

Open Public Meetings Act

RCW 42.30

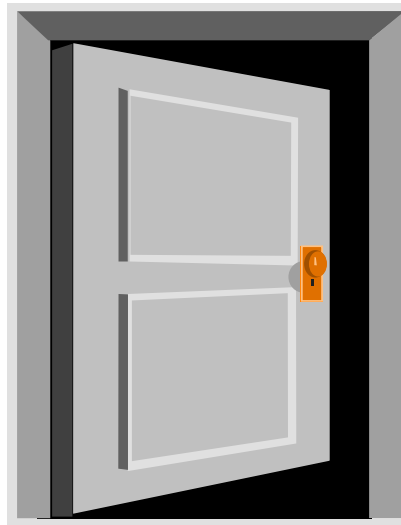


Prepared by Washington State Attorney General's Office
Last revised: July 2017



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.

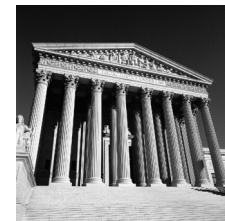
~ *RCW 42.30.010*

- Act is to be “liberally construed.”

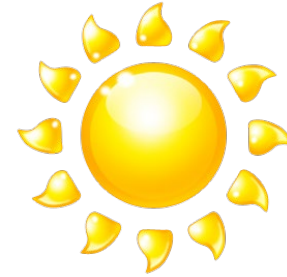
~ *RCW 42.30.910*

- 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.

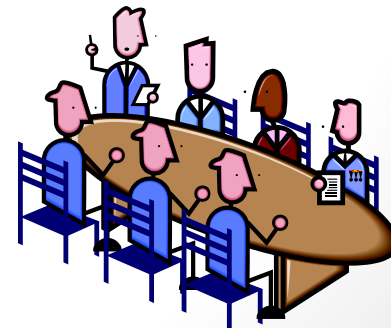
OPMA Applies To:

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*



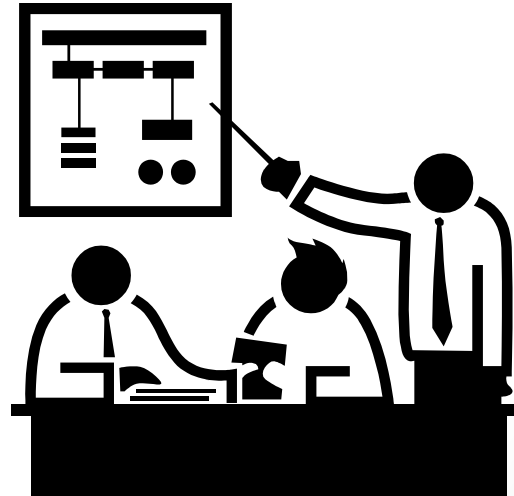
What is a Governing Body?

- 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*
- **“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. See upcoming slide on “final action.”

- A “meeting” of a governing body occurs when a **majority of its members (quorum)** gathers with the **collective intent of transacting the governing body’s business.**

~ Citizens Alliance for Property Rights Legal Fund v. San Juan County

“Meeting” (Cont.)



- Physical presence not required – a meeting 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.
~ Wood v. Battle Ground School District; Citizens Alliance for Property Rights Legal Fund v. San Juan County
- 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.

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

~ *RCW 42.30.070; RCW 42.30.075; RCW 42.30.077*

“Regular” Meetings (Cont.)

- Agenda notice requirements apply to regular meetings.
- RCW 42.30.077 requires 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.



- This 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 this 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), for example, if the agency does not have a website]
 - 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

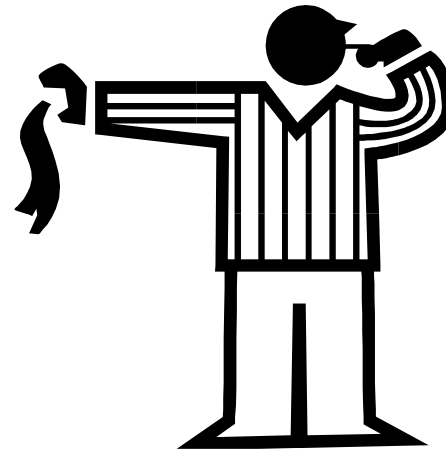
~ *RCW 42.30.110*



Penalties for Violating the OPMA

- A court can impose a \$500 civil penalty against each member (personal liability) who knowingly attends a meeting in violation of OPMA; and \$1000 for a subsequent knowing violation.
- 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 42.30.____*

- 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

* *Formerly at RCW 42.32.030; To be recodified in 2017 in a new section in RCW 42.30 (OPMA) per Chap. 25, Laws of 2017, 3rd Sp. Sess.*



Risk Management Tips

- Establish a culture of compliance with the OPMA.
- Receive training on the OPMA.
- Review available resources; institute best practices.
- Keep updated on current developments in OPMA; correctly apply law.
 - *Remember: the OPMA can change through amendments, or develop through case law.*
 - *Remember: other laws can govern an agency's meeting procedures.*
- Consult with agency's legal counsel.



OPMA Training

- The “Open Government Trainings Act” requires OPMA training for every member of a governing body within 90 days of taking their oath or assuming their duties. RCW 42.30.205.
- 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>

OPMA Assistance

- The Washington State Attorney General's Office may provide information, technical assistance, and training on the OPMA. Contact Assistant Attorney General for Open Government.
- The Attorney General's Office may issue formal opinions about the OPMA for qualified requesters.
- The Attorney General's Office has helpful materials about the OPMA and on other open government topics and resources, on its website at <http://www.atg.wa.gov/Open-Government>.
 - One example is the *Open Government Resource Manual* (see next slide).

~ RCW 42.30.210



AGO Open Government Resource Manual – Available on AGO Website*



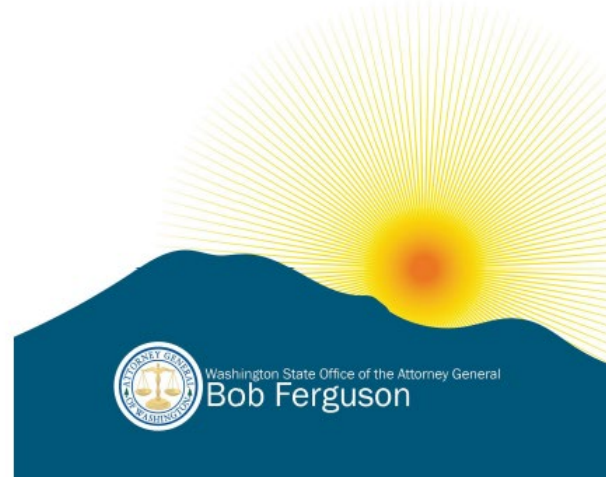
Updated
October 31,
2016**

WASHINGTON STATE



Sunshine
Laws 2016

An Open Government Resource Manual



* <http://www.atg.wa.gov/open-government-resource-manual>

**Does not yet include statutory changes resulting from 2017 sessions.

Municipal Research & Services Center – Another Resource

OPMA – AGENCY OBLIGATIONS: A STARTING POINT

PRACTICE TIPS

For Local Government Success



The basic requirement of the Open Public Meetings Act (OPMA) is that meetings of governing bodies be open and public. Use these practice tips to guide your agency's OPMA compliance.* For more information and resources visit www.mrsc.org/opmapra.

Basic Requirements

- All meetings open and public. All meetings of governing bodies of public agencies must be open to the public, except for certain exceptions outlined in the OPMA. RCW 42.30.030.
- Quorum. Generally, a meeting occurs when a quorum (majority) of the governing body is in attendance and action is taken, which includes discussion or deliberation as well as voting. RCW 42.30.020(2) & (3).
- Attendees. All persons must be permitted to attend and attendees cannot be required to register their names or other information as a condition of attendance. Disruptive and disruptive persons may be removed from the meeting.
- No secret ballots. Votes may not be taken by secret ballot.
- Adoption of ordinances. Ordinances, resolutions, rules, regulations, or other actions that require a vote are invalid. RCW 42.30.060(1).

Position in Agency

- Member of a governing body
 - City or Town Councilmember or Mayor
 - County Commissioner or County Councilmember
 - Special Purpose District Commissioner/Board Member

- Member of a subagency created by ordinance or legislative act
 - Planning Commission
 - Library Board
 - Parks Board
 - Civil Service Commission

- Member of a committee
 - Committees that act on behalf of the governing body, or public comment

Agency staff

Penalties for Noncompliance

- Actions null and void. Any action taken at a meeting which is not in compliance with the OPMA is null and void. RCW 42.30.060(1).
- Personal liability. Potential personal liability of \$100 for any person who violates the OPMA. RCW 42.30.120(1).
- Agency liability. Any person who prevails against an agency in a lawsuit awarded all costs, including attorney fees, incurred in connection with the lawsuit.

OPMA Training Requirements, Effective July 1, 2014

- Every member of a governing body of a public agency must complete training before assuming office or taking the oath of office.
- In addition, every member of a governing body must complete training before they remain in office.

*DISCLAIMER: These practice tips are meant to provide summary information and are not intended to be regarded as specific legal advice. Consult with your agency's legal counsel about this topic as well.

OPMA – EXECUTIVE SESSIONS

CHECKLIST

For Local Government Success



The Open Public Meetings Act (OPMA) requires specific steps be taken in order to hold an executive session. Use this checklist to guide your agency's compliance with the OPMA related to executive sessions.* For more information and resources visit www.mrsc.org/opmapra.

| | Requirement | Completed/ Applicable |
|-----------------|---|--------------------------|
| Meeting | An executive session can only be held as part of a regular or special meeting. | <input type="checkbox"/> |
| Purpose | The presiding officer announces in open session the purpose of the executive session. | <input type="checkbox"/> |
| End Time | The presiding officer announces in open session the time the executive session will end. | <input type="checkbox"/> |
| Legal Counsel | Legal counsel is present during the executive session, if required. (See topics below and on the next page for discussions that require the presence of legal counsel.) | <input type="checkbox"/> |
| Confidentiality | At the start of the executive session, participants are reminded that discussions are confidential. | <input type="checkbox"/> |
| Topics | Related to local governments, the following topics set forth in RCW 42.30.110(1) can be discussed in executive session: <ul style="list-style-type: none"> Matters affecting national security. RCW 42.30.110(1)(p). | <input type="checkbox"/> |

OPMA – NOTICE REQUIREMENTS

PRACTICE TIPS

For Local Government Success



Under the Open Public Meetings Act (OPMA), to ensure that agency deliberations and other actions are conducted and taken openly, agencies are required to provide sufficient public notice of their meetings. Use these practice tips as a starting guide for OPMA notice requirements.* For more information and resources visit www.mrsc.org/opmapra.

| | Regular Meetings (RCW 42.30.070) | Special Meetings (RCW 42.30.080) |
|---------------------|---|---|
| Definition | Held in accordance with a schedule fixed by ordinance, resolution, bylaws, or other rule. | Anything other than a regular meeting. May be called by the presiding officer or a majority of the members of the governing body. |
| Notice and Agendas | Effective June 12, 2014, agendas must be made available on the agency's website at least 24 hours in advance of the meeting unless the agency: <ol style="list-style-type: none"> Doesn't have a website; or Employs fewer than 10 full-time equivalent employees. There are no other notice requirements for regular meetings in the OPMA. However, other relevant laws apply to some local governments. For example, cities and towns are required to establish a procedure for notifying the public of the preliminary agenda for the forthcoming council meeting (although not necessarily online) as well as regarding upcoming hearings. RCW 35A.12.180; RCW 35.22.288; RCW 35.23.221; RCW 35.27.300. There are no similar requirements for counties or special purpose districts related to preliminary agendas. | The special meeting notice must specify the date, time, and place of the special meeting, and the business to be transacted. <ul style="list-style-type: none"> Personal notice. Written notice must be delivered personally, by mail, fax, or e-mail at least 24 hours before the meeting to: <ol style="list-style-type: none"> Each member of the governing body, unless the member submits a written waiver of notice in advance with the clerk, or the member is actually present at the meeting; and Each member of the news media who has on file with the governing body a written request for notice of special meetings. Website notice. Notice must be posted on the agency's website 24 hours in advance of the meeting, unless the agency: <ol style="list-style-type: none"> Doesn't have a website; or Employs less than 10 full-time equivalent employees; or Doesn't employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the website. Notice at agency's principal location. Notice must be prominently displayed at the main entrance of the agency's principal location and the meeting site if the meeting isn't held at the agency's principal location. |
| Emergencies | In an emergency situation (e.g., fire, flood, earthquake, or other emergency), a meeting may be held at a site other than the regular meeting site, and the notice requirements under the OPMA are suspended during such an emergency. | The notices required for special meetings aren't required if 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. |
| Holidays | Regular meetings shall not be held on holidays. If a regular meeting falls on a holiday, the meeting must be held on the next business day. | Although not specifically addressed by the OPMA, we recommend that special meetings not be held on holidays out of consideration for public participation. |
| Business Transacted | There are no restrictions on the type of business that may be transacted at regular meetings. | Final disposition cannot be taken on any matter not listed in the special meeting notice. |

*DISCLAIMER: These practice tips are meant to provide summary information on the notice requirements of the OPMA; these tips are not intended to be regarded as specific legal advice. Consult with your agency's legal counsel about this topic as well. May 2014

| | |
|--|--------------------------|
| disclosure would increase the | <input type="checkbox"/> |
| use of real estate if there's a | <input type="checkbox"/> |
| 42.30.110(1)(c). | <input type="checkbox"/> |
| must be taken in open session. | <input type="checkbox"/> |
| 42.30.110(1)(d). See back of page. | <input type="checkbox"/> |
| employee. RCW 42.30.110(1)(f). | <input type="checkbox"/> |
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| unannounced end time, the presiding | <input type="checkbox"/> |
| returning to executive session. | <input type="checkbox"/> |
| te. | <input type="checkbox"/> |
| checklist is not intended to be regarded as specific legal | <input type="checkbox"/> |
| May 2014 | <input type="checkbox"/> |



Public Records Act Training



March 2018

Prepared by Washington State Attorney General's Office



Open Government Laws Like the Public Records Act 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.*”



*Let Us
Begin!*

Transparency builds public confidence in government.

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 (PRA)*



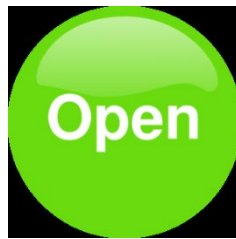
Washington's Open Public Records Act (PRA)

- Passed in 1972 – Initiative 276
- RCW 42.56 (formerly RCW 42.17)

*Most recent amendments –
ESHB 1594
(Chap. 303, 2017 Laws);
EHB 1595 (Chap. 304,
2017 Laws)*



Touchstone:



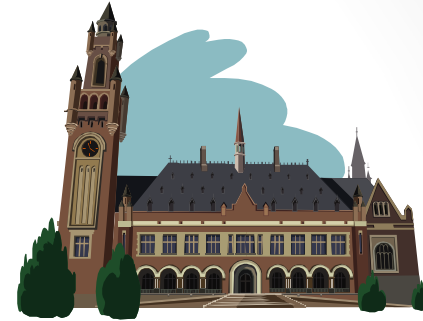
- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



PRA Applies to Records of:

- State government agencies*
- Local government agencies*
- Extent to Legislature – pending



~ RCW 42.56.010

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

PRA Does Not Apply to:

- Court records (court files)
- Records of certain volunteers (next slide)
- 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 42.56.010

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 42.56.010

- So, “public record” is broadly defined.



Volunteers



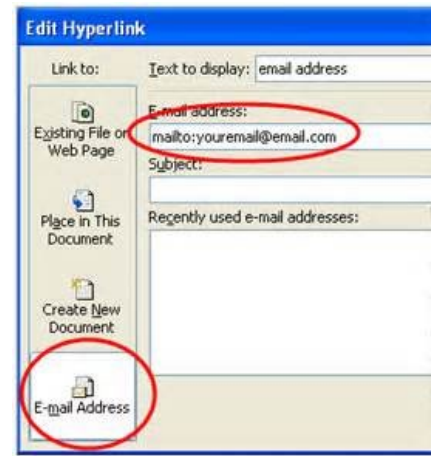
- ESHB 1594 (2017): records of **certain volunteers** are exempt from the definition of “public record.” They are:
 - Records not otherwise required to be retained
 - and are held by volunteers who
 - (a) do not serve in an administrative capacity,
 - (b) have not been appointed by the agency to an agency board, commission or internship, and
 - (c) do not have a supervisory role or delegated agency authority.
- Change effective July 23, 2017.

~ RCW 42.56.010(3)



Note: Public Records Include...

...records of agency business when they are created or retained by agency employees or officials on **home computers or devices, or in non-agency email accounts or files.**



Text Messages (“Scope of Employment”)

- *Nissen v. Pierce County* (Aug. 2015)

- **Text messages sent and received by a public employee in the employee’s official capacity are public records of the employer, regardless** of the public or private nature of the **device** used to create them; thus, even if the employee uses a private cell phone.
- A record that an agency employee prepares, owns, uses, or retains ***within the scope of employment**** is a record “prepared, owned, used or retained by a state or local agency” under the PRA.
 - An employee’s communication is “within the scope of employment” *when the job requires it, the employer directs it, or it furthers the employer’s interests.*
 - This inquiry is always case- and record-specific.



[* The Nissen court equated “official capacity” with “scope of employment” when referring to an elected official. See also *West v. Puyallup*.]

Call and Text Logs (“Use”)

- *Nissen v. Pierce County*

- For a record to be “used” by an agency it must bear a nexus with the agency’s decision-making process.
- A record held by a third party, without more, is not a “public record”, unless the agency “uses” it. In this case, that principle applied to **call and text logs** at the phone service provider which **were not used by the agency** (“the county did nothing with them”).

Call Log (104)

ⓘ * These details are cross-referenced from this device's contacts

Incoming (23)

| # | Country code | Network code | Party | Time |
|---|--------------|--------------|------------|-----------------------------|
| 1 | 310 | 410 | [Redacted] | 7/29/2012 7:30:13 AM(UTC+0) |
| 2 | 310 | 410 | [Redacted] | 7/30/2012 1:36:51 AM(UTC+0) |
| 3 | 310 | 410 | [Redacted] | 7/30/2012 2:34:08 AM(UTC+0) |
| 4 | 310 | 410 | [Redacted] | 7/30/2012 5:38:54 PM(UTC+0) |
| 5 | 310 | 410 | [Redacted] | 7/30/2012 5:44:59 PM(UTC+0) |
| 6 | 310 | 410 | [Redacted] | 7/30/2012 5:49:11 PM(UTC+0) |

Post-Nissen v. Pierce County:



- PRA requests for **public records** in a **local elected official's personal residence, on a personal computer, and in a personal email account (2016); and personal Facebook site (2018).**
- Court of Appeals:
 - *West v. Vermillion, Puyallup* (2016): **Public records** must be disclosed. The constitutions do not provide an individual a privacy interest in those public records. State Supreme Court denied review. (*See upcoming slide on "privacy."*)
 - *West v. Puyallup* (2018): Facebook posts on an elected official's personal site are **public records** if they relate to the conduct of government and are prepared within the scope of employment or official capacity.

General PRA Procedures



Under PRA, agencies must:

- Appoint a **public records officer**.
- Publish **procedures** describing certain agency organization, operations, rules of procedure, and adopt/enforce **rules/regulations*** that:
 - 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.



***See AGO Model Rules.** See upcoming slides.

- Publish **fee schedule**. See upcoming slide.
- 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 42.56.100; RCW 42.56.580

New PRA Procedures

(ESHB 1594 and EHB 1595 – Eff. July 23, 2017)



- **Format for requests.** No official format is required. Agencies can recommend requesters use their form or web page. Must accept in person requests made during normal office hours.
- **Log.** Agency must keep a log of PRA requests (identity of requester if provided, date of receipt, text of request, description of records produced, description of records redacted/withheld and reasons, and date of final disposition.)
- **Ordinances.** Local agencies should consult AGO Model Rules in developing PRA ordinances.

*~ RCW 42.56.080; RCW 40.14.026;
RCW 42.56.570*



New PRA Procedures (cont.)

(ESHB 1594 and EHB 1595 – Eff. July 23, 2017)

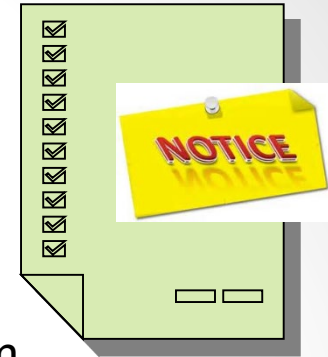


- **Additional training.** Records officers must also receive training on electronic records. (*See upcoming slides on training*)
- **Data collection & reporting.** Agencies having PRA staff and legal costs of more than \$100,000/year must report 17 data points about their agencies' PRA requests to the Joint Legislative Audit and Review Committee (JLARC).
- **Copy fees.** New procedures for fees/authorized copy fees for electronic records. (*See upcoming slide*)

~ RCW 42.56.152; RCW 40.14.026;
RCW 42.56.120; RCW 42.56.070



Requests for Public Records



- Persons can request **identifiable public records** from public agencies.
 - Requester can use agency public records request form.
(Form not required effective July 23, 2017)
 - 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.
 - At minimum, requester must **identify documents with sufficient clarity to allow the agency to locate them.**
 - Requesters can ask to **inspect** records, or request **copies** of records. Requests can be made via mail, e-mail, in person.
- 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;
Hangartner v. City of Seattle; Bonamy v. City of Seattle; Hobbs v. State.

Requests (Cont.)



- “**Identifiable**” records (cont.)
- EHB 1595 (effective July 23, 2017):
- “A public records request must be for **identifiable records.**”
 - “A request for all or substantially all records, prepared, owned, use or retained by an agency is not a valid request for identifiable records under this chapter,
 - “Provided that a request for all records regarding a particular topic or containing a particular keyword or name shall **not** be considered a request for all of an agency’s records.”

~ RCW 42.56.080



Requests (Cont.)



- Requesters do *not*:
 - Generally need to identify **purpose** of request, unless required by law (e.g., restriction on providing lists of individuals for a commercial purpose).
 - Need to limit the **number** of requests they make.
 - Need to **exhaust** an agency's internal appeal procedures prior to seeking judicial review when a record is denied and two business days have passed. (Agencies are to have review mechanisms but review deemed completed after 2 business days following the denial of inspection.)

~ *RCW 42.56.070; RCW 42.56.520; Zink v. City of Mesa*

Requests (Cont.)



- EHB 1595 (eff. July 23, 2017): An agency may deny a **“bot” request**, under the criteria in the bill.
 - A “bot” request is one of multiple requests from a requestor to the agency within a 24 hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential function of the agency.
 - “Bot” request means a request for public records that an agency reasonably believes was automatically generated by a computer program or script.



~ RCW 42.56.080

Requests (Cont.)

- **Requesters must:**
 - **Clarify** a request when an agency asks for clarification.
 - **Claim or review records** when the records or an installment of records is ready.
 - Comply with **agency procedures** including those that protect records from damage/disorganization (such as when viewing records).
 - Provide a **deposit** when an agency requires a deposit.
 - **Pay** for copies per fee schedule, including copies for an installment.

- **Requesters should also:**



- Promptly **communicate** with agency,
- including to **voice any concerns** regarding agency action or inaction.

~ RCW 42.56.070(7) – (9); RCW 42.56.080; RCW 42.56.100; RCW 42.56.120; RCW 42.56.520; Model Rules; Zink v. City of Mesa; Hobbs v. State Auditor

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** (still need to give estimate of time)*; or,
 5. **Deny** the request with an accompanying written statement of the specific **reasons**.

~ RCW 42.56.520



*ESHB 1594 (eff. July 23, 2017) – if request unclear, give estimate to greatest extent possible

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’s rules are 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

*ESHB 1594 (eff. July 23, 2017)
Agency must respond
to parts of request that are clear.



Estimate of Time for Further Response



- An agency can provide an **estimate of time for further response**. Further response includes estimate to produce first installment.
- Estimate is to be **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.
 - Prepare an exemption log if necessary.
 - Perform other essential agency functions.
- An agency can **extend** the time if needed.

~ RCW 42.56.520; RCW 42.56.080; RCW 42.56.550; *Andrews v. Washington State Patrol*; *Hobbs v. State*

Installments



- Agencies can provide records in **installments**, particularly for larger requests.
- Agencies can request a deposit up front for copies (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



Searches



- An agency must conduct an **adequate search** for responsive records.
- 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.
- If responsive public records are on or in employees'/officials' personal devices, personal accounts, or personal files, those must be searched, too.
- The focal point of the judicial inquiry is the agency's search process, not the outcome of the search.
- The agency bears the burden of proof to show the adequacy of the search.

~ *RCW 42.56.520; Neighborhood Alliance of Spokane v. Spokane County; Hobbs v. State; Block v. City of Gold Bar; Nissen v. Pierce County.*

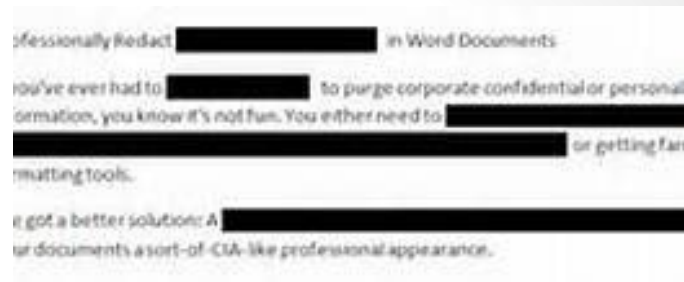
“Mechanics” of Searching/Producing Public Records Controlled by Employee

- The public **employee** must **obtain, segregate and produce** to the employer those public records that are responsive to a PRA request from the employee’s **personal accounts, files, and devices**.
- Employee may be required to submit affidavit regarding his/her search.
- Also applies to agency’s public officials.

~ *Nissen v. Pierce County*



Exemptions



- 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.
- 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.”**

~ RCW 42.56.050

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



Fees



EHB 1595 (effective July 23, 2017):

- **Copy fee schedule:**
 - Agencies can charge **actual costs** (following certain procedures & **notice/public hearing**) or
 - A **default statutory cost** (following a declaration of undue burden in **rule**).
 - **Alternative up to \$2** for entire request (see details in statute)
- EHB 1595's **default schedule** includes paper copies, scanned copies, electronic records costs.
- No fee for records routinely posted on **agency website**.
- Must provide an **estimate of costs to requester** upon request.
- Act provides for **other fee arrangements** in defined circumstances.
- “Customized access charge” under defined circumstances.
- No fees for inspection.
- Court action can be brought to challenge agency’s estimate of fees.

~ *RCW 42.56.120; RCW 42.56.070; RCW 42.56.130; RCW 42.56.550*

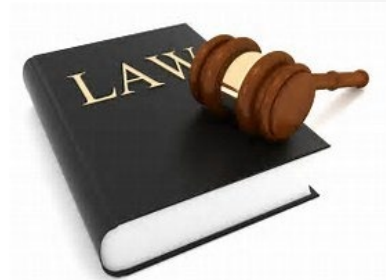
Electronic Records Production & Disclosure – The Basics for Agencies





- **Remember definition** of “public record” – includes **electronic records**: emails, texts, databases, social media records, electronic versions of printed documents, Excel spreadsheets, PowerPoint presentations, website records, videos, audio recordings, etc. Includes public records on/in personal devices/accounts.
- Note other **legislative statements**:
 - **RCW 43.105.351**: ... *It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.*
 - **Chap. 69, Laws of 2010**: *The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.*

Electronic Records Production & Disclosure – The Basics (Cont.)

- **Remember** there can be **changes/developments in law** (statutes, case law) including as they impact electronic public records. Examples:



- **ESHB 1594** (Chap. 303, Laws of 2017) (RCW 42.56.152): Public records officers' required training on electronic records (retention, production & disclosure, updating & improving technology information services). 
- **EHB 1595** (Chap. 304, Laws of 2017) (RCW 42.56.120): 
 - Fees for copies of electronic records.
 - Bot requests.
 - Translating a records into an electronic format (including scanning a paper record) is not creating a new record.
 - Local governments: consultation programs, competitive grant program. (RCW 40.14.026)
- ***O'Neill v. City of Shoreline; Nissen v. Pierce County; West v. Vermillion, Puyallup; West v. Puyallup***
 - Producing public records located on/in home computers, personal devices, personal accounts.

Electronic Records Production & Disclosure

– Resources

- **Attorney General's Office.** www.atg.wa.gov. Examples:

- Open Government Training Web Page
- PRA Model Rules, WAC 44-14
- Local Governments Consultation Program
- Other materials. (See upcoming slides).



- **Municipal Research & Services Center:** www.mrsc.org.

Examples:

- “New PRA Legislation: To Boldly Go Where the PRA Hasn’t Gone Before”
- “Use of Electronic Devices During Council/Commission Meetings”
- “Establishing Effective Social Media Policies for Your Agency”
- “Text Messaging Policies”
- “Public Records: Tackling The Tough Questions (Including Use of Smart Phones and Other Thorny Issues)”
- Other materials.



- **Washington Secretary of State – State Archives.**

www.sos.wa.gov/archives. Examples:

- In-person trainings on electronic records management – retention.
- Advice sheets & other publications:
 - “Blogs, Wikis, Facebook, Twitter & Managing Public Records”
 - “Capture and Retention of Text Messages”
 - “Digital Audio/Visual – Recommendations and Best Practices”
 - Other materials.



Office of the Secretary of State

Washington State Archives

Electronic Records Production & Disclosure – Redaction Mechanics



- Electronic records **redaction**:
 - Various **software programs** permit standard redactions on many electronic records (Adobe Acrobat X Pro, Informative Graphics Redact-it, RapidRedact, and similar technologies).
 - Not all agencies have such software, or software than can electronically redact all electronic records.
 - For example, there may be “non-standard” redactions in some types of electronic records (videos, audios, photos, etc.) that require particular software.
 - In some circumstances, due to lack of software or other technical issues, it may be necessary to print out a copy of the electronic record and apply the redactions to the paper record.
 - An agency may need to work with its IT staff and legal counsel on such issues.

Electronic Records Production & Disclosure – Production Mechanics

- Electronic records can be **produced/delivered electronically** in many ways. Delivery practices may vary among agencies, depending upon agency resources, software, or other issues (e.g. limits on size of files that can be sent/received by email).
- Some examples:
 - Posting them on agency's web site and provide requester links to specific records.
 - Delivering copies on a CD, DVD, thumb drive/flash drive.
 - Delivering by email.
 - Delivering through an agency portal or cloud-based delivery (File Transfer Protocol - FTP).
 - Arranging for inspection at an agency's office, on an agency computer.
 - See AGO Model Rules.



Electronic Records Production & Disclosure

– Updating & Improving Technology Information Services

- Agencies can consider making their websites - **current technology** - more **robust**. Examples:



- Posting more *commonly requested records*.
 - Posting information about how to *search for* records.
 - Posting more information about how to *request* records (agency's PRA procedures, fee schedule, request form, contact information for Public Records Officer, etc.).
- Agencies can consider **new technology** purchases to assist them in retaining/producing records.



- **Examples:** Portals; electronic redaction tools; texting/website capture and retention software; other software.
- **Master state contracts:** Several vendors awarded statewide master contracts for retention - "Enterprise Content Management Systems." State, & local agencies can use. More information on State Archives website and Department of Enterprise Services website.
- **ESHB 1594:** Local government grants (State Archives). RCW 40.14.026.



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 **factors** in requiring an agency to pay a penalty.
- Plus, a court will award the prevailing 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.

~ *Yousoufian v. Sims*



❑ **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*

PRA Training



- “Open Government Trainings Act”: RCW 42.56.150, RCW 42.56.152, RCW 42.30.205.
- Public records officers; statewide and local government officials. Training required depends upon position. 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/open-government-training>

Other AGO PRA Assistance

- The Attorney General's Office has provided an explanatory **pamphlet and other materials** about the PRA on its website at <http://www.atg.wa.gov/opengovernment.aspx>
- The AGO has also published PRA **Model Rules**. Updated 2018. See *upcoming slides*. 
- The Attorney General has also appointed an Assistant Attorney General for Open Government (**Ombuds**). The AGO can provide technical assistance and training. <http://www.atg.wa.gov/open-government-training>
- The AGO may provide records **consultation** services for **local governments**. In 2018, the Attorney General appointed a Local Government Records **Consultant**. See: <http://www.atg.wa.gov/pr-consulting-program> 
- The AGO may also **review a state agency denial** of a record when the agency concludes the record is exempt.

~ RCW 42.56.155; RCW 42.56.570;
RCW 42.56.530; RCW 42.30.210



AGO PRA Model Rules – ch. 44-14 WAC



Washington State
Office of the Attorney General

Attorney General
Bob Ferguson

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MODEL RULES ON PUBLIC DISCLOSURE



History

As part of the 2005 recodification of the Public Records Act to chapter 42.56 RCW, the Legislature asked the Attorney General to provide guidance to both records requestors and agencies on the public records process by drafting model rules on public disclosure. RCW 42.56.570.

After conducting a 13-city Open Government tour, gathering comments, and holding a public hearing, the Office adopted Model Rules in 2006. Chapter 44-14 WAC. In 2007, again at the Legislature's directive, and after gathering additional comments, the Office adopted Model Rules for electronic records. In 2018, after gathering additional comments, the Office updated the Model Rules to reflect changes in statutes, laws and technology since 2006-2007.



Effect

The Model Rules are non-binding and provide "best practices" for requestors and agencies. Agencies can use the Model Rules to develop their own practices and rules. Local agencies should consider the Model Rules. RCW 42.56.570.

Open Government

[Request AGO Public Records](#)
[Open Government Training](#)
[Public Records & Open Public Meetings](#)
[Open Government Resource Manual](#)
[Model Rules](#)
[Open Government Ombuds Function](#)
[Sunshine Committee](#)
[Local Government Public Records Consultation](#)

AGO PRA Model Rules (cont.)

- **Chapter 44-14 WAC.**
- Adopted under RCW 42.56.570.
- Advisory and non-binding.
- Provide model rule language for agencies to consider in adopting their own PRA rules.
- Provide comments on model rule language, with background and references to PRA statutes and case law.
- A resource for state and local agencies, requesters, the courts, trainers, others interested in the PRA.
- PRA provides that local agencies should consult them when establishing local PRA ordinances. RCW 42.56.570(4). 
- Updated in 2018: 
 - <http://www.atg.wa.gov/model-rules-public-disclosure>

AGO PRA Model Rules (cont.)

- 2018 Model Rules Updates:



- Confirm that the public is entitled to request public records stored on personal devices if those records concern agency business;
- Address relevant court rulings and legislative changes to the PRA including, for example, those concerning copy fees and required records training;
- Address technology changes such as online records portals used at some agencies, and give examples of how agencies can provide records electronically; and,
- State that an agency should reasonably organize its records. Agencies are encouraged to refer to the extensive guidance published by the Secretary of State for advice regarding records management.

AGO Open Government Resource Manual – Available on AGO Website*



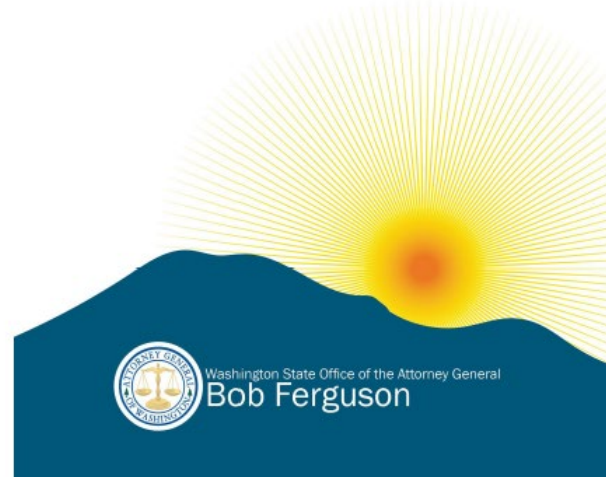
Updated
October 31,
2016**

WASHINGTON STATE



Sunshine
Laws 2016

An Open Government Resource Manual



* <http://www.atg.wa.gov/open-government-resource-manual>

**Does not yet include PRA statutory changes which were effective July 23, 2017; or updated 2018 Model Rules.

Risk Management Tips for Agencies

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



Thank you!

