



SUNSHINE LAWS TRAINING

**OPEN PUBLIC
MEETINGS ACT**
CH. 42.30 RCW

**PUBLIC
RECORDS ACT**
CH. 42.56 RCW

JULY 19, 2023

OVERVIEW

SIGNIFICANCE OF GOVERNMENT TRANSPARENCY
OPEN PUBLIC MEETINGS ACT
PUBLIC RECORDS ACT

DISCLAIMER

This presentation is educational only and is not legal advice or a legal opinion. The OPMA and PRA change over time. Later court decisions, or changes in statutes, can impact the OPMA and PRA as well as an agency's obligations under these laws. Agencies are encouraged to consult with their legal counsel.

THE STARTING POINT

“The people do not yield their sovereignty to the agencies which serve them.”

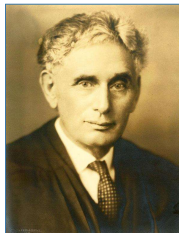
“The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know.”

RCW 42.30.010, RCW 42.56.030

WHY YOU SHOULD CARE ABOUT TRANSPARENCY LAWS

IT'S THE LAW!
Your Boss Says So.

"Sunlight is the best disinfectant."



U.S. Supreme Court Justice
Louis Brandeis

The Leader PTSD settles lawsuit over public records
School district is latest hit by legal action from chronically litigious Whidbey resident

KEPR RSD Board Recall on the Ballot for August Special Election

THE SPOKESMAN-REVIEW
Justices uphold \$502,000 public records fine against state

PRA Penalties & Judgments

\$2.6 M – City of Tacoma



\$14.00 – Office of the Governor

OPEN PUBLIC MEETINGS ACT

OPMA'S POLICY

It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people insist on remaining informed and informing the people's public servants of their views so that they may retain control over the instruments they have created.

RCW 42.30.010

BASIC REQUIREMENTS

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.

Public agencies are encouraged to provide for the increased ability of the public to observe and participate in the meetings of governing bodies through real-time telephonic, electronic, internet, or other readily available means of remote access that do not require an additional cost to access the meeting.

RCW 42.30.030

WHAT IS A GOVERNING BODY?

Multimember boards, commissions, councils, or other policy or rule-making bodies of a public agency.

Includes

– Committees and Subcommittees –
Acting on behalf of governing body, taking testimony or public comment, or conducting hearings.

– Advisory Bodies –
If the body's advice is necessary for another governing body to act, and the body was created by the legislative body.

MEETING



- Meeting means meetings at which the public agency takes “action.
- Requires a majority of its members (quorum).
No quorum → No meeting
Physical presence not required – a meeting can occur by phone or email.
- Does not need to be titled “meeting” – may be a “retreat,” “workshop,” “study session,” etc.
- Simply receiving information without comment is not a meeting.



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.
(See upcoming slide on “final action.”)

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.

VOTE



RCW 42.30.060, RCW 42.30.020

PUBLIC ATTENDANCE

- A public agency can't place conditions on public to **attend** meetings subject to OPMA.
- Reasonable rules of conduct can be set.
- Governing body may adopt generally applicable conditions determined to be reasonably necessary to protect public health or safety, or to protect against interruptions.
- Have a plan for addressing disruptions and interruptions.

New!

RCW 42.30.040, AGO Opinion 1998 No. 15

REMOTE OBSERVATION AND PARTICIPATION

New!

Agencies are encouraged to:

- Provide remote access that does not require an additional cost to access the meeting.
- Provide an online streaming option for, all regular meetings.
- Make audio or video recordings.
- Make recordings available online for a minimum of six months.
- This does not alter recordkeeping requirements under chapter 42.56 RCW.

RCW 42.30.030, RCW 42.30.220

PUBLIC COMMENT

Oral or written public comment required prior to taking final action at a regular meeting

New!

Oral Comment

- If oral comment accepted, the governing body shall, when reasonable, provide people with a disability, limited mobility or any other reason that makes physical attendance difficult, the opportunity to make oral comment.
- May limit comment on items not on agenda.
- May put guidelines in place for public comment i.e. time limits.

Written Comment

- Written testimony must be distributed to the governing body.
- May have reasonable deadlines for submission of written testimony.
- May limit comment on items not on agenda.

RCW 42.30.240

THREE TYPES OF MEETINGS

Regular Meetings, RCW 42.30.070, 075, & 077

- Recurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws or other rule.
- Must have an agenda available online at least 24 hours in advance.

Special Meetings, RCW 42.30.080

- Called by presiding officer OR majority of the members.

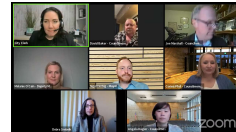
Emergency Meetings, RCW 42.30.080(4)

- Called to deal with an emergency, notice is not required. Very limited reasons.

[15]

REMOTE MEETINGS

New!



In the event of an emergency, an agency may:

- *Option 1: Hold an all remote meeting without a physical location.*
- *Option 2: Hold a meeting with governing body present but some or all of the public excluded.*

Requirements for a remote meeting:

- Declared emergency at the local, state or federal level.
- Agency determines it cannot hold a meeting in person with reasonable safety where members or public are in attendance.
- Public must be able to listen, if not, meeting prohibited except executive session.
- Notice of meeting must include remote participation instructions.

Individual governing body members may participate remotely during non-emergency times.

RCW 42.30.230

EXECUTIVE SESSION

**MEETING
IN PROGRESS**

- Part of a regular or special meeting that is closed to the public.
- Limited to specific purposes set out in the OPMA, RCW 42.30.110.
- 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.
- Purpose of executive session must be entered into the minutes.
- If going into executive session, have a plan for ensuring only invited people are allowed access.
 - Unique “meeting” for this part of the meeting.
 - Utilize waiting room feature and admit participants.

New!

RCW 42.30.110

MINUTES

- 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.
- Executive session’s purpose must be recorded in the minutes.
- If meeting provides remote option, add relevant information to the minutes.
 - Links & phone numbers.
 - Number of remote participants.

New!



RCW 42.30.035

OPMA PENALTIES AND LEGAL ACTIONS

- Individual penalty.
 - **\$500** fine for the first violation.
 - **\$1,000** for subsequent violation.
 - **Costs and attorney fees.**
- Final action at illegal meetings may be declared void.
- Mandamus or injunction action to stop violations or preventing threatened violations by members of a governing body.



RCW 42.30.050, RCW 42.30.130



PUBLIC RECORDS ACT

THE PRA'S PURPOSE

“The purpose of the PRA is to increase governmental transparency and accountability by making public records accessible to Washington residents.”

THE PRA, IT'S NOT JUST CHAPTER 42.56 RCW

- The Legislature enacts statutes.
 - The Courts interpret statutes.
- (But it's not a clean division of labor.)

Example: You won't find anything in the PRA about a “reasonable search.”

Neighborhood Alliance of Spokane County v. Spokane County
127 Wn.2d 702, 261 P.3d 119 (2011).

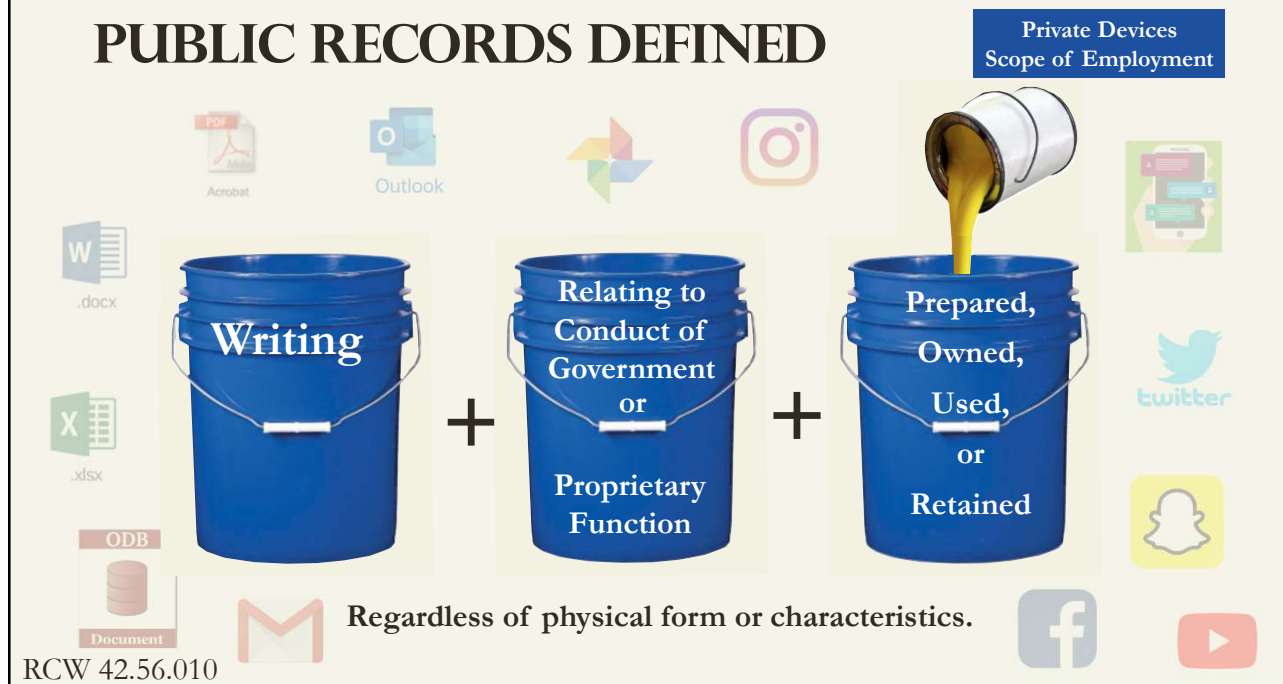
UNDER THE PRA, AGENCIES MUST...

- ✓ **Appoint a public records officer.**
RCW 42.56.580
- ✓ **Publish procedures describing agency organization, operations, rules of procedure, and adopt/enforce rules/regulations.**
RCW 42.56.040, RCW 42.56.100
- ✓ **Publish fee schedule. No fee to inspect records.**
RCW 42.56.070, RCW 42.56.120
- ✓ **Maintain a list of laws the agency believes exempts or prohibits disclosure.**
RCW 42.56.070

UNDER THE PRA, AGENCIES MUST ALSO...

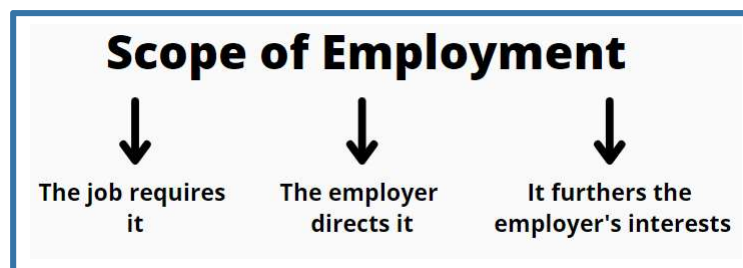
- ✓ **Provide indexes of records.**
RCW 42.56.070
- ✓ **Make non-exempt records available for inspection and copying during customary business hours for a minimum of 30 hours per week, excluding holidays.**
RCW 42.56.090
- ✓ **Post customary business hours on the agency's website.**
RCW 42.56.090
- ✓ **Maintain a Public Records Request Tracking Log. RCW**
RCW 40.14.026

PUBLIC RECORDS DEFINED



PERSONAL DEVICES & ACCOUNTS

Includes - personal cell phone text messages, email accounts, and social media accounts.

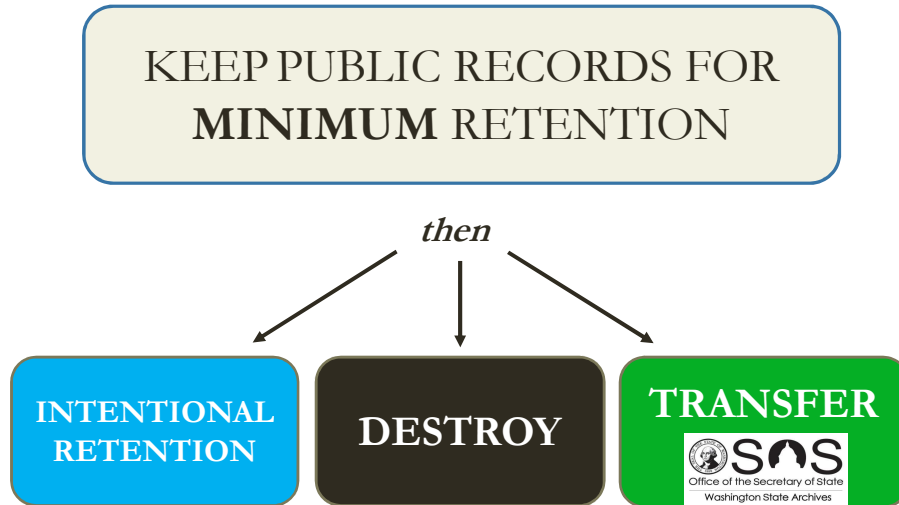


The public employee must obtain, segregate and produce to the employer those public records that are responsive to a PRA request from the employee's personal accounts, files, and devices.

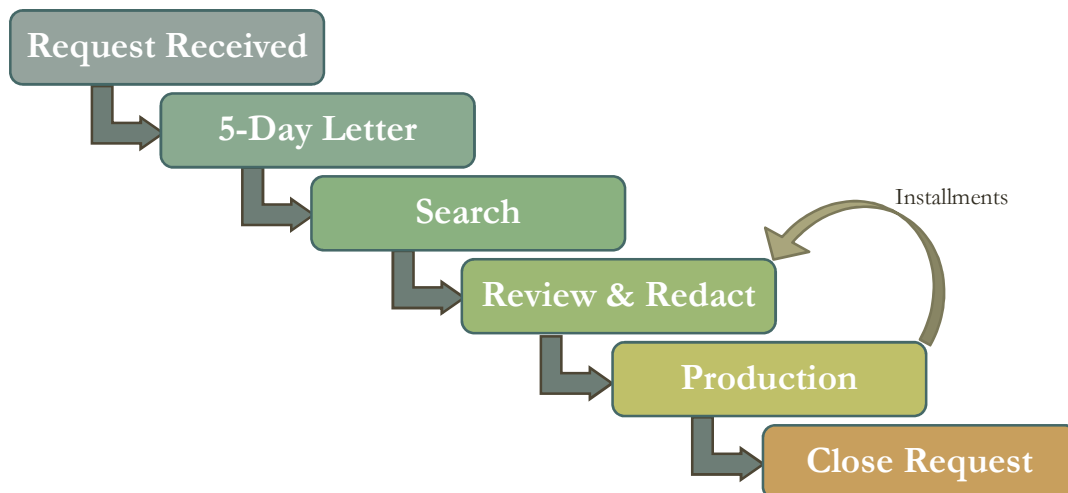
Bottom Line

Records belong to the agency. They are not personal records.

RECORDS RETENTION



THE PUBLIC RECORDS PRODUCTION PROCESS



WHAT DOES A PRA REQUEST LOOK LIKE?

- Did you receive one? Test: “FAIR NOTICE”
Says “I am making a **public records request** for...”
On the agency’s **Public Records Request form**
Says it is a “**Public Records Act**” or “**PRA**” request
Cites PRA - **RCW 42.56**, “**Freedom of Information Act**” or “**FOIA**”
Says “Attention: **Public Records Officer**”
- No specific format or form required. Must accept in person requests made during normal office hours.
- Most requesters will utilize the systems an agency puts in place, facilitate the production of records.



BEST PRACTICE

REFER PERSONS TO PUBLIC RECORDS OFFICER.



IF YOU RECEIVE A COMMUNICATION SUCH AS THOSE ABOVE, GET IT TO PUBLIC RECORDS OFFICER ASAP.

Requester Identity & Motives

- Treat all requesters the same - does not mean they all get the same records.
City of Fife v. Hicks
- Requester’s motives for making requests is irrelevant.
Hood v. Columbia County, Hood v. Centralia College
- While the default is neutrality, identity of the requester may impact exemptions.

RECORDS SEARCH

“The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.”

Plan searches and document your work:

- “Easy” vs Complex searches.
- It’s not the PRO’s job to find all the records, all staff have a role to play.
- Assessed as a whole, was it reasonable. Does not have to be perfect.
- What records to you personally hold?
- Talk with staff about potential search terms.
- Be aware of acronyms, misspellings, or alternative spellings.

Cast a wide net and document all of your search efforts including:

- Search terms used.
- Locations searched.
- Description of records produced & how.
- Description of records not produced.



EXEMPTIONS – A FOUNDATION

- Records are presumed open.
- An exemption must exist in law (state or federal; PRA or other laws).
- Exemptions are narrowly construed.
- An agency must, in writing, cite the exemption for the requester and provide a brief explanation. Typically agencies provide an “Exemption Log.”
- No “silent withholding.”
- The majority of exemptions are discretionary.

PRIVACY AS AN EXEMPTION

There is **no general “privacy”** exemption.

If privacy is an express element of another exemption, privacy is invaded only if disclosure would be:

**Highly offensive to the reasonable person, and
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

Example: RCW 42.56.230(3)

Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their **right to privacy** (information regarding misconduct is not exempt).

A SAMPLING OF EXEMPTIONS

Personal Financial Information, RCW 42.56.230(5)	Commercial Purpose, RCW 42.56.070(8)
Attorney-Client, RCW 5.60.060(2) (RCW 42.56.070(1))	Library Records Disclosing the Identity of a Library User, RCW 42.56.310
IT & Network Security, RCW 42.56.420(4), RCW 42.56.230(5)	Juvenile Records – Relating to the Commission of an Offense, RCW 13.50.050 (RCW 42.56.070(1))
Witnesses to or victims of crime or who file complaints. RCW 42.56.240(2)	Deliberative Process, RCW 42.56.280

Fees

- Determine what fees the agency is going to charge – no fees, actual costs, default fees, or flat fees.
- Publish the fees in the PRA policy and on agency website. This gives requesters prior notice of any potential fees.
- Consider charging a 10% deposit for larger requests before processing the request.
- Give all requesters the same time period for paying fees and close requests if fees are not paid.
- Notify the requester that the request will be closed if fees are not paid.

ENFORCEMENT & PENALTIES

- PRA enforced by courts for claims listed in PRA.
- A court can impose civil penalties: \$0.00 to \$100 per day per document. No proof of “damages” required.
- Penalties imposed to encourage PRA compliance.
- Plus, a court will award the prevailing requester’s attorneys fees and costs.
- Requester motives for making requests is irrelevant.
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.



Touchstones



- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by legal exemption.
- Exemptions must be “narrowly construed.”
- Non-exempt public records must be disclosed.
- Location does not matter.
- Public records must be retained pursuant to records retention laws.

WHERE TO TURN FOR MORE INFORMATION AND ASSISTANCE



The Agency's AAG



Open Government Resource Manual
<https://www.atg.wa.gov/open-government-resource-manual>



Open Government Training Videos
<https://www.atg.wa.gov/open-government-training>



Model Rules on Public Disclosure
<https://www.atg.wa.gov/model-rules-public-disclosure>