

OPEN PUBLIC MEETINGS and PUBLIC RECORDS

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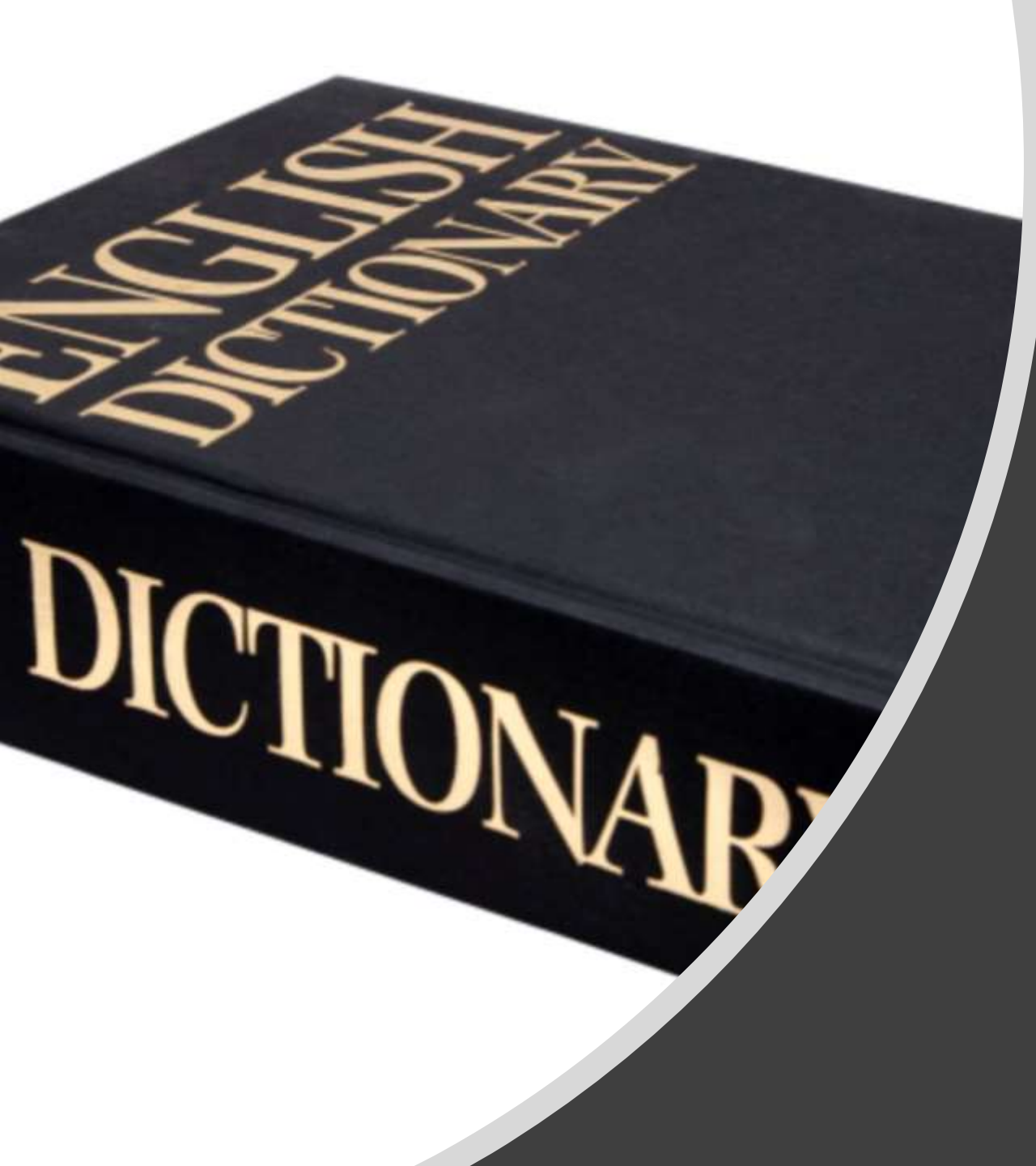
Meetings

The people insist on remaining informed so that they retain control over the instruments they have created.



RCW 42.30.205 (enacted 2014)

Open meetings and public records training is mandatory for all members of governing bodies, boards and must be completed within 90 days of taking office and every four years.



Legislative Declaration

RCW 42.30.030

- Meetings declared open and public
- All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body... except as otherwise provided in this chapter

It's all about the definitions . . .

“Meeting”:
meetings of a
quorum at
which action
is taken

“Action” is broadly defined as “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
- final actions



Examples of Meetings

Traditional types of Meetings

- Regular and special meetings
- Workshops
- Trainings
- Retreats

But can be informal discussions

Meetings

- “Meeting” does not require members to be present in one location
 - or even interact simultaneous
- Conference call with a majority
- Email exchange that includes substantive input from a majority
- “Serial” meetings such as a phone tree
- “Rolling” a topic along in repeated discussions

BUT simply receiving information *without comment* is not a meeting





Did We Just Have a Meeting?

- Meetings may take place in person, by phone, by email, by text, etc.
- Travel & social gatherings excepted only if no “action” is taken
- Texting during meetings is not an “open” discussion

Serial Meetings

Wood v. Battle Ground School Dist. 107 Wn. App. 550 (2001)

- Exchange of emails between school district board members regarding the performance of two employees
- “...the active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business”



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Serial Meetings

Citizens Alliance v. San Juan County 184 Wn.2d 428, 359 P.3d 753 (2015)

- There must be a “collective intent” to meet
- Where there was no evidence that commissioners were aware that communications included a majority of the commission, there was no “collective intent”

Serial Meetings

City of Seattle v. Kasberg 13 Wn. App. 2d
322 (2018)

- Council was considering condemning beach front property for public access
- Emails sent between councilmembers and members of the public
- Communications between individual councilmembers and members of the public do not trigger serial meeting concerns
- No evidence in *Kaseburg* that a majority of the governing body communicated with each other





Serial Meetings

Egan v. City of Seattle *Division 1 Ct. App. (2020)*

- Illustrates the potential complexity of serial meeting scenarios
- Council was considering repeal of Seattle's head tax of employees
- Multiple communications over 3 days via multiple methods
 - In-person meetings, phone calls, emails, texts, distribution of draft press releases
- Court found that a meeting could occur if a majority of the council members were aware of communications among a quorum even if a majority is not
- Returned to trial court for further proceedings

What is a Governing Body?

“Governing body” means...

The council, or other policy or any committee thereof when the committee acts on behalf of the council or conducts hearings or takes testimony or public comment.

RCW 42.30.020(2)

Acts on Behalf Of

A committee acts on behalf of governing body

- NOT simply because the committee provides advice or recommendations
- Only “when it exercises actual or . . . decision-making authority for the governing body”
- Although, even if advisory, it can be open as a policy choice



Meetings Are

Regular

or

Special



Timing and Notice for Meetings

Regular Meetings

- Established by board ordinance, resolution, bylaw, or other rule

Special Meetings

- Called by presiding officer or majority of board members
- 24-hour notice to board members and media
- Must include time, location, agenda
- Prominently display at main entrance and meeting site, post to website
- Members can waive notice if attend or submit written waiver
- Final action may be taken only on items listed in the notice

Advance Posting of Meeting Agendas

- Post regular meeting agendas online at least 24 hours in advance
- Agendas may be amended after posting
- Failure to post agenda does not invalidate an otherwise legal action



Executive Sessions

Common Grounds

- Acquisition of real estate
- Sale/lease of real estate* (final decision in open meeting)
- Evaluate charges against a public officer or employee

*Must be focused on price, not factors affecting value

Columbia Riverkeepers v. Port of Vancouver USA,
188 Wn.2d 421 (June 8, 2017)

Executive Sessions

(cont.)

- To evaluate the qualifications of, review applicant / performance
- To evaluate the qualifications of a candidate for appointment to elective office (interviews and selection in public)
- To discuss with legal counsel enforcement action or potential litigation
- Discussion of labor negotiations is not subject to the OPMA

Confidentiality of Executive Session

- Legal obligation to not disclose information discussed in properly convened executive session
- Disclosure would violate Code of Ethics of Municipal Officers; could also constitute
 - Misdemeanor offense under RCW 42.20.100,
 - Official misconduct under RCW 9A.80.010, and
 - Forfeiture of office and grounds for recall. RCW 42.23.050



So,
We Took
Action
in a
Closed
Meeting,
Now what?

Unintentional Violation?

- Nullification of action RCW 42.30.060.
- Attorney's fees and costs RCW 42.30.120(2)

Knowing violation?

- Add personal liability. RCW 42.30.120(1)
- \$500 civil fine for first violation
- \$1,000 civil fine for any subsequent violation
- Potential forfeiture of office or recall



Curing an OPMA Violation

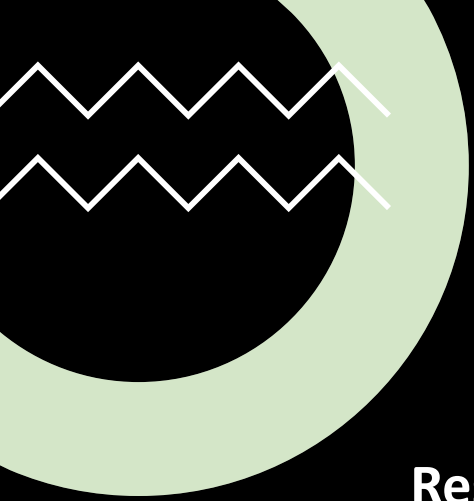
- Later action in OPMA compliance will “cure” the violation
- But the subsequent action must be open, otherwise conform to the OPMA, and not simply be a “summary approval” of the earlier discussions
- Approval in “consent agenda” insufficient
Feature Realty v. Spokane, 331 F.3d 1082 (9th Cir. 2003)
-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

COVID and OPMA

Governor's Proclamation 20-28.15 (Jan. 19, 2021)

- Public meetings must have a virtual component
- Must follow DLI rules for “business meetings” in miscellaneous venues
 - Face coverings required
 - Must post signs at entrance
 - Must engage customers who are not following rules
 - No capacity limit
 - Social distancing is not required

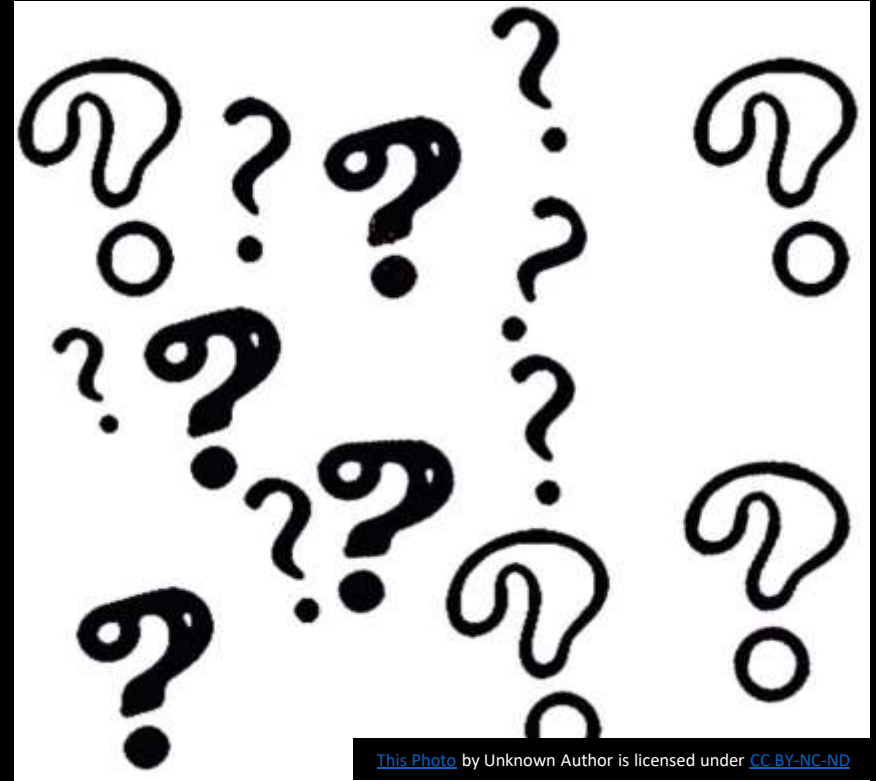




Questions on OPMA?

Resources

- MRSC: Knowing the Territory
<https://mrsc.org/getmedia/1e641718-94a0-408b-b9d9-42b2e1d8180d/Knowing-The-Territory.pdf.aspx?ext=.pdf>
- Attorney General's Office: Open Government Training -
<https://www.atg.wa.gov/open-government-training>



Public Records



Roots of the PRA

In 1972 Initiative 276 was favored by 72% of Washington voters

It gave rise to the PRA which states, “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”

- *(continued...)*



Agencies Must Make Documents Available

An agency shall make available for inspection and copying all public records, unless covered by a specific exemption

No Particular Form of Request Required

Agencies shall honor requests received by mail for identifiable public records (unless exempted)

Including:

In Writing

By Email (2017)

Verbally

RCW 42.56.080

(continued)

No Statement of Reasons is Necessary

- A person making a public records request is not required by the Act to state a reason for the request. The only limitation is that the Act may not be employed to obtain “lists of individuals requested for commercial purposes”
- RCW 42.56.070(9). *See also* AGO 1988 No. 12; and *SEIU Local 925 v. Freedom Found.*, 197 Wn. App. 203 (2016) (interpreting commercial purposes exception)



Responding to Public Records Requests

- Initial response – within 5 business days (RCW 42.56.520)*
- 4 initial responses: Provide records, provide reasonable estimate of time, seek clarification, or deny
- Installments
- Exemption logs
- Brief explanation of *how* exemptions apply to the record
- Don't simply cite the statute
- Third-party notice

*Proclamation 20-18: if electronic

Records, Not Information

REQUEST



- An important distinction must be drawn between a request for information and a request for the records themselves
- The act does not require agencies to create records, but only to make those records accessible to the public

“Public Records” Defined

Broadly
defined at
RCW

1) “any writing . . . regardless
of physical form or
characteristics”

42.56.010 -
Three
Elements:

2) “containing information
relating to the conduct of
government or the performance
of any governmental or
proprietary function”

3) “prepared, owned, used, or
retained by any state or local
agency”

Questions about whether something is a
“public record” are usually about (2) or
(3), not (1)



Public Records on Personal Devices

- Location is not the only test; public records can be located on personal devices, with third-party contractors, etc.
- “Scope of employment” test intended to address 3rd prong (prepared, owned, used, or retained) for personal devices
 - 1) The job requires it;
 - 2) The employer directs it; or
 - 3) It furthers the employer’s interests
- Scope of employment test does not apply to records on agency devices. *SEIU Local 925 v. University of Washington*, 193 Wn.2d 860 (2019)



Searches of Personal Devices

- Right of privacy versus duty to produce public record
- If a request is made for emails, texts or Facebook postings on personal devices or accounts, you **MUST**:
 - Perform a diligent good faith search;
 - Describe in a sworn statement how you searched and what you found;
 - Produce responsive records to the City; and
 - Identify any records not produced and the reason.



Fees for Responding to Requests

- Cannot charge for inspection of records
- Cannot charge for time to prepare records for production (e.g., redaction time)
- Statutory default fee schedule (addresses electronic records)

Exempt Records?

There are 46 exemptions to disclosure
in the PRA

There are also exemptions in other state
and federal statutes on many subjects
(everything from license plates to child support
to criminal records)

Courts enforce the duty to disclose
broadly and the exemptions narrowly

Privacy Under the Public Records Act

There is no stand-alone “privacy” exemption in the PRA

The PRA *does* exempt some records from disclosure if disclosure would be an invasion of privacy; E.g. personal information in files of employees and officials; taxpayer information; investigative records

There is only an invasion of privacy when information is

- Highly offensive to a reasonable person; and
- Not of legitimate concern to the public RCW 42.56.050

Privacy Under the Public Records Act

- RCW 42.56.250(4) exempts specified **personal information of employees** without needing to show violation of right to privacy (e.g., residential addresses and phone numbers, personal cell phone numbers and email addresses, social security numbers, driver's license numbers, emergency contact information, dependent information)
- Legislative amendment in 2020: photographs and month and year of birth in the personnel files of employees or volunteers of a public agency are now exempt (RCW 42.56.250(6))

Exempt Records – Response

- Redact, if possible, rather than withhold entirely
- Claiming an exemption requires
 - Brief description and explanation of how the exemption applies to the record

(More than just citing the statute)



Agency Record Retention

Multiple retention schedules available - Washington State Archivist

- Local Government Common Records Retention Schedule (CORE) – Version 4.2 (August 2021)
- Communications to/from council unless covered by another specific schedule – 2 years then transfer to State Archivist



Technology: Manage Risk

- Dedicated e-mail accounts and devices for agency business
- Central servers and other electronic document sharing solutions
- Email and telecommute policies
- Disable features (such as text) on agency devices
- Be consistent in your practices
- Use the records retention schedules to appropriately delete records in timely manner

Disposition of Public Records

Public records may be destroyed or transferred only in accord with the instructions and approval of the State of Washington's Local Records Committee.

RCW 40.14.070

Enforcement and Penalties

- 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
- Paid from General Fund, not insurance

RCW 42.56.550., 565



Resources:

- MRSC: Knowing the Territory
<https://mrsc.org/getmedia/1e641718-94a0-408b-b9d9-42b2e1d8180d/Knowing-The-Territory.pdf.aspx?ext=.pdf>
- Attorney General's Office:
Open Government Training
<https://www.atg.wa.gov/open-government-training>

