although a court has discretion to group records into categories and impose penalties per category. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004). The penalty runs "for the time between the request and the disclosure[.]" *Spokane Research IV*, 155 Wn.2d at 104.

Chapter 2

PUBLIC RECORDS ACT – EXEMPTIONS FROM DISCLOSURE (LAWS ALLOWING WITHHOLDING OF RECORDS)

2.1 Introduction – General Information on Exemptions from Disclosure

“Exemption from disclosure” or “exemption” or “exempt” are the terms used to describe the laws allowing an agency to withhold a public record or part of one. The PRA and other statutes outside the PRA contain hundreds of very specific exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of this Internet Manual. (For a more in-depth treatment of the exemptions, including a table listing all of them, see the Washington State Bar Association’s Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase.) Instead, this chapter provides general guidance on exemptions and summarizes many of the ones most frequently encountered by requestors and agencies.

A. Exemptions In General

Given the pro-disclosure approach of the PRA, the law requires an exemption from disclosure to be narrowly construed in favor of disclosure. RCW 42.56.030. An exemption from disclosure must specifically exempt a record or part of a record from disclosure. RCW 42.56.070(1). An exemption will not be inferred or presumed. *Progressive Animal Welfare Soc’y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (“PAWS II”). A record or portion of a record must fit squarely within a specific statutory exemption in order to be withheld.

An agency cannot define the scope of a statutory exemption through rule making or policy. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995). An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.56.070(1). *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989).

Exemptions are “permissive rather than mandatory.” 1980 Att’y Gen. Op. No. 1. Therefore, an agency has the discretion to disclose an exempt record. However, in contrast to an “exemption” it may waive, an agency cannot provide a record if a statute makes it “confidential” or otherwise prohibits disclosure. See RCW 42.56.510. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient’s consent. RCW 70.02.020(1). If a statute classifies information as “confidential” or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it. 1986 Att’y Gen. Op. No. 7.

See generally WAC 44-14-06002(1) (describing exemptions in general).

B. No “Privacy” exemption

There is no general “privacy” exemption. 1988 Att’y Gen. Op. No.12. Since “privacy” is not a stand-alone exemption, an agency cannot claim RCW 42.56.050 as an exemption. 1988 Att’y Gen. Op. No.12. However, a few exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee’s right to “privacy.” RCW 42.56.230(2). “Privacy” is then one of the elements, in addition to the others in RCW 42.56.230(2), that an agency or a third party resisting disclosure must prove.

A violation of a person’s “privacy” would occur under RCW 42.56.050 when the disclosure of information “(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” This two-part test requires the person seeking to prevent disclosure to prove both elements. *King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).

See generally Chapter 13, *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase)

2.2 Specific Exemptions from Disclosure

A. Personal Information

1. Student, Institutional, and Welfare Records

Statutory Provision: Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients is exempt from disclosure. RCW 42.56.230(1)

This exemption covers “personal information” in the files of public assistance or public health clients, students, and residents of public institutions. See *Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 618 P.2d 76 (1980). In *Oliver*, a patient was allowed copies of her own medical records.

Case example: A private insurance claim investigator requests a roster of participants in a city summer jobs program for at-risk youth, who come from families receiving public assistance, and general information on the program.

Resolution: The identifying information of the participants may be redacted from the roster. However, the general information on the program (handbooks, job descriptions, etc.) must be provided.

There are statutory exceptions to this exemption: (1) the public may have access to a jail register of jail inmates, RCW 70.48.100; (2) criminal history record information of past convictions and information pertaining to an incident for which a person is currently being processed in the criminal justice system, chapter 10.97 RCW; and (3) community protection statutes including RCW 4.24.550 which permit release of information about dangerous offenders that is needed to protect the public or persons in the criminal justice system.

2. Public Employee Records

See generally Chapters 11 and 13, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) ([available for purchase](#))

Statutory Provisions: Personal information in files maintained for employees, appointees, or elected officials of any public agency [are exempt from disclosure] to the extent that disclosure would violate their right to privacy. RCW 42.56.230(2).

“Privacy” as used in an exemption means] disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. RCW 42.56.050.

Washington courts have not defined precisely what information in personnel records violates a right of privacy, but some cases have discussed the issue. See *Tiberino v. Spokane County*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (content of particular emails was personal and unrelated to government operations so content was exempt but number of emails and time spent was of public concern); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 890 P.2d 544 (1995) (information is exempt from disclosure as personal if it concerns intimate details of employee's personal and private life not of legitimate concern to the public); *Washington State Human Rights Comm'n v. City of Seattle*, 25 Wn. App. 364, 607 P.2d 332 (1980) (personal and confidential information in employment application about the applicant's life and past activities are matters of personal privacy).

Other statutes exempt particular items potentially in a public employee's personnel files such as applications for public employment, résumés, and related material, and home and family information of employees RCW 42.56.250(2) and (3).

The test is a two-part test. Information may be highly offensive, but if it is of legitimate concern to the public, it is not exempt. Information may not be of legitimate concern to the public, but if it is not highly offensive, it is not exempt.

Courts have held that an employee's performance evaluations with no discussion of specific incidents of misconduct are exempt because they are both highly offensive and of no legitimate concern to the public. *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *Brown v. Seattle Public Schools*, 71 Wn. App. 613, 860 P.2d 1059 (1993). In *Dawson v. Daly*, the court held that there was no legitimate public concern in disclosure of the performance evaluations of a deputy prosecutor to a potential defense expert witness because it would impair employee morale if employees thought that their evaluations would be made public to anyone who requested them and because supervisors would be reluctant to write candid evaluations of their subordinates. The requestor in *Brown* was a PTA president who sought access to an elementary school principal's performance evaluations. The court upheld denial of the request, citing *Dawson v. Daly*.

An appellate court ruled that the performance evaluation of a city manager, however, was not exempt because it was of legitimate concern to the public. *Spokane Research & Defense Fund v. City of Spokane*, 99 Wn. App. 452, 994 P.2d 267 (2000). Records describing specific instances of misconduct to be of legitimate interest to the public, despite the embarrassing nature of the disclosure. See *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (records of teacher certificate revocation records are of legitimate public interest); *Columbian Publishing Co. v. City of Vancouver*, 36 Wn. App. 25, 671 P.2d 280 (1983) (the investigative agency exemption did not apply to shield the job performance investigation of police chief). The question is whether false allegations are of “legitimate interest to the public” and therefore disclosable. One case holds that “patently false” allegations of sexual misconduct against teachers are exempt, but “unsubstantiated” allegations are disclosable because of the important public interest in those accusations. *Bellevue John Does v. Bellevue School Dist.*, 129 Wn. App. 832, 120 P.3d 616 (2005), review granted (January 3, 2006).

This exemption is not limited to an actual employee “personnel file” but rather applies to employee information in an agency computer system. See *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 216, 951 P.2d 357, review

granted and remanded, 136 Wn.2d 1030, 972 P.2d 101, amended opinion, 972 P.2d 932 (1998). The exemption also includes records in files for current and former employees, whether held by an employing agency or other agency, such as a retirement system. *Seattle Fire Fighters Union, Local No. 27, v. Hollister*, 48 Wn. App. 129, 737 P.2d 1302, review denied, 18 Wn.2d 1033 (1987).

3. Taxpayer Information

Statutory Provision: Information required of any taxpayer in connection with the assessment or collection of any tax is exempt from disclosure if the disclosure would be prohibited pursuant to RCW 82.32.330 or would violate any taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer. RCW 42.56.230(3).

See *Van Buren v. Miller*, 22 Wn. App. 836, 592 P.2d 671, review denied, 92 Wn.2d 1021 (1979) (information relied upon by the assessor to make valuation is not private); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

4. Banking Information

Statutory Provision: Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial account numbers [are exempt from disclosure], except when disclosure is expressly required by or governed by other law. RCW 42.56.230(4).

This exemption is designed to limit the risk of identity theft and protects account numbers that can be used to receive funds, benefits or payments.

B. Investigative Information

See generally Chapter 8, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) ([available for purchase](#))

1. Investigative Records

Statutory Provision: Specific intelligence information and specific investigative records, compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy [are exempt from disclosure]. RCW 42.56.240(1).

"Specific . . . investigative records" are the result of an investigation focusing on a particular person, *Laborers Int'l Union of North America, Local No. 374 v. City of Aberdeen*, 31 Wn. App. 445, 642 P.2d 418, review denied, 97 Wn.2d 1024 (1982), or an investigation to ferret out criminal activity or to shed light on specific misconduct. *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993); *Columbian Publishing v. City of Vancouver*, 36 Wn. App. 25, 671 P.2d 280 (1983). If a law enforcement agency maintains reports as part of a routine administrative procedure, not as the result of a specific complaint or allegation of misconduct, the reports are not investigative reports within the terms of this exemption. For example, "Use of Force Administrative Reports" prepared by police whenever there is contact between a K-9 unit dog and a person were held not within the investigative information exemption. *Cowles Publishing v. City of Spokane*, 69 Wn. App. 678, 849 P.2d 1271, review denied, 122 Wn.2d 1013 (1993).

"Investigative, law enforcement, and penology agencies" are agencies having authority to investigate and penalize, such as the police, the police internal affairs investigation unit, the Public Disclosure Commission, medical disciplinary boards, or a local health department. An investigative agency which is not acting in its investigative capacity may exempt only those records made in its investigative function. *Columbian Publishing Co. v. City of Vancouver*, 36 Wash. App. 25, 671 P.2d 280 (1983) (a general inquiry into agency personnel matters is not an "investigation" as contemplated by the Public Disclosure Act, even if it's performed by law enforcement officers). See also *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 637-40, 115 P.3d 316 (2005) (discussing "law enforcement" element of exemption).

The contents of an open, ongoing investigation are generally exempt from disclosure because premature disclosure could jeopardize the investigation. *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997); *Ashley v. Washington State Public Disclosure Comm'n*, 16 Wn. App. 830, 650 P.2d 1156, review denied, 89 Wn.2d 1010 (1977). Once the investigation is completed, the records can be made available. *Hearst v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). However, an agency may withhold specific records of completed investigations if their disclosure would jeopardize witnesses or discourage potential sources of information from

coming forward in the future. *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 778 P.2d 1066 (1989), review denied, 113 Wn.2d 1037 (1990).

The names of complainants, witnesses and officers contained in police Internal Investigation Unit (IIU) files of completed investigations of sustained complaints are exempt from disclosure because the IIU process is vital to law enforcement and officers would be reluctant to be candid if they thought their identities or that of other officers would be disclosed. The agency may disclose the substance of the files. *Cowles Publishing v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988). When the identity of the officer who was the subject of the investigation is well known through other sources, exemption of the name is not essential to effective law enforcement. *Ames v. City of Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993). But see *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (in dicta, the court encouraged a narrow view of what falls within law enforcement purposes, holding that revocation of teacher certificates was not exempt). The *Cowles* court held that the redaction of officers' names in the IIU files was not necessary to protect their privacy.

2. Identity Of Complainants, Witnesses And Victims

Statutory Provision: Information revealing the identity of witness to or victims of a crime or a person who files a complaint with an investigative, law enforcement or penology agency is exempt if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the public disclosure commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath. RCW 42.56.240(2).

An agency need not verify the accuracy of the alleged endangerment, but the desire for nondisclosure must be based upon risk of harm rather than mere embarrassment at the prospect of disclosure. Agencies should inquire at an early stage of the complaint process to preserve confidentiality.

3. Sex Offender Investigative Reports

Statutory Provision: Any records of investigative reports prepared by any state, county, municipal, or other law enforcement agency pertaining to sex offenses contained in chapter 9A.44 RCW or sexually violent offenses as defined in RCW 71.09.020, which have been transferred to the Washington association of sheriffs and police chiefs for permanent electronic retention and retrieval pursuant to RCW 40.14.070(2)(b) [are exempt from disclosure]. RCW 42.56.240(3).

While the underlying reports would be exempt, some information reported about offenders may be disclosed that is relevant and necessary under community protection statutes such as RCW 4.24.550.

4. Concealed Pistol Licenses

Statutory Provision: License applications under RCW 9.41.070 [are exempt from disclosure]; copies of license applications or information on the applications may be released to law enforcement or corrections agencies. RCW 42.56.240(4).

5. Child Victim of Sexual Assault

Statutory Provision: Information revealing the identity of child victims of sexual assault who are under age eighteen [is exempt from disclosure]. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator. RCW 42.56.240(5).

This exemption is thoroughly explored in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). The court held that this statute requires disclosure of this information with redaction only of the specified identifiers, even if the requestor knows the identity of the child victim and requests the record by the victim's name.

C. Employment and Licensing

1. Test and Exam Questions

Statutory Provision: Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination [are exempt from disclosure]. RCW 42.56.240(1).

This information is exempt because disclosure would give an undue advantage to applicants for licenses or jobs.

2. Applicants For Public Employment

Statutory Provision: All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant [are exempt from disclosure]. RCW 42.56.240(2).

See Beltran v. Dep't Social & Health Services, 98 Wn. App. 245, 989 P.2d 604 (1999), review granted, 140 Wn.2d 1021, 10 P.3d 405, appeal dismissed (2000).

If an applicant is hired, many agencies do not consider that this exemption applies to these records. Instead, the agencies look to exemptions such as RCW 42.56.230(2) and RCW 42.56.250(3) to decide whether or not to disclose personal information from these records.

3. Public Employees' Home Addresses, Phone Numbers, etc.

Statutory Provision: The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency [are exempt from disclosure]. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240. RCW 42.56.250(3).

This section exempts home addresses and telephone numbers of employees and volunteers, personal cell phone numbers and email addresses, social security numbers, emergency contact information, and similar information about their dependents. Information about individual home health care workers are treated the same as employees only under this subsection.

4. Human Rights Commission Complaints and Investigative Records

Statutory Provisions: Information [is exempt from disclosure] that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed. RCW 42.56.250(4).

This exemption, like the earlier investigative witness exemption, requires an employee to ask that their name be withheld but does not require a showing of risk of harm.

Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment [are exempt from disclosure]. RCW 42.56.250(5).

Records of investigations by employers into unfair labor practices or discrimination claims are exempt while those investigations are in process. RCW 42.56.250(5).

5. State Ferry Employee Salary and Benefit Survey Information

Statutory Provision: Except as provided in RCW 47.64.220, salary and employee benefit information collected under RCW 47.64.220(1) and described in RCW 47.64.220(2) [is exempt from disclosure]. RCW 42.56.250(6).

As a general rule, salary and benefit information for public employees is held to be public.

D. Real Estate Appraisals

Statutory Provision: Except as provided by chapter 8.26 RCW, the contents of real estate appraisals made for or by an agency relative to the acquisition or sale of property are exempt from

disclosure until all of the property has been acquired or has been sold or three years from the date of appraisal, whichever occurs first. RCW 42.56.260.

E. Research Data And Intellectual Property

See generally Chapter 9, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) ([available for purchase](#))

1. Statutory Provision: Valuable formulae, designs, drawings, and research data obtained by an agency within five years of the request for disclosure are exempt from disclosure when disclosure would produce private gain and public loss. RCW 42.56.270(1).

The purpose of this exemption is to prevent the taking of potentially valuable intellectual property held by an agency. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 254-55, 884 P.2d 592 (1994). Valuable formula or research data may include material in an unfunded grant proposal, including raw data and guiding hypotheses that structure data (*id.*), and a cash flow analysis prepared by a consultant to assist an agency to negotiate lease rates for potential developers of agency properties. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 830, 904 P.2d 1124 (1995). In *Servais*, the court held the cash flow analysis to be exempt because private developers would benefit by insight into the port's negotiating position to the detriment of the public if the record was disclosed. Research data, which is not limited to scientific or technical information, means facts and information collected for a specific purpose and derived from close study or from scholarly or scientific investigation or inquiry, if the disclosure would result in private gain and public loss. See also *Evergreen Freedom Fdn. v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005) (discussing exemption).

In addition to the protections of this exemption, intellectual and proprietary information may also be covered by the Washington Trade Secrets Act, chapter 19.108 RCW. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995).

2. Financial and Proprietary Information Involved in Miscellaneous Government Programs RCW 42.56.270(2) – (17) exempts from disclosure:

(2) Financial information supplied by or on behalf of a person, firm, or corporation for the purpose of qualifying to submit a bid or proposal for (a) a ferry system construction or repair contract as required by RCW 47.60.680 through RCW 47.60.750 or (b) highway construction or improvement as required by RCW 47.28.070;

(3) Financial and commercial information and records supplied by private persons pertaining to export services provided under chapters 43.163 and 53.31 RCW, and by persons pertaining to export projects under RCW 43.23.035;

(4) Financial and commercial information and records supplied by businesses or individuals during application for loans or program services provided by chapters 15.110, 43.163, 43.160, 43.330, and 43.168 RCW, or during application for economic development loans or program services provided by any local agency;

(5) Financial information, business plans, examination reports, and any information produced or obtained in evaluating or examining a business and industrial development corporation organized or seeking certification under chapter 31.24 RCW;

(6) Financial and commercial information supplied to the state investment board by any person when the information relates to the investment of public trust or retirement funds and when disclosure would result in loss to such funds or in private loss to the providers of this information;

(7) Financial and valuable trade information under RCW 51.36.120;

(8) Financial, commercial, operations, and technical and research information and data submitted to or obtained by the clean Washington center in applications for, or delivery of, program services under chapter 70.95H RCW;

(9) Financial and commercial information requested by the public stadium authority from any person or organization that leases or uses the stadium and exhibition center as defined in RCW 36.102.010;

(10)(a) Financial information, including but not limited to account numbers and values, and other identification numbers supplied by or on behalf of a person, firm, corporation, limited liability company, partnership, or other entity related to an application for a horse racing license submitted pursuant to RCW 67.16.260(1)(b), liquor license, gambling license, or lottery retail license; (b) Financial or proprietary information supplied to the liquor control board including the amount of beer or wine sold by a domestic winery, brewery, microbrewery, or certificate of approval holder under RCW 66.24.206(1) or 66.24.270(2)(a) and including the amount of beer or wine purchased by a retail licensee in connection with a retail licensee's obligation under RCW 66.24.210 or 66.24.290, for receipt of shipments of beer or wine.

(11) Proprietary data, trade secrets, or other information that relates to: (a) A vendor's unique methods of conducting business; (b) data unique to the product or services of the vendor; or (c) determining prices or rates to be charged for services, submitted by any vendor to the department of social and health services for purposes of the development, acquisition, or implementation of state purchased health care as defined in RCW 41.05.011;

(12)(a) When supplied to and in the records of the department of community, trade, and economic development: (i) Financial and proprietary information collected from any person and provided to the department of community, trade, and economic development pursuant to RCW 43.330.050(8) and 43.330.080 (4); and (ii) Financial or proprietary information collected from any person and provided to the department of community, trade, and economic development or the office of the governor in connection with the siting, recruitment, expansion, retention, or relocation of that person's business and until a siting decision is made, identifying information of any person supplying information under this subsection and the locations being considered for siting, relocation, or expansion of a business; (b) When developed by the department of community, trade, and economic development based on information as described in (a)(i) of this subsection, any work product is not exempt from disclosure; (c) For the purposes of this subsection, "siting decision" means the decision to acquire or not to acquire a site; (d) If there is no written contact for a period of sixty days to the department of community, trade, and economic development from a person connected with siting, recruitment, expansion, retention, or relocation of that person's business, information described in (a)(ii) of this subsection will be available to the public under this chapter;

(13) Financial and proprietary information submitted to or obtained by the department of ecology or the authority created under chapter 70.95N RCW to implement chapter 70.95N RCW;

(14) Financial, commercial, operations, and technical and research information and data submitted to or obtained by the life sciences discovery fund authority in applications for, or delivery of, grants under chapter 43.350 RCW, to the extent that such information, if revealed, would reasonably be expected to result in private loss to the providers of this information;

(15) Financial and commercial information provided as evidence to the department of licensing as required by RCW 19.112.110 or 19.112.120, except information disclosed in aggregate form that does not permit the identification of information related to individual fuel licensees;

(16) Any production records, mineral assessments, and trade secrets submitted by a permit holder, mine operator, or landowner to the department of natural resources under RCW 78.44.085; and

(17)(a) Farm plans developed by conservation districts, unless permission to release the farm plan is granted by the landowner or operator who requested the plan, or the farm plan is used for the application or issuance of a permit. (b) Farm plans developed under chapter 90.48 RCW and not under the federal clean water act, 33 U.S.C. Sec. 1251 are subject to RCW 42.56.610 and 90.64.190

3. Deliberative Process (Preliminary Drafts, Notes, Recommendations, Intra-Agency Memoranda)

Statutory Provision: Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended [are exempt from disclosure] except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action. RCW 42.56.280.

See generally Section 7.3(4), *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase); WAC 44-14-06002(4).

Preliminary drafts or recommendations may be withheld by an agency but only if they pertain to the agency's deliberative process and show the exchange of opinions within an agency before it reaches a decision or takes an action. The purpose of this exemption severely limits its scope. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 256, 884 P.2d 592 (1994); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). Its purpose is to "protect the give and take of deliberations necessary to formulation of agency policy." *Hearst Corp. v. Hoppe*, at 123; *Progressive Animal Welfare Soc'y v. University of Wash.*, at 256.

The test to determine whether a record is covered by this exemption has been summarized by the Supreme Court as follows:

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not raw factual data on which a decision is based. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d at 256. It is not, however, required that documents be prepared by subordinates to be exempt. *ACLU v. City of Seattle*, 121 Wn. App. 544, 552, 89 P.3d 295 (2004).

The exemption applies only to documents that are part of the deliberative or policy-making process; records about implementing policy are not covered. *Cowles Publishing v. City of Spokane*, 69 Wn. App. 678, 849 P.2d 1271 (1993), *review denied*, 122 Wn.2d 1013 (1993). For this reason, inter-agency (as opposed to intra-agency) discussions probably are not covered by this exemption. *Columbian Publishing Co. v. City of Vancouver*, 36 Wash. App. 25, 671 P.2d 280 (1983).

Matters that are factual, or that are assumed to be factual for discussion purposes, must be disclosed. *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (description of a taxpayer's home by a field assessor treated as fact by agency appraisers). Thus, unless disclosure would reveal or expose the deliberative process, as distinct from the facts used to make a decision, the exemption does not apply. *Hearst Corp. v. Hoppe*, at 133. Moreover, once the policies or recommendations are implemented, those recommendations, drafts and opinions cease to be protected under this exemption. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994). An evaluation of a real property site requested by a city attorney was exempt from disclosure under the deliberative process exemption where it was cited as the basis for a final action. *Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 810 P.2d 507 (1991), *appeal after remand*, 70 Wn. App. 789, 855 P.2d 706, *review denied*, 123 Wn.2d 1009 (1994) (study ultimately withheld on other grounds). Subjective evaluations are not exempt under this exemption if they are treated as raw factual data and not subject to further deliberation and consideration. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d at 256-57; *Hearst Corp. v. Hoppe*, 90 Wn.2d at 134.

Case example: *A public agency conducts an internal review of a specific problem. A report is prepared consisting of an overview of the problem, information collected or reviewed, and recommendations for policy changes.*

Resolution: *The recommendations for policy changes are the only parts of the report likely to be exempt, unless the agency can show that the remainder of the report contains information that is inextricably intertwined with the recommendation. The agency must show that release of the factual or discussion portions would be the same as releasing the recommendations. This situation seldom exists and, for that reason, an agency must usually disclose parts of predecisional memos before it makes a final decision.*

4. Information Protected In Litigation

Statutory Provisions: Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts [are exempt from disclosure]. RCW 42.56.290.

See generally Chapter 10, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) ([available for purchase](#)).

A "controversy" covered by this exemption includes threatened, actual, or completed litigation. *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

If an agency is a party to a controversy, the agency may withhold records that normally would be privileged under litigation discovery rules (commonly called the "work product" doctrine). A document is work product if an attorney prepares it in confidence and in anticipation of litigation or it is prepared at the attorney's request and if

the requester could obtain about the same information by other means. For example, a study of the economic viability of hotels of various sizes, commissioned by a city attorney's office to determine the city's potential liability for a constitutional takings claim qualified as work product and was insulated from disclosure. *Overlake Fund v. City of Bellevue*, 70 Wn. App. 789, 855 P.2d 706 (1993), review denied, 123 Wn.2d 1009 (1994). See generally Public Records: The Attorney-Client Privilege and Work Product Doctrine – Guidance on Recurring Issues (Washington State Attorney General's Office) (Dec. 1, 2004)

The Supreme Court in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004) ruled that RCW 5.60.060(2), the statute codifying the common law attorney-client privilege, is an "other statute" exemption under the PRA in RCW 42.56.070(1). Accordingly, records or portions of records covered by the attorney-client privilege are exempt from disclosure. See generally WAC 44-14-06002(3)

5. Archaeological Sites

Statutory Provisions: Records, maps, or other information identifying the location of archaeological sites in order to avoid the looting or depredation of such sites are exempt from disclosure under this chapter. RCW 42.56.300(1).

Records, maps, and other information, acquired during watershed analysis pursuant to the forests and fish report under RCW 76.09.370, that identify the location of archaeological sites, historic sites, artifacts, or the sites of traditional religious, ceremonial, or social uses and activities of affected Indian tribes, are exempt from disclosure under this chapter in order to prevent the looting or depredation of such sites. RCW 42.56.300(2).

6. Library Records

Statutory Provision: Any library record, the primary purpose of which is to maintain control of library materials, or to gain access to information, that discloses or could be used to disclose the identity of a library user is exempt from disclosure under this chapter. RCW 42.56.310.

7. Educational Information

RCW 42.56.320 exempts from disclosure:

(1) Financial disclosures filed by private vocational schools under chapters 28B.85 and 28C.10 RCW;

(2) Financial and commercial information supplied by or on behalf of a person, firm, corporation, or entity under chapter 28B.95 RCW relating to the purchase or sale of tuition units and contracts for the purchase of multiple tuition units;

(3) Individually identifiable information received by the work force training and education coordinating board for research or evaluation purposes; and

(4) Except for public records as defined in RCW 40.14.040, any records or documents obtained by a state college, university, library, or archive through or concerning any gift, grant, conveyance, bequest, or devise, the terms of which restrict or regulate public access to those records or documents.

8. Public Utilities and Transportation

RCW 42.56.330 exempts from disclosure:

(1) Records filed with the utilities and transportation commission or attorney general under RCW 80.04.095 that a court has determined are confidential under RCW 80.04.095;

(2) The residential addresses and residential telephone numbers of the customers of a public utility contained in the records or lists held by the public utility of which they are customers, except that this information may be released to the division of child support or the agency or firm providing child support enforcement for another state under Title IV-D of the federal social security act, for the establishment, enforcement, or modification of a support order;

(3) The names, residential addresses, residential telephone numbers, and other individually identifiable records held by an agency in relation to a vanpool, carpool, or other ride-sharing program or service; however, these records may be disclosed to other persons who apply for ride-matching services and who need that information in order to identify potential riders or drivers with whom to share rides;

(4) The personally identifying information of current or former participants or applicants in a paratransit or other transit service operated for the benefit of persons with disabilities or elderly persons;

(5) The personally identifying information of persons who acquire and use transit passes and other fare payment media including, but not limited to, stored value smart cards and magnetic strip cards, except that an agency may disclose this information to a person, employer, educational institution, or other entity that is responsible, in whole or in part, for payment of the cost of acquiring or using a transit pass or other fare payment media, or to the news media when reporting on public transportation or public safety. This information may also be disclosed at the agency's discretion to governmental agencies or groups concerned with public transportation or public safety;

(6) Records of any person that belong to a public utility district or a municipally owned electrical utility, unless the law enforcement authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this subsection is inadmissible in any criminal proceeding;

This exemption only applies to a specific requester, namely, a law enforcement agency. It was passed in response to the decision in *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986), which limited the ability of law enforcement to engage in "fishing expeditions" through utility records while investigating marijuana growing operations. A telephone request is not sufficient. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Voluntary production of information about power consumption does not violate the statute. *State v. Maxfield*, 125 Wn.2d 378, 886 P.2d 123 (1994). See also *State v. Cole*, 128 Wn.2d 262, 906 P.2d 925 (1995).

(7) Any information obtained by governmental agencies that is collected by the use of a motor carrier intelligent transportation system or any comparable information equipment attached to a truck, tractor, or trailer; however, the information may be given to other governmental agencies or the owners of the truck, tractor, or trailer from which the information is obtained. As used in this subsection, "motor carrier" has the same definition as provided in RCW 81.80.010; and

(8) The personally identifying information of persons who acquire and use transponders or other technology to facilitate payment of tolls. This information may be disclosed in aggregate form as long as the data does not contain any personally identifying information. For these purposes aggregate data may include the census tract of the account holder as long as any individual personally identifying information is not released. Personally identifying information may be released to law enforcement agencies only for toll enforcement purposes. Personally identifying information may be released to law enforcement agencies for other purposes only if the request is accompanied by a court order.

9. Timeshare and Condominium Owners Lists

Statutory Provision: Membership lists or lists of members or owners of interests of units in timeshare projects, subdivisions, camping resorts, condominiums, land developments, or common-interest communities affiliated with such projects, regulated by the department of licensing, in the files or possession of the department are exempt from disclosure under this chapter. RCW 42.56.340.

10. Health Professionals

RCW 42.56.350 exempts from disclosure:

(1) The federal Social Security number of individuals governed under chapter 18.130 RCW maintained in the files of the department of health is exempt from disclosure under this chapter. The exemption in this section does not apply to requests made directly to the department from federal, state, and local agencies of government, and national and state licensing, credentialing, investigatory, disciplinary, and examination organizations.

(2) The current residential address and current residential telephone number of a health care provider governed under chapter 18.130 RCW maintained in the files of the department are exempt from disclosure under this chapter, if the provider requests that this information be withheld from public inspection and copying, and provides to the department of health an

accurate alternate or business address and business telephone number. The current residential address and residential telephone number of a health care provider governed under RCW 18.130.040 maintained in the files of the department of health shall automatically be withheld from public inspection and copying unless the provider specifically requests the information be released, and except as provided for under RCW 42.56.070(9).

11. Health Care

RCW 42.56.360 provides:

(1) The following health care information is exempt from disclosure under this chapter:

(a) Information obtained by the board of pharmacy as provided in RCW 69.45.090;

(b) Information obtained by the board of pharmacy or the department of health and its representatives as provided in RCW 69.41.044, 69.41.280, and 18.64.420;

(c) Information and documents created specifically for, and collected and maintained by a quality improvement committee under RCW 43.70.510 or 70.41.200, or by a peer review committee under RCW 4.24.250, or by a quality assurance committee pursuant to RCW 74.42.640 or 18.20.390, and notifications or reports of adverse events or incidents made under RCW 70.56.020 or 70.56.040, regardless of which agency is in possession of the information and documents;

(d)(i) Proprietary financial and commercial information that the submitting entity, with review by the department of health, specifically identifies at the time it is submitted and that is provided to or obtained by the department of health in connection with an application for, or the supervision of, an antitrust exemption sought by the submitting entity under RCW 43.72.310; (ii) If a request for such information is received, the submitting entity must be notified of the request. Within ten business days of receipt of the notice, the submitting entity shall provide a written statement of the continuing need for confidentiality, which shall be provided to the requester. Upon receipt of such notice, the department of health shall continue to treat information designated under this subsection (1)(d) as exempt from disclosure; (iii) If the requester initiates an action to compel disclosure under this chapter, the submitting entity must be joined as a party to demonstrate the continuing need for confidentiality;

(e) Records of the entity obtained in an action under RCW 18.71.300 through 18.71.340;

(f) Except for published statistical compilations and reports relating to the infant mortality review studies that do not identify individual cases and sources of information, any records or documents obtained, prepared, or maintained by the local health department for the purposes of an infant mortality review conducted by the department of health under RCW 70.05.170; and

(g) Complaints filed under chapter 18.130 RCW after July 27, 1997, to the extent provided in RCW 18.130.095(1).

(2) Chapter 70.02 RCW [Health Care Information Act] applies to public inspection and copying of health care information of patients.

The exemption of health care information is addressed in detail in Chapter 14, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws*. The disclosure of these highly personal records when held by public agencies is governed by the state Health Care Information Act, which mirrors and meshes with the federal Privacy Rule, 45 CFR 160 – 164, adopted by authority of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC §1320d.

12. Domestic Violence and Rape Crisis Centers

Statutory Provision: Client records maintained by an agency that is a domestic violence program as defined in RCW 70.123.020 or 70.123.075 or a rape crisis center as defined in RCW 70.125.030 are exempt from disclosure under this chapter. RCW 42.56.370.

See also the address confidentiality program at the office of the Secretary of State under RCW 40.24.070 and the protection of this information in marriage licenses under RCW 26.04.175;

13. Agriculture and Livestock

RCW 42.56.380 exempts from disclosure:

(1) Business-related information under RCW 15.86.110;

(2) Information provided under RCW 15.54.362;

(3) Production or sales records required to determine assessment levels and actual assessment payments to commodity boards and commissions formed under chapters 15.24, 15.26, 15.28, 15.44, 15.65, 15.66, 15.74, 15.88, 15.100, 15.89, and 16.67 RCW or required by the department of agriculture to administer these chapters or the department's programs;

(4) Consignment information contained on phytosanitary certificates issued by the department of agriculture under chapters 15.13, 15.49, and 15.17 RCW or federal phytosanitary certificates issued under 7 C.F.R. 353 through cooperative agreements with the animal and plant health inspection service, United States department of agriculture, or on applications for phytosanitary certification required by the department of agriculture;

(5) Financial and commercial information and records supplied by persons (a) to the department of agriculture for the purpose of conducting a referendum for the potential establishment of a commodity board or commission; or (b) to the department of agriculture or commodity boards or commissions formed under chapters 15.24, 15.26, 15.28, 15.44, 15.65, 15.66, 15.74, 15.88, 15.100, 15.89, or 16.67 RCW with respect to domestic or export marketing activities or individual producer's production information;

(6) Except under RCW 15.19.080, information obtained regarding the purchases, sales, or production of an individual American ginseng grower or dealer;

(7) Information that can be identified to a particular business and that is collected under section 3(1), chapter 235, Laws of 2002;

(8) Financial statements provided under RCW 16.65.030(1)(d);

(9) Information submitted by an individual or business for the purpose of participating in a state or national animal identification system. Disclosure to local, state, and federal officials is not public disclosure. This exemption does not affect the disclosure of information used in reportable animal health investigations under chapter 16.36 RCW once they are complete; and

(10) Results of testing for animal diseases not required to be reported under chapter 16.36 RCW that is done at the request of the animal owner or his or her designee that can be identified to a particular business or individual.

In addition, RCW 42.56.610 [link](#) provides:

The following information in plans, records, and reports obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations, not required to apply for a national pollutant discharge elimination system permit is disclosable only in ranges that provide meaningful information to the public while ensuring confidentiality of business information regarding: (1) Number of animals; (2) volume of livestock nutrients generated; (3) number of acres covered by the plan or used for land application of livestock nutrients; (4) livestock nutrients transferred to other persons; and (5) crop yields. The department of agriculture shall adopt rules to implement this section in consultation with affected state and local agencies.

14. Emergency or Transitional Housing

Statutory Provision: Names of individuals residing in emergency or transitional housing that are furnished to the department of revenue or a county assessor in order to substantiate a claim for property tax exemption under RCW 84.36.043 are exempt from disclosure under this chapter. RCW 42.56.390.

15. Insurance and Financial Institutions

RCW 42.56.400 exempts from disclosure:

(1) Records maintained by the board of industrial insurance appeals that are related to appeals of crime victims' compensation claims filed with the board under RCW 7.68.110;

(2) Information obtained and exempted or withheld from public inspection by the health care authority under RCW 41.05.026, whether retained by the authority, transferred to another state purchased health care program by the authority, or transferred by the authority to a technical review committee created to facilitate the development, acquisition, or implementation of state purchased health care under chapter 41.05 RCW;

(3) The names and individual identification data of all viators regulated by the insurance commissioner under chapter 48.102 RCW;

(4) Information provided under RCW 48.30A.045 through 48.30A.060;

(5) Information provided under RCW 48.05.510 through 48.05.535, 48.43.200 through 48.43.225, 48.44.530 through 48.44.555, and 48.46.600 through 48.46.625;

(6) Information gathered under chapter 19.85 RCW or RCW 34.05.328 that can be identified to a particular business;

(7) Examination reports and information obtained by the department of financial institutions from banks under RCW 30.04.075, from savings banks under RCW 32.04.220, from savings and loan associations under RCW 33.04.110, from credit unions under RCW 31.12.565, from check cashers and sellers under RCW 31.45.030(3), and from securities brokers and investment advisers under RCW 21.20.100, all of which is confidential and privileged information;

(8) Information provided to the insurance commissioner under RCW 48.110.040(3);

(9) Documents, materials, or information obtained by the insurance commissioner under RCW 48.02.065, all of which are confidential and privileged;

(10) Confidential proprietary and trade secret information provided to the commissioner under RCW 48.31C.020 through 48.31C.050 and 48.31C.070;

(11) Data filed under RCW 48.140.020, 48.140.030, 48.140.050, and 7.70.140 that, alone or in combination with any other data, may reveal the identity of a claimant, health care provider, health care facility, insuring entity, or self-insurer involved in a particular claim or a collection of claims. For the purposes of this subsection: (a) "Claimant" has the same meaning as in RCW 48.140.010(2). (b) "Health care facility" has the same meaning as in RCW 48.140.010(6). (c) "Health care provider" has the same meaning as in RCW 48.140.010(7). (d) "Insuring entity" has the same meaning as in RCW 48.140.010(8). (e) "Self-insurer" has the same meaning as in RCW 48.140.010(11); and

(12) Documents, materials, or information obtained by the insurance commissioner under RCW 48.135.060.

16. Employment Security Department Records

Statutory Provisions: Any information or records concerning an individual or employing unit obtained by the department of employment security pursuant to the administration of [Title 50 RCW] or other programs for which the department has responsibility shall be private and confidential, except as otherwise provided in this chapter. This chapter does not create a rule of evidence. Information or records may be released by the department of employment security when the release is: (1) Required by the federal government in connection with, or as a condition of funding for, a program being administered by the department; or (2) Requested by a county clerk for the purposes of RCW 9.94A.760. The provisions of RCW 50.13.060 (1) (a), (b) and (c) will not apply to such release. RCW 50.13.020.

Records maintained by the employment security department and subject to chapter 50.13 RCW if provided to another individual or organization for operational, research, or evaluation purposes are exempt from disclosure under this chapter. RCW 42.56.410.

17. Security and Terrorism

RCW 42.56.420 exempts from disclosure:

(1) Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that

manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of: (a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans; and (b) Records not subject to public disclosure under federal law that are shared by federal or international agencies, and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism;

(2) Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans at a city, county, or state adult or juvenile correctional facility, the public disclosure of which would have a substantial likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility or any individual's safety;

(3) Information compiled by school districts or schools in the development of their comprehensive safe school plans under RCW 28A.320.125, to the extent that they identify specific vulnerabilities of school districts and each individual school;

(4) Information regarding the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities; and

(5) The security section of transportation system safety and security program plans required under RCW 35.21.228, 35A.21.300, 36.01.210, 36.57.120, 36.57A.170, and 81.112.180.

18. Fish and Wildlife

RCW 42.56.430 exempts from disclosure:

(1) Commercial fishing catch data from logbooks required to be provided to the department of fish and wildlife under RCW 77.12.047, when the data identifies specific catch location, timing, or methodology and the release of which would result in unfair competitive disadvantage to the commercial fisher providing the catch data, however, this information may be released to government agencies concerned with the management of fish and wildlife resources;

(2) Sensitive wildlife data obtained by the department of fish and wildlife, however, sensitive wildlife data may be released to government agencies concerned with the management of fish and wildlife resources. As used in this subsection, sensitive wildlife data includes: (a) The nesting sites or specific locations of endangered species designated under RCW 77.12.020, or threatened or sensitive species classified by rule of the department of fish and wildlife; (b) Radio frequencies used in, or locational data generated by, telemetry studies; or (c) Other location data that could compromise the viability of a specific fish or wildlife population, and where at least one of the following criteria are met: (i) The species has a known commercial or black market value; (ii) There is a history of malicious take of that species; or (iii) There is a known demand to visit, take, or disturb, and the species behavior or ecology renders it especially vulnerable or the species has an extremely limited distribution and concentration; and

(3) The personally identifying information of persons who acquire recreational licenses under RCW 77.32.010 or commercial licenses under chapter 77.65 or 77.70 RCW, except name, address of contact used by the department, and type of license, endorsement, or tag; however, the department of fish and wildlife may disclose personally identifying information to: (a) Government agencies concerned with the management of fish and wildlife resources; (b) The department of social and health services, child support division, and to the department of licensing in order to implement RCW 77.32.014 and 46.20.291; and (c) Law enforcement agencies for the purpose of firearm possession enforcement under RCW 9.41.040.

19. Veterans' Discharge Papers

See RCW 42.56.440.

20. Check Cashers and Sellers Licensing Applications

Statutory Provision: Information in an application for licensing or a small loan endorsement under chapter 31.45 RCW regarding the personal residential address, telephone number of the applicant, or financial statement is exempt from disclosure under this chapter. RCW 42.56.450.

21. Fireworks

Statutory Provision: All records obtained and all reports produced as required by state fireworks law, chapter 70.77 RCW, are exempt from disclosure under this chapter. RCW 42.56.460.

22. Correctional Industry Workers

Statutory Provision: All records, documents, data, and other materials obtained under the requirements of RCW 72.09.115 from an existing correctional industries class I work program participant or an applicant for a proposed new or expanded class I correctional industries work program are exempt from public disclosure under this chapter. RCW 42.56.470.

23. Mediation Communications

Statutory Provision: Records of mediation communications that are privileged under chapter 7.07 RCW are exempt from disclosure under this chapter. RCW 42.56.600.

RCW 7.07.070 states that mediation communications are confidential as agreed by the parties or as covered by other laws.

2.3 "Other Statutes" (Laws Outside the Public Records Providing Exemptions from Disclosure)

The PRA provides that an agency can refuse inspection and copying of public records based on exemptions found either in Chapter 42.56 RCW or in an "other statute which exempts or prohibits disclosure of specific information or records." Thus, if another statute: (1) does not conflict with the Act; and (2) either exempts or prohibits disclosure of specific public records in their entirety; then (3) the information may be withheld despite the redaction requirements in RCW 42.56.210(1). *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994). The "other statutes" exception applies only to those exemptions explicitly identified in other statutes; it does not allow a court "to imply exemptions but only allows specific exemptions to stand." *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990) (cited in *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 W.2d. at 261-62).

For a comprehensive list of all "other statute" exemptions, see Chapter 12, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) (available for purchase)

A. Criminal Records Privacy Act (Chapter 10.97 RCW)

This act deals with disclosure of "criminal history record information," which is defined as information contained in records collected on individuals by criminal justice agencies, other than courts. These documents include identifiable descriptions and records of arrests, detentions, indictments, and criminal charges, and any dispositions, including sentences, correctional supervision, and release. "Criminal history record information" is divided into "conviction data," which may be disseminated freely, and "nonconviction data," which may be disclosed to other criminal justice agencies; to implement a statute, ordinance, executive order, or court rule; to those under contract with a criminal justice agency to provide services related to the administration of criminal justice; or for research with an agreement limiting the use of the data. Investigative information does not fall within the definition of "criminal history record information." Release of police investigative information is covered by the PRA. See RCW 42.56.240(1) and Section 2.2B (above).

B. Records of a Juvenile Justice or Care Agency and Other Specific Juvenile Records (Chapter 13.50 RCW)

See *Deer v. Dep't of Social & Health Servs.*, 122 Wn. App. 84, 93 P.3d 195 (2004). That decision describes the relationship between the PRA and these "other statute" exemptions, and holds that these records meet the definition of public records under the PRA. The court also found that these statutes supplement the PRA unless they conflict and that the process set by these statutes is the "exclusive means" of obtaining these records. Parties denied access to these records must follow these statutes to challenge the denial.

C. Dissolution of Marriage and Child Support

(RCW 26.09.255, 26.10.150, 26.12.170, 26.23.120, 26.26.041, 26.26.450)

D. Adoption (Chapter 26.33 RCW)

These records are confidential. Information that does not identify the parties can be provided to others involved in the process. A confidential intermediary may be appointed by the court to determine if the identity can be revealed if requested.

E. Uniform Health Care Information Act (Chapter 70.02 RCW)

This act governs the disclosure of medical records. Of particular interest is RCW 70.02.060, which controls the disclosure of health care information through discovery. The attorney seeking discovery of health care information must give the health care provider and the patient or his or her attorney at least fourteen days notice before service of a discovery request or compulsory process. The act is addressed in detail in Chapter 14, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws*. That chapter also covers laws applying to the following specially protected types of health information:

1. **Mental Health Records (RCW 71.05.390 – 420)**
2. **Mental Health Records of Juveniles (RCW 71.34.200)**
3. **HIV/STD Information (RCW 70.24.105)**
4. **Alcohol and Drug Treatment Records (RCW 70.96A.150, 42 C.F.R. Part 2)**

F. Sex Offenders Community Protection Act (RCW 4.24.550)

G. Jail Records (RCW 70.48.100)

H. Autopsy Reports (RCW 68.50.105)

I. Traffic Accident Reports (RCW 46.52.080)

J. Communications Made to a Public Officer in Official Confidence, When the Public Interest Would Suffer by Disclosure (RCW 5.60.060(5))

Chapter 3

OPEN PUBLIC MEETINGS ACT – GENERAL AND PROCEDURAL PROVISIONS

Last revised: January 2007 - Currently under review; updates forthcoming

3.1 Introduction and Other Resources

The Open Public Meetings Act ("OPMA"), chapter 42.30 RCW was passed by the legislature in 1971 as a part of a nationwide effort to make government affairs more accessible and, in theory, more responsive. It was modeled on a California law known as the "Brown Act" and a similar Florida statute. *See* Cal. Governmental Code 54950-61 and 11120 *et seq.*; Fla. Stat. 286.011 *et seq.*

While the Washington legislature has clarified some of its provisions, the OPMA is substantially unchanged. There has been relatively little litigation regarding its interpretation, with the result that many gray areas exist. Soon after its passage, the Attorney General issued a comprehensive opinion which continues to be a useful resource. *See* 1971 Att'y Gen. Op. No. 33. Other resources on the OPMA are Chapter 21, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws* (Greg Overstreet, ed.) (Wash. State Bar Assoc. 2006) ([available for purchase](#)) and the Municipal Research Service Center's [OPMA Frequently Asked Questions](#)

Together with the Public Records Act, chapter 42.56 RCW, the legislature has created important and powerful tools enabling the public to inform themselves about their government.

3.2 Interpretation of the OPMA

As with all laws, the courts will attempt to interpret the OPMA to accomplish the legislature's intent. The OPMA declares its purpose in a very strongly worded statement.

Statutory Provisions: The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which 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 retain control over the instruments they have created. RCW 42.30.010.

The purposes of [the OPMA] are hereby declared remedial and shall be liberally construed. RCW 42.30.010.

Exceptions to the openness requirements of the OPMA (such as the grounds for executive sessions) are narrowly construed. *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999).

3.3 What Entities Are Subject To The Act

A. "Public Agency"

The Open Public Meetings Act requires, in essence, that meetings of the governing body of a "public agency" are open to the public. RCW 42.30.030 [link](#)

Statutory Provision: "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; (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. RCW 42.30.020.

The OPMA does not apply to an entity simply because it receives public funds (such as grants or contracts). Instead, the Attorney General has suggested a four-part test to be used in determining whether an entity is a "public agency" and subject to the OPMA: "(1) whether the organization performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the organization was created by the government." [1991 Att'y Gen. Op. No. 5.](#)

B. "Governing Body"

Statutory provision: "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, conducts hearings, or takes testimony or public comment. RCW 42.30.020 (2).

Because the OPMA is directed to meetings of governing bodies, it does not apply to the activity of an agency which is governed by an individual. In *Salmon for All v. Department of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (1992), the court held that the Department of Fisheries was not subject to the OPMA because it was governed by an individual, the Director. Many state agencies are governed by individuals and, therefore, not subject to the OPMA such as Labor and Industries, Licensing, Social and Health Services, State Patrol, Employment Security, etc.

In 1983, the legislature amended the definition of governing body to include "any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment." Laws of 1983, ch. 155, §1. Since the definition uses the language, "a committee thereof," the implication is that some member of the governing body must be included in the committee.

Because a committee of a governing body is typically created by some sort of legislative act of the governing body, a committee may appear to be similar to a subagency, which is also created by legislative act. The difference under the OPMA between a "committee" and a "subagency" is that a committee does not possess policy or rule-making authority. This distinction between whether an entity is a subagency or a committee can be important as to the notice requirements for their meetings. All meetings of the governing body of a subagency are subject to the notice requirements of the OPMA; however, as discussed below, a dispute exists as to whether a committee is similarly required to give notice for all of its meetings when it is only at some of its meetings that it is acting so as to come within the definition of "governing body."

Although it may be clear when a committee is conducting hearings or taking public testimony or comment, it is not clear from the language of the OPMA when a committee "acts on behalf" of the governing body. A 1986 attorney general opinion concludes that a committee acts on behalf of the governing body "when it exercises actual or de facto decision-making authority for the governing body." [1986 Att'y Gen. Op. No. 16.](#) That opinion, citing the legislative history of the OPMA and its amendments, distinguished when a committee is exercising such authority from when it is simply providing advice or information to the governing body. Using that rationale, the question of whether notice under the OPMA is required would depend on the kind of activity to be conducted.

However, in *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001), the Ninth Circuit Court of Appeals found that a committee took public testimony and comment, held hearings, and acted on behalf of the governing body and therefore violated the Act when it failed to provide notice of all of its meetings. The court, however, did not

analyze the committee's activity at each of the meetings, but simply concluded that all the meetings required the statutory notice.

While an argument can be made that a committee may be required to give notice only for those meetings when it will be taking testimony or public comment or exercising decision-making authority for the governing body, it would be prudent for such committees to conduct all their business in open meetings.

Case example: *The seven-member city council is considering the purchase of public art. The council agrees that public input would assist the selection process. Some councilmembers believe that the creation of an arts commission that would adopt policies for the city's acquisition of public art would "get politics out of the world of art." Other councilmembers express concern that an arts commission will control too much of the process without significant council input. Three resolutions are drafted for council consideration:*

The first establishes a city arts commission and details the method of selecting the members, including three city councilmembers and two citizen members, who would serve specific terms. The commission is directed to establish policies for the selection and placement of public art in the city. Its recommended policies will be subject to city council approval. It is directed to obtain public input before the adoption of the recommended policies. As funding becomes available, it will make recommendations to the city council regarding the purchase of works of public art and their location in the city.

The second resolution establishes a public arts committee of the city council consisting of three members of the council. Five interested citizens will be asked to participate in its determination of worthy projects. The citizens would serve at the pleasure of the council. The public arts committee is directed to develop a list of citizens who have expressed interest in public art and to hold hearings seeking public comment regarding any recommendations that the committee might make to the full city council.

The third resolution recognizes the existence of a citizen's committee known as "Public Art Now!" that was formed by a councilmember. The committee would be authorized to use city's meeting rooms. The council would welcome the committee's advice regarding the selection and placement of public art and its recommendations would be considered at any public hearing when the council decided to purchase works of art. What would be the consequences under the OPMA of the adoption of each resolution?

Resolution: *The city arts commission is probably a "subagency" under the OPMA. It has been created by legislative act and its governing body is directed to develop policy for the city. As such, all of its meetings would be subject to the Act's requirements.*

The public arts committee is probably a "committee" of the governing body, the city council. It is not a separate entity. Since it will be obtaining public input, at least some of its meetings would be subject to the Act. However, it is advisable that it hold all its meetings in open session.

"Public Art Now" is not subject to the OPMA. The city council did not establish it or grant it any authority.

3.4 Meetings

A. What Is A "Meeting"

Statutory provisions: "Meeting" means meetings at which action is taken. RCW 42.30.020(4). No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. RCW 42.30.060(1).

It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: PROVIDED, That they take no action as defined in this chapter. RCW 42.30.070.

A meeting occurs whenever the governing body of a public agency takes "action" (the meaning of "action" is discussed below). If the required notice has not been given, the action taken is null and void, that is, as if it had never occurred. The OPMA expressly permits the members of the governing body to travel together or engage in other activity, such as attending social functions, so long as they do not take action.

An email exchange among members of a governing body in which an "action" takes place can be a "meeting" under the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 564, 27 P.3d 1208 (2001). (Whether a quorum is required is addressed below.) Since an email exchange among members of a governing body is not open to the public, such an exchange in which an "action" took place would violate the OPMA.

It is generally agreed that an agency may conduct its meeting where one of the members of the governing body attends by telephone and a speaker phone is available at the official location of the meeting so as to afford the public the opportunity to hear the member's input. This should occur only when a member is unable to travel to the meeting site and would not include "telephone trees" where the members repeatedly call each other to form a majority decision.

A quorum of members of a governing body may attend a meeting of another organization's provided that the body takes no "action" (defined below). 2006 Att'y Gen. Op. No. 6. For example, a majority of a city council could attend a meeting of a regional chamber of commerce or a county commission meeting provided that the council members did not discuss city business or do anything else that constitutes an "action."

B. What Is "Action"

Statutory provision: "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. RCW 42.30.020(3).

It is important to realize that the OPMA provides that a meeting occurs whenever there is action, including the discussion, deliberation or evaluation that may lead to a final decision. That is, it is the "action" (discussion, etc.) that determines whether a "meeting" has taken place, not whether a "meeting" in the everyday sense of the term (such a gathering of people at City Hall) has taken place. *Eugster v. Spokane*, 110 Wn. App. 212, 225, 39 P.3d 380, *review denied*, 147 Wn.2d 1021 (2002).

The notice requirements of the OPMA are not limited to meetings at which a final official vote is taken, which is intended to authorize or memorialize the policy of the governing body. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), *review denied*, 121 Wn.2d 1011 (1993). That is "final action" under the OPMA and is important for deciding what decisions can be made during an executive session. "Final action" refers to the final vote by the governing body on the matter. One court held that a decision by fire district commissioners to terminate a fire chief was not final action because it was not a decision upon a motion, proposal, resolution, order or ordinance. *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656, *review denied*, 110 Wn.2d 1031 (1988). However, in 1989 the legislature amended the statute to require such action to be taken in an open public meeting. See RCW 42.30.110 (1)(g).

A meeting occurs if a quorum (that is, a majority) of the members of the governing body were to discuss or consider, for instance, the budget, personnel, or land use issues no matter where that discussion or consideration might occur. What about if less than a quorum is present? Several cases hold that the OPMA is only triggered by a quorum of the governing body, so the "action" of less than a quorum is not subject to the OPMA. See, e.g., *Eugster v. City of Spokane*, 128 Wn. App. 1, 8, 114 P.3d 1200 (2005). Others argue that the legislative history of the OPMA indicates that the statute formerly required a quorum for an "action" but was amended to apply to an action with less than a quorum. Laws of 1985, ch. 366, § 1(3).

The OPMA does not allow for "study sessions", "retreats", or similar efforts to discuss agency issues without the required notice. Notice must be given just as if a formally scheduled meeting was to be held. In one case, the court held that it was not "action" for members of the governing body to individually review material in advance of a meeting at which a public contract was awarded. *Equitable Shipyards, Inc. v. State of Wash.*, 93 Wn.2d 465, 611 P.2d 396 (1980).

Case example: *The five member School Board attend the annual convention of the State School Association. Over dinner, three members discuss some of the ideas presented during the convention, but refrain from any conversation about how they might apply them to the school district. All five travel together to and from the convention and the only discussion is over whether they are lost.*

Resolution: *No violation occurred but the board members must be careful. The example is offered to highlight the level of awareness members of a governing body must have. It is not unusual for such situations to arise. For instance, the dinner discussion was between a majority of the members so a discussion about school district business would have been "action" and, without the required notice, would be in violation of the OPMA.*

C. Secret Votes Prohibited

Statutory provision: No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter. RCW 42.30.060(2).

"Secret" votes are prohibited and any votes taken in violation of the OPMA are null and void. Presumably, the members of the governing body are required to publicly announce their vote at the time it is taken, and that vote would be recorded in the minutes of the meeting for future reference.

D. Kinds of Meetings Not Covered by the OPMA

The OPMA excludes from its coverage:

(1) The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a member of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or

(2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or

(3) Matters governed by chapter 34.05 RCW, the Administrative Procedure Act; or

(4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress. RCW 42.30.140.

The OPMA provides that certain activities that would otherwise be meetings are exempt from its notice requirements. When an agency engages in those activities, it is not required to comply with the OPMA, although other public notice requirements may apply. *Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994). Generally, this provision applies to activities that already require public notice, such as quasi-judicial matters or hearings governed by the Administrative Procedure Act (chapter 34.05 RCW). Quasi-judicial matters are those where the governing body is required to determine the rights of individuals based on legal principles. The court has held that a decision by a school board to not renew teacher's contracts is quasi-judicial in nature and can properly be discussed outside of public view. *Pierce v. Lake Stevens School Dist. No. 4*, 84 Wn.2d 772, 529 P.2d 810 (1974).

The courts have employed a four-part test to determine whether administrative action is quasi-judicial: (1) Whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), review denied, 121 Wn.2d 1011 (1993); *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220, review denied, 98 Wn.2d 1008 (1982).

Case example: *During a break in the regular meeting, the Council gets together in the chambers to decide what they should do with regard to the union's latest offer. They authorize the negotiator to accept the offer on wages if the union will accept the seniority amendments. When they return to the meeting, nothing is said about the discussion or decision.*

Resolution: *The Act specifically exempts the discussion and decision about the collective bargaining strategy or position from its requirements. Since it was exempt, the discussion could have occurred at any time or place. It was unnecessary to announce the fact that the discussion took place.*

The OPMA is not a basis for withholding public records. See *Am. Civil Liberties Union v. City of Seattle*, 121 Wn. App. 544, 555, 89 P.3d 295 (2004). Therefore, even though collective bargaining matters can be discussed in a closed session, this is not a basis for withholding public records relating to that topic.

E. Who May Attend Public Meetings and Recording Meetings, and Disorderly Conduct at Meetings

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

The OPMA provides that any member of the public may attend the meetings of the governing body of a public agency. The agency may not require people to sign in, complete questionnaires or establish other conditions to attendance. For instance, an agency could not limit attendance to those persons subject to its jurisdiction. The OPMA does not address whether an agency is required to hold its meeting at a location that would permit every person to attend. However, it seems clear that the courts would discourage any attempt to deliberately schedule a meeting at a location that was too small to permit full attendance or that was locked. RCW 42.30.050.

A person may record a meeting (audio or video) provided that it does not disrupt the meeting. 1998 Att'y Gen. Op. No.15. A stationary audio or video recording device would not disrupt the meeting.

Statutory provision: In the event that any meeting is interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are interrupting the meeting, the members of the governing body conducting the meeting may 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. In such a session, final disposition may be taken only on matters appearing on the agenda.

Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the governing body from establishing a procedure for readmitting an individual or individuals not responsible for disturbing the orderly conduct of the meeting. RCW 42.30.050.

If those in attendance are disruptive and make further conduct of the meeting unfeasible, those creating the disruption may be removed. *In re Recall of Kast*, 144 W.2d 807, 817, 31 P.3d. 677 (2001). Or the meeting may be adjourned to another place; however, members of the media are entitled to attend the adjourned meeting and the governing body is limited to act only on those matters on the agenda.

Case example: *The Board schedules a special meeting to discuss a controversial policy question. It becomes obvious that the regular meeting room is too small for all of those trying to attend the meeting. The Board announces that the meeting will be adjourned to an auditorium in the same building. The chair announces that those who wish to speak should sign in on the sheet on the table. She states that given the available time, speakers will be limited to 10 minutes each. At one point, the meeting is adjourned to remove an apparently intoxicated person who had been interrupting the comments of speakers.*

Resolution: *While the OPMA allows the public to attend all meetings, it does not allow for the possibility of insufficient space. Presumably, if a nearby location is available, the governing body should move there to allow attendance. The chair can require those who wish to speak (but not all attendees) to sign in. The sign-in requirement for speaking does not restrict attendance, only participation. Since the OPMA does not require the governing body to allow public participation, the time for each speaker can also be limited. The governing body can maintain order by removing those who are disruptive.*

G. Right to Speak at Meetings

The OPMA does not require a governing body to allow everyone to speak at a public meeting. A governing body has significant authority to limit the time of speakers to a uniform amount (such as three minutes) or to not allow anyone to speak. Other laws might require the governing body to allow the public to speak at a public meeting, but the OPMA does not.

F. Minutes of Meetings

Under a statute outside the OPMA, RCW 42.32.010, agencies must maintain minutes of their meetings and make them available upon request. The law does not specify the format or content of the required minutes. In order to satisfy the need to memorialize certain actions such as the adoption of a budget, the minutes should, at a minimum, recite the significant actions of the agency. Many agencies maintain audio recordings of the open portions of their public meetings (that is, the portions not conducted in executive session).

3.5 Required Notice of Public Meetings

The notice requirements of the OPMA are divided into notice of regular meetings (such as the third Tuesday of every month) and special meetings (meeting to address special occurrences).

A. Regular Meetings

Statutory provisions: State agencies which hold regular meetings shall file with the code reviser a schedule of the time and place of such meetings on or before January of each year for publication in the Washington state register. Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date. For the purposes of this section "regular" meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule. RCW 42.30.075.

The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body. Unless otherwise provided for in the act under which the public agency was formed, meetings of the governing body need not be held within the boundaries of the territory over which the public agency exercises jurisdiction. If at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day. RCW 42.30.070.

The OPMA requires agencies to identify the time and place they will hold their regular meetings, that is, "recurring meetings held in accordance with a periodic schedule declared by statute or rule." State agencies subject to the OPMA must publish their schedule in the Washington State Register, while local agencies (such as cities and counties) must adopt the schedule "by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body." Although an agency is not required to meet inside the boundaries of its jurisdiction, there is general agreement that agencies should not schedule meetings at locations that effectively exclude the public. Other statutes may require certain entities to hold their meetings at particular locations, such as RCW 36.32.080, which requires a board of county commissioners to hold regular meetings at the county seat.

The OPMA does not require an agency to notify the public of anything other than the time and place that it will hold its regular meetings. That is, the OPMA does not require an agency to provide an agenda of a regular meeting. *Hartman v. Washington State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975); *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 650 P.2d 220 (1982), *review denied*, 98 Wn.2d 1008 (1982). However, other laws may require additional notice or an agenda in specific circumstances. *See, e.g.*, RCW 35.23.221, RCW 35A.12.160. No agenda or other description of the business to be transacted is required by the OPMA for regular meetings.

B. Special Meetings

Statutory provision: A special meeting may be called at any time by the presiding officer of the governing body of a public agency or by a majority of the members of the governing body by delivering written notice personally, by mail, by fax, or by electronic mail to each member of the governing body; and to each local newspaper of general circulation and to each local radio or television station which has on file with the governing body a written request to be notified of such special meeting or of all special meetings. Such notice must be delivered personally, by mail, by fax, or by electronic mail at least twenty-four hours before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the governing body a written waiver of notice. Such waiver may be given by telegram, by fax, or electronic mail.

Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. The notices provided in this section may be dispensed with in the event 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. RCW 42.30.080.

Whenever an agency has a meeting at a time other than a scheduled regular meeting, it is conducting a "special meeting." For each special meeting, the OPMA requires at least 24 hours' written notice to the members of the governing body and media representatives who have filed a written request for notices of special meetings. Notice by fax or e-mail is allowed. The OPMA does not provide any guidance as to whether the media's written request

for notice must be renewed; it is advisable, however, to periodically renew such requests to insure that they contain the proper contact information for the notice and have not been misplaced or inadvertently overlooked due to changes in agency personnel.

The notice of a special meeting must specify the time and place of the meeting and "the business to be transacted," which would normally be an agenda. At a special meeting, final disposition by the agency is limited to the matters identified as the business to be conducted in the notice. There is disagreement as to whether the governing body could discuss, but not finally dispose of, matters not included in the notice of the special meeting.

A member of the governing body may waive the required notice by filing a written waiver or simply appearing at the special meeting. *Estey v. Dempsey*, 104 Wn.2d 597, 707 P.2d 1338 (1985). The failure to provide notice to a member of the governing body can only be asserted by the person who should have received the notice, not by any person affected by action at the meeting. *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 630 P.2d 930 (1981).

Case example: *The superintendent of the school district announced her retirement. The five-member school board passed a motion at its regular meeting to direct the staff to announce the vacancy, seek applicants, screen them and select the three most qualified candidates for presentation to the board for their final selection. The three candidates were identified together with a description of their qualifications. The letter was released to the public and the local newspaper. Controversy arose over which of the candidates was most qualified.*

At the next regular meeting, the board decided to schedule a special meeting the following week to consider the three candidates, receive public comment and select the new superintendent. No particular agenda was created. The newspaper published the various points of view and the stories described the time and place of the special meeting. The entire board attended the special meeting. No other notice was given.

Resolution: *The notice of the meeting was sufficient, unless the media had filed a written request for notice of special meetings. The only notice required of a special meeting is to the members of the governing body and only the members of the governing body may raise the lack of that notice. Here, the members of the governing body all attended the meeting, waiving any objection to the lack of notice. The media is only entitled to notice if the written request is filed.*

C. No Other Notices Required

It is notable that the above regular and special meetings notice requirements are the only meeting notice requirements in the OPMA. With the exception of the media's request for notice of a special meeting, there is no requirement to provide notice to the local media of regular or special meetings, unless the required written request for notice has been filed. Nor are agencies required to publish information through the media or to post notice at public locations. However, local jurisdictions may adopt additional notice requirements according to their own rules of procedure, or other laws may require notice.

D. No Notice Is Required For Emergency Meetings

The OPMA provides that no notice is required for an emergency meeting such as when the jurisdiction has suffered a natural disaster or similar emergency:

Statutory provision: If, by 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. RCW 42.30.070.

The courts have found that the agency must be confronted with a true emergency that requires immediate action, such as a natural disaster. It has been held that a strike by teachers did not justify an "emergency" meeting by the school board. *Mead School Dist. No. 354 v. Mead Education Ass'n*, 85 Wn.2d. 140, 530 P.2d 302 (1975). It is advisable for the agency to provide special-meeting notice of the emergency meeting if possible.

3.6 Remedies For Violations

There are both public-relations and legal consequences from an OPMA violation. The loss of credibility suffered by an agency as a result of a judicial finding of an OPMA violation—or even the mere filing of an OPMA suit—may be the most severe consequence. Once damaged, that credibility can be very difficult to regain and can negatively affect every other action of the agency in the public's eyes. Most agencies are governed by elected officials, and actual or perceived attempts to hold secret meetings are not popular with voters.

The legal consequences can be severe. First, any action taken in violation of the OPMA is void.

Statutory Provision: (1) No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection shall be null and void. (2) No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void, and shall be considered an "action" under this chapter. RCW 42.30.060.

If an agency violates the OPMA and its action is null and void, it must retrace its steps by taking the action in accordance with the OPMA, which usually means re-discussing and re-voting on the matter in an open meeting. See *Henry v. Town of Oakville*, 30 Wn. App. 240, 246, 633 P.2d 892 (1981), *review denied*, 96 Wn.2d 1027 (1982); *Feature Realty v. City of Spokane*, 331 F.3d 1082, 1091 (9th Cir. 2003) (agency re-tracing of steps must be done in public). If a person seeks to void an election based upon a violation of the OPMA, the lawsuit must be initiated as soon as possible or the court may bar that relief based on the delay in filing. *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978).

Second, the OPMA provides for financial penalties.

Statutory provision: (1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense. (2) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause. RCW 42.30.120.

A member of the governing body is personally liable for the \$100 penalty only if he or she is aware that the meeting is in violation of the OPMA. *Eugster v. Spokane*, 110 Wn. App. 212, 226, 39 P.3d 380 (2002). The court must award attorney fees to a successful party. If the court finds that the lawsuit against the agency is frivolous, which is a very difficult burden for the agency to prove, the agency may recover its attorney fees and expenses. The only statutory remedy is an action filed in superior court. No agency has the authority to sanction violations or to issue regulations interpreting the "gray areas" of the OPMA.

Chapter 4

OPEN PUBLIC MEETINGS ACT – EXECUTIVE SESSIONS (CLOSED SESSIONS)

Last revised: January 2007 - Currently under review; updates forthcoming

4.1 Executive Sessions Allowed For Specific Topics

Statutory Provision: Nothing contained in [the OPMA] may be construed to prevent a governing body from holding an executive session during a regular or special meeting. RCW 42.30.110(1).

"Executive session" is not expressly defined in the OPMA, but the term is commonly understood to mean that part of a regular or special meeting of the governing body that is closed to the public. A governing body may hold an executive session only for specified purposes, which are identified in RCW 42.30.110(1)(a)-(m), and only during a regular or special meeting. Nothing, however, prevents a governing body from holding a meeting, which complies with the OPMA's procedural requirements, for the sole purpose of having an executive session.

Attendance at an executive session need not be limited to the members of the governing body. Persons other than the members of the governing body may attend the executive session at the invitation of that body. Those invited should have some relationship to the matter being addressed in the closed session, or they should be in attendance to otherwise provide assistance to the governing body. For example, staff of the governing body or of the governmental entity may be needed to present information or to take notes or minutes. However, minutes are not required to be taken at an executive session. See RCW 42.32.030.

Because an executive session is an exception to the OPMA's overall provisions requiring open meetings, a court will narrowly construe the grounds for an executive session in favor of requiring an open meeting. *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999).

4.2 Procedures For Holding An Executive Session

Statutory Provision: Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer. RCW 42.30.110(2).

The announcement by the presiding officer of the executive session must state two things: (1) the purpose of the executive session, and (2) the time when the executive session will end. The announcement is to be given to those in attendance at the meeting.

The announced purpose of the executive session must be one of the statutorily-identified purposes for which an executive session may be held. The announcement therefore must contain enough detail to identify the purpose as falling within one of those identified in RCW 42.30.110(1). It would not be sufficient, for example, for a mayor to declare simply that the council will now meet in executive session to discuss "personnel matters." See Municipal Research Service Center - OPMA Frequently Asked Questions, No. 15. Discussion of personnel matters, in general, is not an authorized purpose for holding an executive session; only certain specific issues relating to personnel may be addressed in executive session. See RCW 42.30.110(1)(f), (g).

Another issue that may arise concerning these procedural requirements for holding an executive session involves the estimated length of the session. If the governing body concludes the executive session *before* the time that was stated it would conclude, it should not reconvene in open session until the time stated. Otherwise, the public may, in effect, be excluded from that part of the open meeting that occurs between the close of the executive session and the time when the presiding officer announced the executive session would conclude.

If the executive session is not over at the stated time, it may be extended only if the presiding officer announces to the public at the meeting place that it will be extended to a stated time.

Case Example: *Three members of a five-member school board meet privately, without calling a meeting, to exchange opinions of candidates for the school superintendent position. They justify this private meeting on the ground that the board may meet in executive session to discuss the qualifications of applicants for the superintendent position, under RCW 42.30.110(1)(g). Have these school board members complied with RCW 42.30.110?*

Resolution: *Clearly, they have not. Although a governing body may discuss certain matters in closed session under this statute, that closed session must occur during an open regular or special meeting and it may be commenced only by following the procedures in RCW 42.30.110(2). The public must know the board is meeting in executive session and why. Although, as discussed above [link to part in Ch. 3 called something like "Meetings Not Covered by the OPMA"](#), some matters are not subject to the Open Public Meetings Act under RCW 42.30.140; however, the above example is not one of them.*

4.3 Grounds For Holding An Executive Session

An executive session may be held only for one of the purposes identified in RCW 42.30.110(1), as follows:

(a) To consider matters affecting national security;

After September 11, 2001, state and local agencies have an increased role in national security. Therefore discussions by agency governing bodies of security matters relating to possible terrorist activity should come within the scope of this executive session provision.

The Washington National Guard is headed by an adjutant general appointed by the governor; there is no governing body of the National Guard to which the OPMA applies. See chapter 38.12 RCW.

(b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;

This provision has two elements: (1) the governing body must be considering either selecting real property for purchase or lease or it must be considering purchasing or leasing specific property; and (2) public knowledge of the governing body's consideration would likely cause an increase in the price of the real property.

For the purposes of RCW 42.30.110(1), the consideration of the purchase of real property can involve condemnation of the property, including the amount of compensation to be offered for the property. *Port of Seattle v. Rio*, 16 Wn. App. 718, 724, 559 P.2d 18 (1977).

However, it remains unclear exactly what the scope is of "considering" the acquisition of real property. Since this subsection recognizes that the process of purchasing or leasing real property or selecting real property to purchase or lease may, in some circumstances, justify an executive session, it implies that the governing body may need to reach some consensus in closed session as to the price to be offered or the particular property to be selected. See *Port of Seattle*, 16 Wn. App. at 723-25.

However, the state Supreme Court in *Miller v. City of Tacoma*, 138 Wn.2d 318, 327, 979 P.2d 429 (1999), emphasized that "only the action explicitly specified by the exemption ["consider"] may take place in executive session." See also *Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1089 (9th Cir. 2003). Taken literally, this limitation would preclude a governing body in executive session from actually selecting a piece of property to acquire or setting a price at which the body would be willing to purchase property, because such action would be beyond the power to merely "consider." Yet, the purpose of an executive session under this subsection would be defeated if the governing body would be required to vote in open session to select the property or to decide how much it would be willing to pay for the property, where public knowledge of these matters would likely increase its price. This issue calls for judicial or legislative clarification.

(c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;

This subsection, the reverse of the previous one, also has two elements: (1) the governing body must be considering the minimum price at which real property belonging to the agency will be offered for sale or lease; and (2) public knowledge of the governing body's consideration will likely cause a decrease in the price of the property.

The second sentence of the subsection, concerning final action selling or leasing the property, may seem unnecessary, since all final actions must be taken in a meeting open to the public. However, its possible purpose may be to indicate that, although the decision to sell or lease the property must be in open session, the governing body may decide in executive session the minimum price at which it will do so. A contrary interpretation would defeat the purpose of this subsection. *But see Miller v. City of Tacoma*, 138 Wn.2d 318, 327, 979 P.2d 429 (1999) and discussion in [Section 4.3\(b\)](#) above.

Governing bodies should exercise caution when meeting in closed session under this and the preceding provision so that they are not doing so when there would be no likelihood of increased price if the matter were considered in open session.

(d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;

This subsection indicates that when a public agency and a contractor performing a publicly bid contract are negotiating concerning how the contract is being performed, the governing body may "review" those negotiations in executive session if public knowledge of the review would likely cause an increase in contract costs. Presumably, difficulties or disputes concerning contract performance have arisen in some contexts that require confidentiality to avoid increased costs where the nature of the difficulties or disputes would become public knowledge.

(e) To consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;

This provision applies to export trading companies that can be created by port districts under [chapter 53.31 RCW](#). Under [RCW 53.31.050](#), financial and commercial information supplied by private persons to an export trading company must be kept confidential.

(f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;

This subsection should be distinguished from subsection (g), discussed below, concerning reviewing the performance of a public employee in executive session. For purposes of meeting in executive session under provision (f), a charge or complaint must have been brought against a public officer or employee. The complaint or charge could come from within the agency or from the public. Bringing the complaint or charge triggers the

opportunity of the officer or employee to request that a public hearing or open meeting be held regarding the complaint or charge.

(g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;

There are two different purposes under this provision for which a governing body may meet in executive session. For both purposes, the references to "public employment" and to "public employee" include within their scope public offices and public officials, so that a governing body may evaluate in executive sessions persons who apply for appointive office positions, such as state university president or city manager, as well as for employee positions.

The first purpose involves evaluating the qualifications of applicants for public employment. This could include personal interviews with an applicant, discussions concerning an applicant's qualifications for a position, and discussions concerning salaries, wages, and other conditions of employment personal to the applicant. The authority to "evaluate" applicants in closed session allows a governing body to discuss the qualifications of applicants, not to choose which one to hire. Although the subsection expressly mandates that "final action hiring" an applicant for employment be taken in open session, this does not mean that the governing body may take preliminary votes that eliminate candidates from consideration. *Miller v. City of Tacoma*, 138 Wn.2d 318, 329-31, 979 P.2d 429 (1999).

The second part of this provision concerns reviewing the performance of a public employee. This provision would be used typically either where the governing body is considering a promotion or a salary or wage increase for an individual employee or where it may be considering disciplinary action based on an employee's performance. It should be distinguished from subsection (f), which concerns specific complaints or charges brought against an employee and which, at the request of the employee, must be discussed in open session.

The result of a governing body's closed session review of the performance of an employee may be that the body will take some action either beneficial or adverse to the officer or employee. That action, whether raising a salary or disciplining an officer or employee, must be made in open session.

When a discussion involves salaries, wages, or conditions of employment to be "generally applied" in the agency, it must take place in open session. However, if that discussion involves collective bargaining negotiations or strategies, it is not subject to the OPMA and may be held in closed session without being subject to the procedural requirements for an executive session in RCW 42.30.110(2). See RCW 42.30.140(4).

Case Example: *A city council meets in executive session to consider two applicants for the city manager position. During the discussion of the applicants' qualifications, particularly their past city manager experience, it becomes clear that a majority of the council members are not happy with the qualifications of either candidate. The discussion then turns to the search process and whether it was broad enough or sufficiently advertised to attract all interested and qualified candidates. A number of council members express dissatisfaction with the process and express a desire to begin the search for a city manager anew, with a more comprehensive search process. The council then closes the executive session and reconvenes the open session. A motion is made and a vote is taken to reject both of the candidates for the city manager position the council had evaluated in closed session. Then a second motion is made and approved to authorize city staff to develop a new search procedure that is broader and more extensively advertised than the original search. Did the council meet improperly in executive session?*

Resolution: *Yes and no. The council satisfied subsection (g) by discussing the merits of the two applicants. It did not vote on either of the applicants. The fact that it became clear from the individual council members' expressions of opinion that neither applicant was sufficiently qualified from the council's point of view does not allow any final action in closed session. The vote taken to reject both applicants took place in open session. However, the discussion concerning the search process should have taken place in open session, because it did not involve evaluating the qualifications of any applicant for the city manager position.*

(h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;

This provision applies when an elected governing body is filling a vacant position on that body. Examples of such bodies include a board of county commissioners, a city council, a school board, and the boards of special purpose districts, such as fire protection and water districts. Under this provision, an elected governing body may evaluate the qualifications for an applicant for a vacant position on that body in executive session. However, unlike when it is filling other positions, the governing body may interview an applicant for a vacancy in an elective office only in open session. As with all other appointments, the vote to fill the position must also be in open session.

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency. This subsection (1)(i) does not permit a governing body to hold an executive session solely because an attorney representing the agency is present. For purposes of this subsection (1)(i), "potential litigation" means matters protected by Attorney Rules of Professional Conduct 1.6 or RCW 5.60.060(2)(a) concerning:

(A) Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party; (B) Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or (C) Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency;

This provision for holding an executive session is based on the legislative recognition that the attorney-client privilege between a public agency governing body and its legal counsel can co-exist with the OPMA. See *Port of Seattle v. Rio*, 16 Wn. App. 718, 724-25, 559 P.2d 18 (1977); 1971 Att'y Gen. Op. No. 33, at 20-23. However, that privilege is not necessarily as broad as it may be between a private party and legal counsel.

An agency must meet three basic requirements before it can invoke this provision to meet in closed session. First, "legal counsel representing the agency" must attend the executive session to discuss the enforcement action, or the litigation or potential litigation. This is the only executive session provision that requires the attendance of someone other than the members of the governing body. The legal counsel may be the "regular" legal counsel for the agency, such as a city attorney or the county prosecutor, or it may be legal counsel hired specifically to represent the agency in particular litigation.

Second, the discussion with the legal counsel either must concern an agency enforcement action or it must concern litigation or potential litigation to which the agency, the governing body, or one of its members acting in an official capacity is or is likely to become a party. Discussions concerning enforcement actions or existing litigation could, for example, involve matters such as strategy or settlement. In the 2001 session, the legislature added language defining the term "potential litigation." The original bill (House Bill 1384 (2001)) would have restricted its application to situations where litigation had been specifically threatened or the agency reasonably believed litigation would be commenced. Because the legislature ultimately included the authority to discuss the legal risks of a proposed or existing agency practice or action, the governing body may also meet in executive session when discussing those risks in open session would likely have an adverse effect on the agency's financial or legal position. The reference in the definition of "potential litigation" to RPC 1.6 is to the Rule of Professional Conduct adopted by the state Supreme Court that requires all attorneys to maintain the confidentiality of their communications with clients, and the reference to RCW 5.60.060(2)(a) is to the statute prohibiting an attorney from testifying about those communications. The recent amendment permits discussions by an agency of actions that involve a genuine legal risk to the agency. Discussion of such risks in closed session would permit the governing body to freely consider the legal implications of a proposed decision without the attendant concern that it might be jeopardizing some future litigation position.

The third requirement for meeting in closed session under this subsection is that public knowledge of the discussion would likely result in adverse legal or financial consequence to the agency. It is probable that public knowledge of most discussions of existing litigation to which the agency, the governing body, or one of its members in an official capacity is a party would result in adverse legal or financial consequence to the agency.

Knowledge by one party in a lawsuit of the communications between the opposing party and its attorney concerning that lawsuit will almost certainly give the former an advantage over the latter. The same probably can be said of most discussions that qualify as involving potential litigation. The state supreme court, in *Recall of Lakewood City Council*, 144 Wn.2d 583, 586-87, 30 P.3d 474 (2001), held that a governing body is not required to determine beforehand whether disclosure of the discussion with legal counsel would likely have adverse consequences; it is sufficient if the agency, from an objective standard, should know that the discussion is not benign and will likely result in adverse consequences.

Since the purpose of this executive session provision is only to allow the governing body to discuss litigation or enforcement matters with legal counsel, the governing body is not authorized to take final action regarding such matters in an executive session. Recent case law suggests that a governing body may do no more than discuss litigation or enforcement matters and may therefore be precluded from decisions in the context of such a discussion in order to advance the litigation or enforcement action. *In Feature Realty, Inc. v. City of Spokane*, 331 F.3d 1082, 1089 (9th Cir. 2003), the court invalidated a "collective positive decision" of a governing body in executive session to approve a settlement agreement. The *Feature Realty* court relied on the holding in *Miller v. City of Tacoma*, 138 Wn.2d 318, 327, 979 P.2d 429 (1999), that only a governing body can only take an action in executive session "explicitly specified" in an exemption to the OPMA. *Feature Realty*, 331 F.3d at 1089-90.

However, since one purpose of shielding these discussions from public view is to protect the secrecy of strategic moves concerning litigation, the interpretation of the scope of the governing body's authority to take some actions in executive session under this provision should afford that protection. For example, may a city council informally vote or reach a consensus in executive session to authorize the city attorney to settle a case for no higher than a certain amount, which is different in scope from "final action" approving the settlement agreement that was invalidated in *Feature Realty*? An interpretation supporting the council's authority to take such action appears warranted but may not be supported by the strict language in *Feature Realty* and *Miller*. Nevertheless, it is clear that the council's vote to give final approval to a settlement agreement must occur in an open meeting.

This provision is, in practice, often used as a justification for executive sessions, particularly because "potential litigation" is susceptible to a broad reading. Indeed, many things a public agency does will subject it to the possibility of a lawsuit. However, a court will construe "potential litigation" or any other grounds for an executive session narrowly and in favor of requiring open meetings. *Miller*, 138 Wn.2d at 324. To avoid a reading of this subsection that may be broader than that intended by the legislature—and to avoid a suit alleging a violation of the OPMA—it is important for an agency to look at the facts of each situation in the context of all the requirements of this subsection.

Case Example: *A board of county commissioners is considering adopting a stringent adult entertainment ordinance, and a company that had announced its intention to locate a nude dancing establishment in the county states that it will sue the county if it passes this ordinance. The commissioners call an executive session to discuss with the prosecuting attorney this "potential litigation." Specifically, they intend to discuss with the prosecuting attorney his opinion as to the proposed ordinance's constitutionality. May the commissioners meet in executive session to discuss this?*

Resolution: *The county commissioners may discuss with their legal counsel in executive session the constitutionality of the proposed ordinance, particularly in light of the threatened legal challenge. They want to have a strong position coming into the litigation. The company's knowledge of their discussion would give it an unfair advantage in framing the constitutional theories in support of its threatened suit against the county.*

Also, the prosecuting attorney may not feel he can be totally candid with the commissioners in open session.

The company, on the other hand, may argue that the commissioners are not discussing the potential litigation, but rather are only discussing the ordinance. The commissioners should always be aware of the constitutionality of the actions they take. But, that does not mean the commissioners have the authority to meet in executive session any time they are proposing legislation that may implicate constitutional issues. However, given the circumstances here, the commissioners' position should prevail. However, consistent with the definition of "potential litigation" added by the legislature in 2001, the county commissioners may discuss the "legal risks of a proposed action," in this case, the legal risks of adopting a stringent adult entertainment ordinance, particularly when the company has threatened litigation if the county adopts the ordinance.

(j) To consider, in the case of the state library commission or its advisory bodies, western library network prices, products, equipment, and services, when such discussion would be likely to adversely affect the network's ability to conduct business in a competitive economic climate. However, final action on these matters shall be taken in a meeting open to the public;

The Western Library Network, formerly the Washington Library Network, is established and governed by chapter 27.26 RCW. The State Library Commission has responsibility for the network. This provision allows the commission or its advisory bodies to meet in executive session to consider network prices, products, equipment or services when open discussion of these matters "would be likely to adversely affect the network's ability to conduct business in a competitive economic climate."

(k) To consider, in the case of the state investment board, financial and commercial information when the information relates to the investment of public trust or retirement funds and when

public knowledge regarding the discussion would result in loss to such funds or in private loss to the providers of this information;

This provision clearly is designed to protect the integrity of public trust or retirement funds. It allows the state investment board, established and governed by chapter 43.33A RCW, to consider commercial and financial information relating to the investment of such funds in closed session, if discussion in open session would result in loss to those funds or to the private providers of the information.

(l) To consider proprietary or confidential nonpublished information related to the development, acquisition, or implementation of state purchased health care services as provided in RCW 41.05.026;

This provision is self-explanatory.

(m) To consider in the case of the life sciences discovery fund authority, the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information.

This provision is also self-explanatory.

Overview of Open Government in Washington State: Open Public Records and Open Public Meetings



Prepared by Washington State Attorney General's Office
Last revised: April 2014

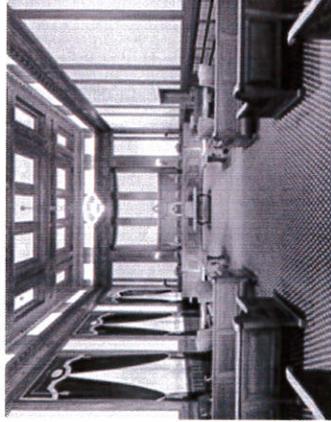


Historical Open Government Principles

"A popular Government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance...." ~ *James Madison*



"...a nation that is afraid to let its people judge the truth and falsehood in an open market is afraid of its people." ~ *John F. Kennedy*



"It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *sine qua non** in regard to a socially effective and desirable continuation of our democratic form of representative government."
~ *Washington State Supreme Court*

**indispensable action*

Open Government Laws are often called “Transparency Laws” or “Sunshine Laws”



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



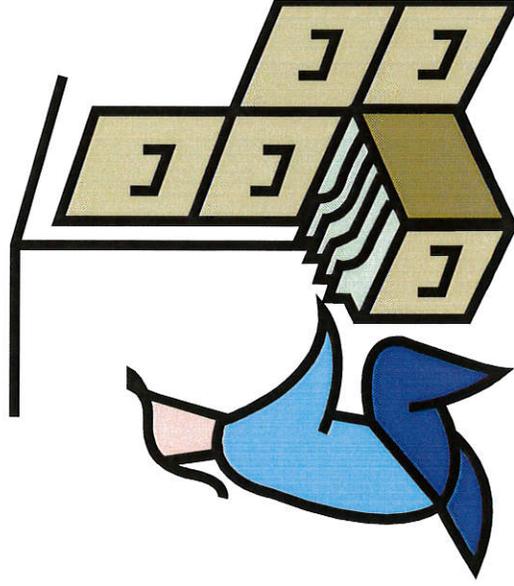
Transparency builds public confidence in government.

Washington - Two Different Statutes

Open Public Records

RCW 42.56

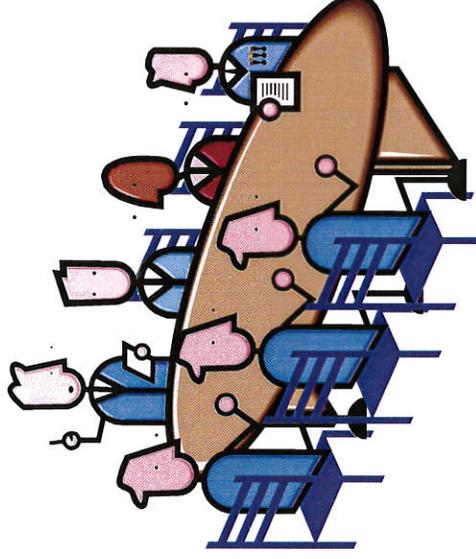
Public Records Act
(PRA)



Open Public Meetings

RCW 42.30

Open Public Meetings Act
(OPMA)



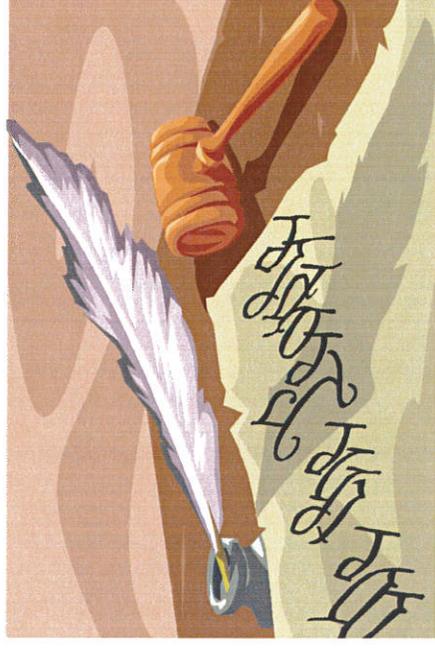


Open Public Records

- “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.”
- 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.”

Open Public Meetings

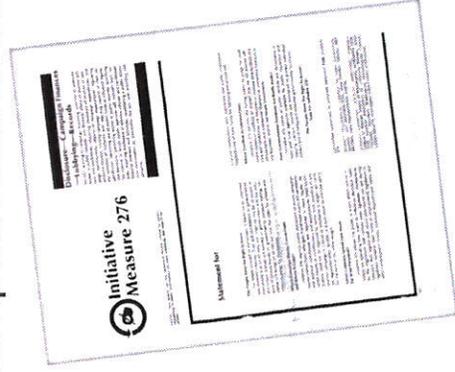
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History

Open Public Records

- PRA passed via Initiative 276 in 1972. Formerly in RCW 42.17 – now RCW 42.56.
- Applies to all public agencies, state and local.
- Does not apply to courts.
- Limited application to Legislature.
- Applies to “public records” which are defined to include “writings.”
- Records are open unless there is an exemption authorized by law.



Open Public Meetings

- OPMA passed in 1971. RCW 42.30. Minutes requirement in another law - RCW 42.32.
- Applies to all multimember public agency boards and commission governing bodies, and their committees.
- Does not apply to courts.
- Does not apply to Legislature.
- Requires meetings of governing body to be open gavel-to-gavel, unless there is an exception authorized by law.



Touchstone:



Open Public Records

- Records of public agencies are presumed open.
- PRA is to be liberally construed.
- Records or information in records can be withheld only by law (e.g. exemption in law).

Open Public Meetings

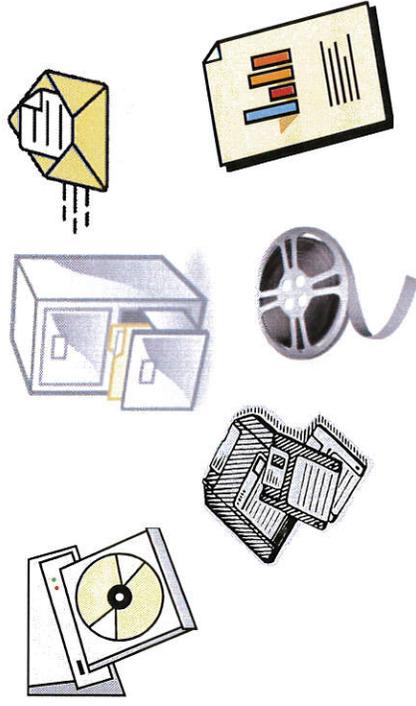
- Meetings of agencies subject to the OPMA are presumed open.
- OPMA is to be liberally construed.
- Meetings or parts of meetings can be closed only by law (e.g. executive sessions).

Scope

Open Public Records

PRA applies to “any writing containing information relating to the conduct of governmental 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.”

- Includes paper records, electronic records, emails, overheads, photographs, CDs, microfiche, etc.



Open Public Meetings

OPMA applies to **multi-member public state and local agencies**, as follows:

- 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.
- Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of Washington.
- 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.
- 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.



Withholding Records or Closing Meetings



Open Public Records

- Withholding a public record or some information in a public record must be authorized by law.
- Only the exempt information can be withheld.
- Agency must cite basis and give brief explanation.
- Exemptions from disclosure must be narrowly construed.

Open Public Meetings

- Closing a meeting or part of a meeting subject to OPMA must be authorized by law – e.g., for listed purposes in OPMA.
- Agency must provide reason where required, e.g., announce reason for going into executive session.

Enforcement & Penalties



Open Public Records

- PRA enforced by courts, for claims listed in PRA.
- RCW 42.56.550, .565
 - Court can impose statutory penalties to be awarded to requester.
 - Court will order payment of requester's attorneys fees & costs.
 - Court can also order disclosure of all or part of withheld record, or non-disclosure of part or all of record.

Open Public Meetings

- OPMA enforced by courts, for claims listed in OPMA.
- RCW 42.30.120, .130.
 - Court can impose a \$100 civil penalty against each member.
 - Court will award costs and attorney fees to a successful party seeking the remedy.
 - Action taken at an improperly closed meeting can be declared null and void.

Risk Management Tips



Open Public Records

Agencies should:

- Establish a culture of compliance with the PRA, beginning with agency leadership and support.
- Review their PRA procedures.
- Review available resources; institute best practices.
- Keep updated on current developments in PRA; correctly apply law.
- Consult with agency's legal counsel.
- Train appropriate staff and officials about the PRA's requirements.
 - > Legislature enacted training requirements in 2014. Chap. 66, 2014 Laws.
 - > State Supreme Court said evidence of PRA training for agency staff can reduce penalties, & lack of training can increase penalties.

Open Public Meetings

Agencies subject to

OPMA should:

- Establish a culture of compliance with the OPMA, beginning with agency leadership and support.
- Review their OPMA procedures.
- Review available resources; institute best practices.
- Keep updated on current developments in OPMA; correctly apply law.
- Consult with agency's legal counsel.
- Train members subject to the OPMA about the law's requirements.
 - > Legislature enacted training requirements in 2014. Chap. 66, 2014 Laws.

Information



Open Public Records

- Attorney General's Office has appointed Assistant Attorney General for Open Government to provide information about the PRA.
- AGO has issued Model Rules.
- AGO may provide technical assistance and training.
- AGO has an online Open Government Deskbook and other materials and resources on its website, including training resources.
- AGO can review exemption from disclosure cited in state agency records, and issue informal opinion.
- AGO can issue formal opinions (for qualified requesters).

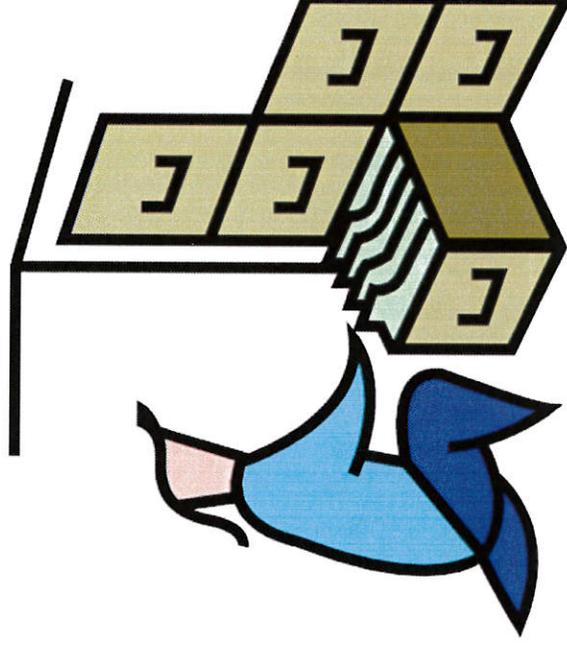
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Open Public Records Act

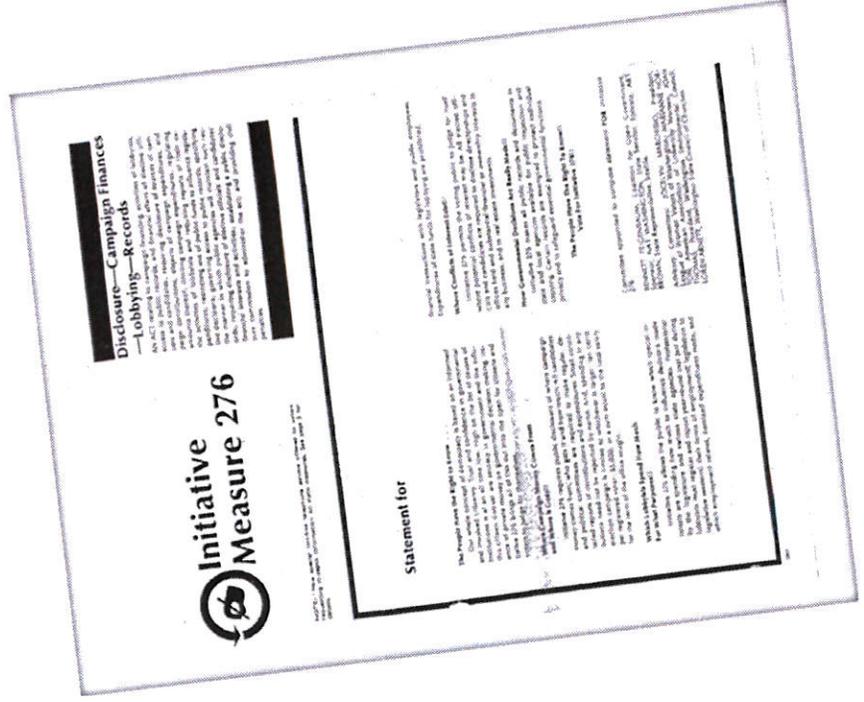
RCW 42.56



Prepared by Washington State Attorney General's Office
Last revised: April 2014

Washington's Open Public Records Act (PRA)

- Passed in 1972 – Initiative 276
- 72 percent of the popular vote
- RCW 42.56 (formerly RCW 42.17)



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.”

~ RCW 42.56.030



Purpose (Cont.)

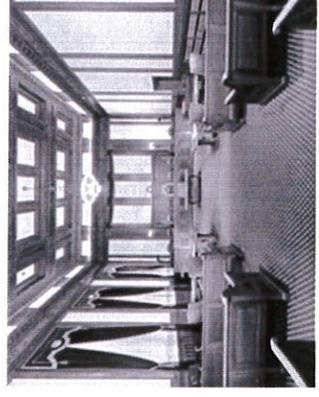
- The “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”
- Act is to be “liberally construed.”

~ RCW 42.56.030; RCW 42.56.550

-
- “It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *sine qua non** in regard to a socially effective and desirable continuation of our democratic form of representative government.”

~ *Washington State Supreme Court*

**indispensable action*



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



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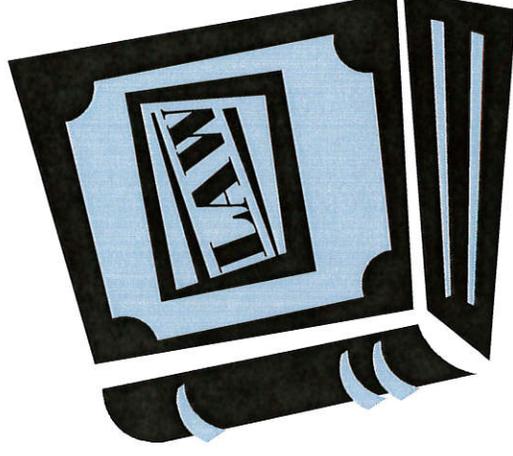
Transparency builds public confidence in government.

Touchstone:



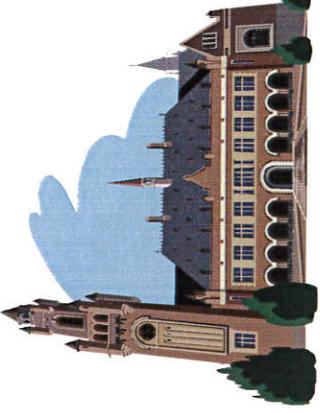
- Public records of government agencies are presumed **open**.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



PRA Applies to Records of:

- State government agencies*
- Local government agencies*
- Limited extent to Legislature



~ RCW 42.56.010

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

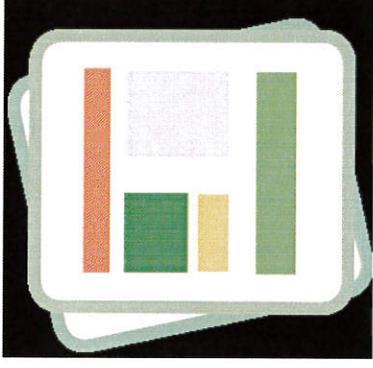
PRA Does Not Apply to:

- Court records (court files)
- Private organizations or persons*



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

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.”

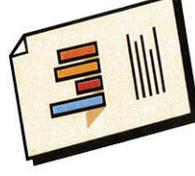
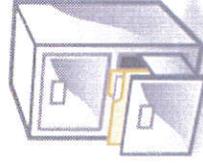
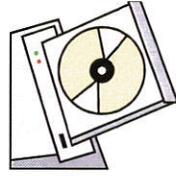
~ RCW 42.56.030

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.”

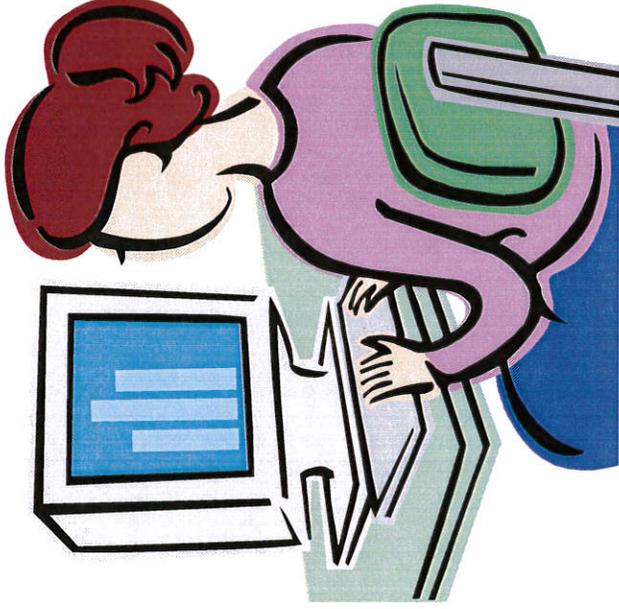
~ RCW 42.56.030

- So, “public record” is broadly defined.



Note: 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.



General PRA Procedures



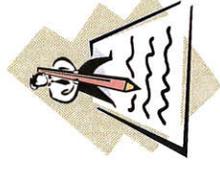
Under PRA, agencies must:

- 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.
- 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.



~ RCW 42.56.040, RCW 42.56.070 - .090, RCW 42.56.580, RCW 42.56.580.

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.

~ RCW 42.56.520; RCW 42.56.080, RCW 42.56.040, RCW 42.56.100.

Agency Responses to Requests

- The agency has five business days to respond to a public records request.
- Agency response 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.



~ RCW 42.56.520

respond

Seeking Clarification

- An agency can seek clarification of a request if it is **not reasonably clear**, or does not request “**identifiable records**.”
- Remember: agency is to give “fullest assistance.”
- Agency should explain why it needs clarification, in order to provide fullest assistance to requester and to search for potentially responsive records.
- If requester does not respond to request for clarification, the agency may close the request.

~ RCW 42.56.520



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.

~ RCW 42.56.520, RCW 42.56.520, RCW 42.56.080, RCW 42.56.550

Searches



- An agency 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.

~ RCW 42.56.520



Installments



- Agencies can provide records in **installments**, particularly for larger requests.
- Agencies can request a deposit up front (not to exceed 10 percent).
- Agencies can provide an installment by providing links to records on its website.
 - Note: Agencies are encouraged to post commonly-requested records on their websites. This:
 - Makes records more accessible.
 - Enables quicker agency responses.
 - Enables requesters to choose to view or copy only those records they want.

~ RCW 42.56.080, RCW 42.56.120



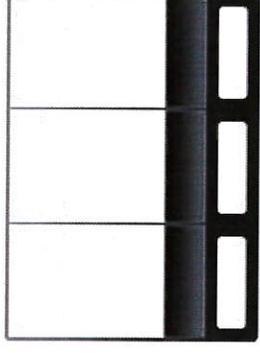
Exemptions

...of us usually find that [redacted] in Word Documents
...we've been had to [redacted] to purge corporate confidential or personal
...information, you know it's not fun. You either need to [redacted] or getting it in
...resulting tools.
...is not a better solution. A [redacted]
...document is a sort of CIA like professional appearance.

- 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.)



- When withholding part (redacting) or all of a record, agency must **describe record** by date, type, authors/recipients, and total number of pages.
- Agency must **list exemption and give brief explanation**.
- This information can be provided to the requester in an “**exemption log**” or in other formats, so long as the required information is provided.
- 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.
- Agencies are not generally authorized in the PRA to provide lists of individuals for commercial purposes.
- The **agency bears the burden of proof** to justify the exemption.

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

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.”

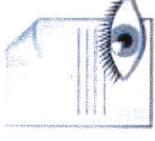
This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes.

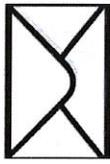


~ RCW 42.56.050



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.

~ RCW 42.56.060, RCW 42.56.120, RCW 42.56.130

Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
- A court is to consider the **factors** in requiring an agency to pay a penalty:
- Plus, a court will award the requester’s **attorneys fees and costs**.
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.

~ RCW 42.56.550, RCW 42.56.565; *Yousoufian v. Sims*

Penalty Factors

A court must consider these nonexclusive **factors** in deciding whether an agency should pay a penalty:

☐ **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.

☐ **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.



~ *Yousoufian v. Sims; Neighborhood Alliance v. Spokane County*

Penalties Outside of PRA



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

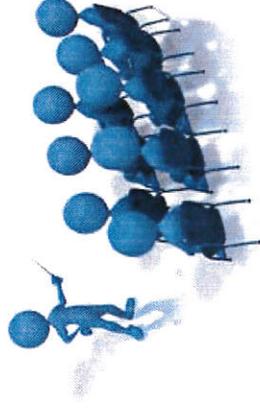
Risk Management Tips

- Establish a culture of compliance with the PRA, beginning with agency leadership and support.
- Train appropriate staff and officials about the PRA's requirements. (See next slide).
- Review agency's PRA procedures.
- Review available resources; institute best practices.
- Review penalty factors.
- Keep updated on current developments in PRA; correctly apply law.
- Consult with agency's legal counsel.



Training

- A new law effective July 1, 2014 amends the PRA to require records training. Chapter 66, 2014 Laws (ESB 5964) (“Open Government Trainings Act”).
- Elected local and statewide officials, and records officers, are to receive records training on the PRA, and records management/retention under RCW 40.14.
- They can take training sooner than July 1. Refresher training occurs no later than every 4 years.
- 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>

PRA Assistance

- The **Washington State Attorney General's Office** has provided an explanatory pamphlet and other materials about the PRA.
- The Attorney General's Office has also published Model Rules.
- The Attorney General has also appointed an Assistant Attorney General for Open Government. The AGO can provide technical assistance and training.
- The Attorney General's Office materials about the PRA, and other open government topics and resources, are on its website at 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>
- The Attorney General's Office may also review a state agency denial of a record when the agency concludes the record is exempt.
- The Attorney General's Office may issue formal opinions about the PRA for qualified requesters.

~ RCW 42.56.570, RCW 42.56.530,
Chap. 66, 2014 Laws





Open Public Meetings Act

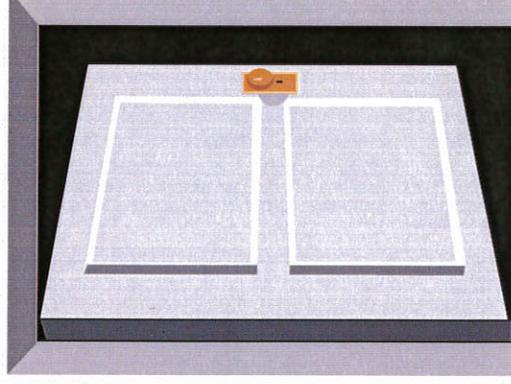
RCW 42.30



Prepared by Washington State Attorney General's Office
Last revised: April 2014

Washington's Open Public Meetings Act (OPMA)

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



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.”

~ RCW 42.30.010



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*

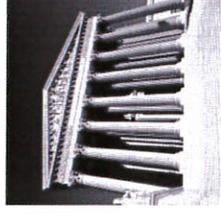


- Act is to be “liberally construed.”

~ *RCW 42.30.910*

- The purpose of the OPMA is to allow the public to view the “decisionmaking process.”

~ *Washington State Supreme Court*



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 once famously said, “*Sunlight is the best disinfectant.*”



Transparency builds public confidence in government.

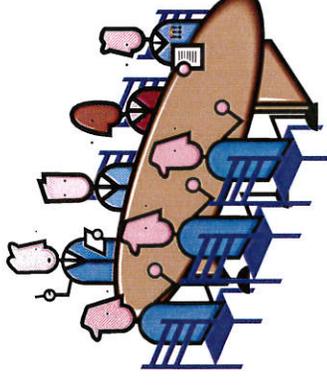
OPMA Applies To:

Multi-member public state and local agencies, such as boards and commissions, as follows:

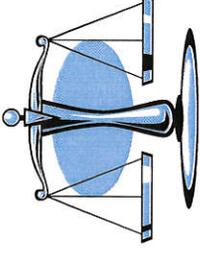
- Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature.
- Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of Washington.
- 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.
- 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.

~ RCW 42.30.020

These are the “public agencies” subject to the OPMA.



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

~ RCW 42.30.020(1), RCW 42.30.140

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



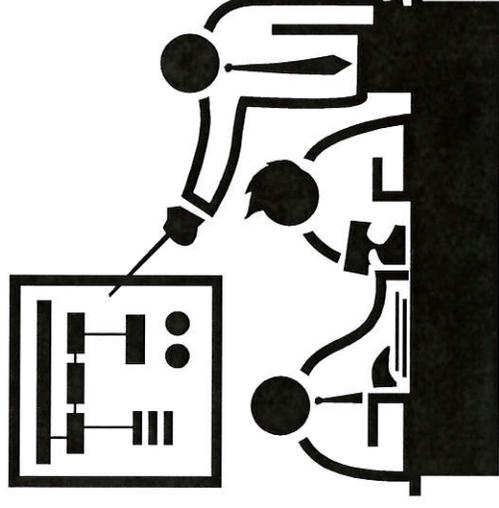
What is a Governing Body?

- 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
- Physical presence not required – 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.

- 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.

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
 - Considerations
 - Reviews
 - Evaluations
 - Final actions



The requirements of the OPMA are triggered whether or not “final” action is taken.

~ RCW 42.30.020

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



“Regular” Meetings



- “**Regular meetings**” are recurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws or other 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
- On June 12, 2014, new agenda notice requirements apply to regular meetings under OPMA (see next slide). (These requirements are in addition to those that may be applicable in other laws outside the OPMA for particular agencies.)

~ RCW 42.30.070, RCW 42.30.075; Chap. 61, 2014 Laws

“Regular” Meetings (Cont.)

- On June 12, 2014, new agenda notice requirements apply to regular meetings.
- Chapter 61, 2014 Laws (SHB 2105) amends the OPMA to require governing bodies to make the agenda of each regular meeting of the governing body available online 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 that employ fewer than 10 full-time employees.
 - 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 the new law.

“Special” Meetings



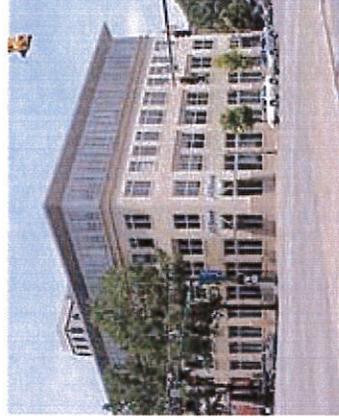
- A “**special meeting**” is a meeting that is not a regular meeting (not a regularly scheduled meeting).
- Called by presiding officer or majority of the members
- Notice - timing: 24 hours before the special meeting, written notice must be:
 - Given to each **member** of the governing body (unless waived)
 - Given to each **local newspaper of general circulation, radio, and TV station** which has a notice request on file
 - Posted on the **agency’s website** --- with certain exceptions in RCW 42.30.080(2)(b), if the agency (i) does not have a website, (ii) employs fewer than ten full-time equivalent employees; or (iii) does not employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the web site
 - Prominently **displayed at the main entrance** of the agency’s principal location and the meeting site (if not that same location)

~ RCW 42.30.080

“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 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

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.

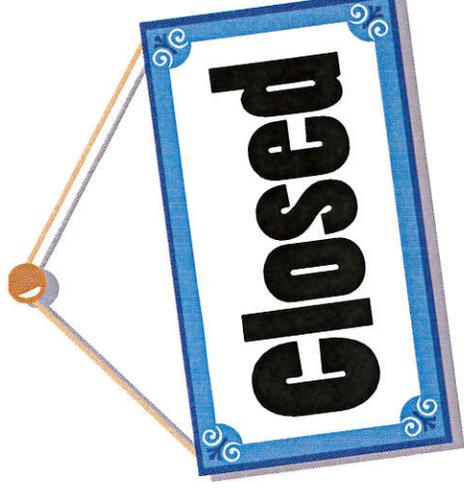
~ RCW 42.30.050

DISRUPTION

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



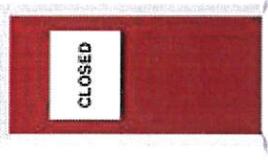
Executive Sessions

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

- 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

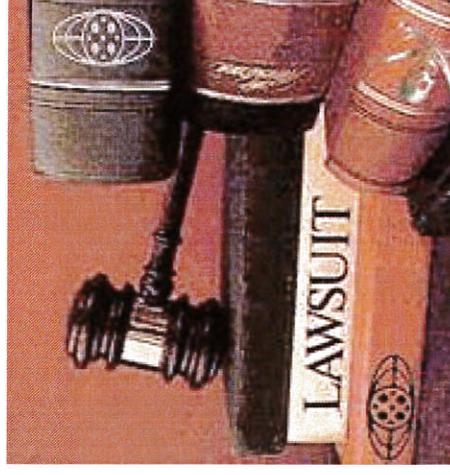
~ RCW 42.30.110



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

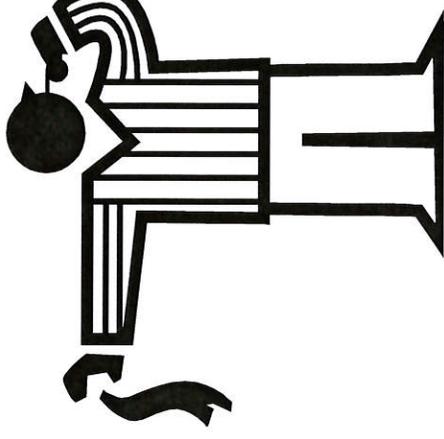
~ RCW 42.30.110



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



Minutes – RCW 42.32.030

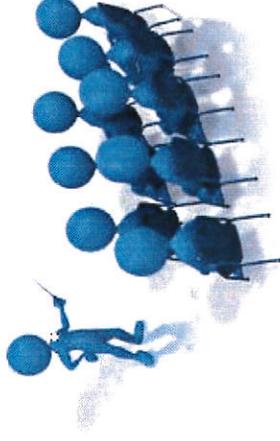
- Minutes of public meetings must be promptly recorded and open to public inspection
- Minutes of an executive session are not required
- No format specified in law

~ RCW 42.32.030



OPMA Training

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~ RCW 42.30.210

THANK YOU



CERTIFICATE OF TRAINING

Name

Completed the following training:

- Open Public Records Act Training (RCW 42.56)**
- Open Public Meetings Act Training (RCW 42.30)**

Date Training Received:

Sponsor: *Washington Fire Commissioners Association*

Format: Handout of open government training manual and slide presentation

I hereby certify that I received this training: _____

Signature & Position or Title