

PRA & OPMA OVERVIEW

LAKE FOREST PARK CITY COUNCIL

JANUARY 22, 2026

ANN MARIE SOTO

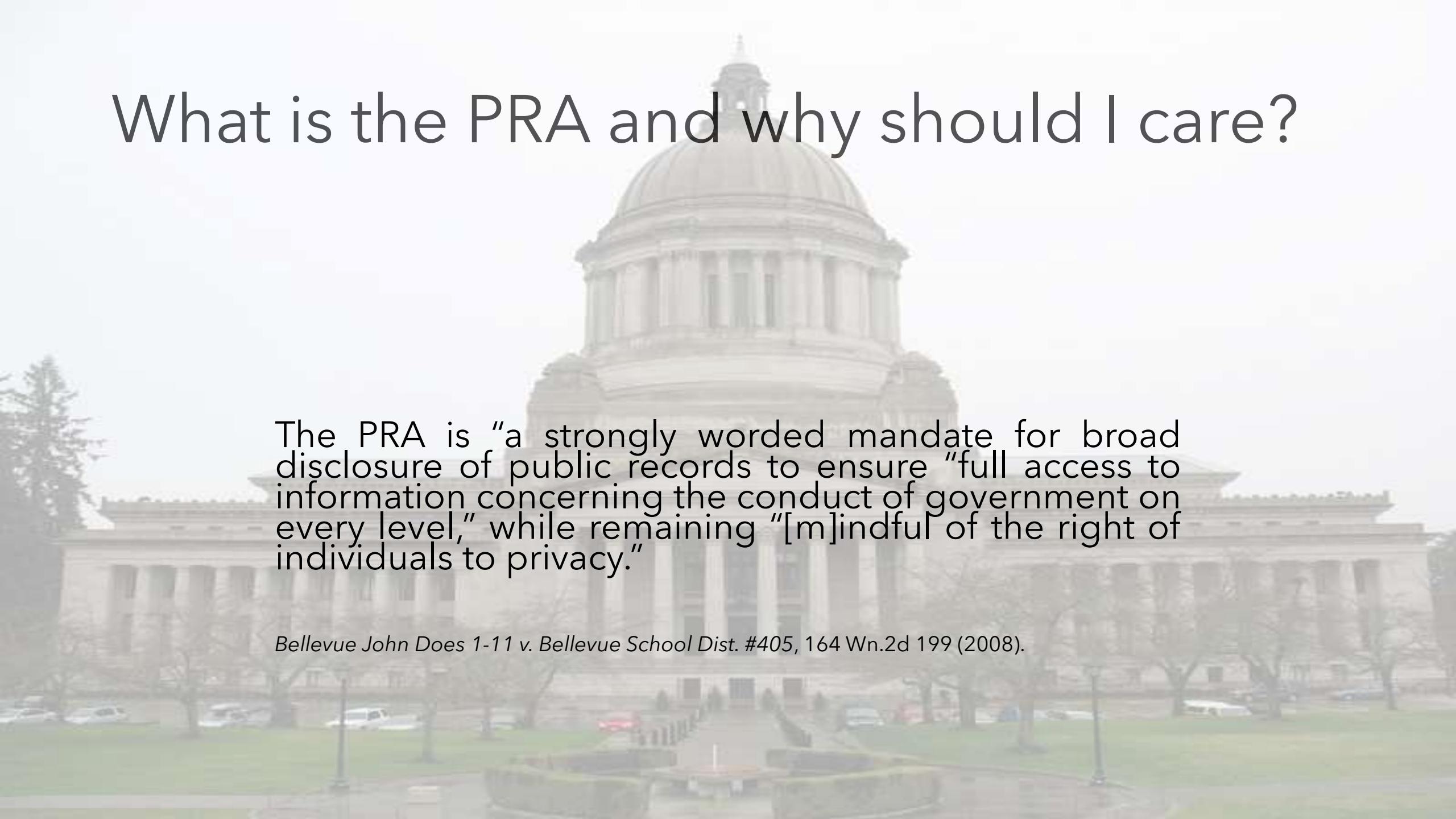


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Overview

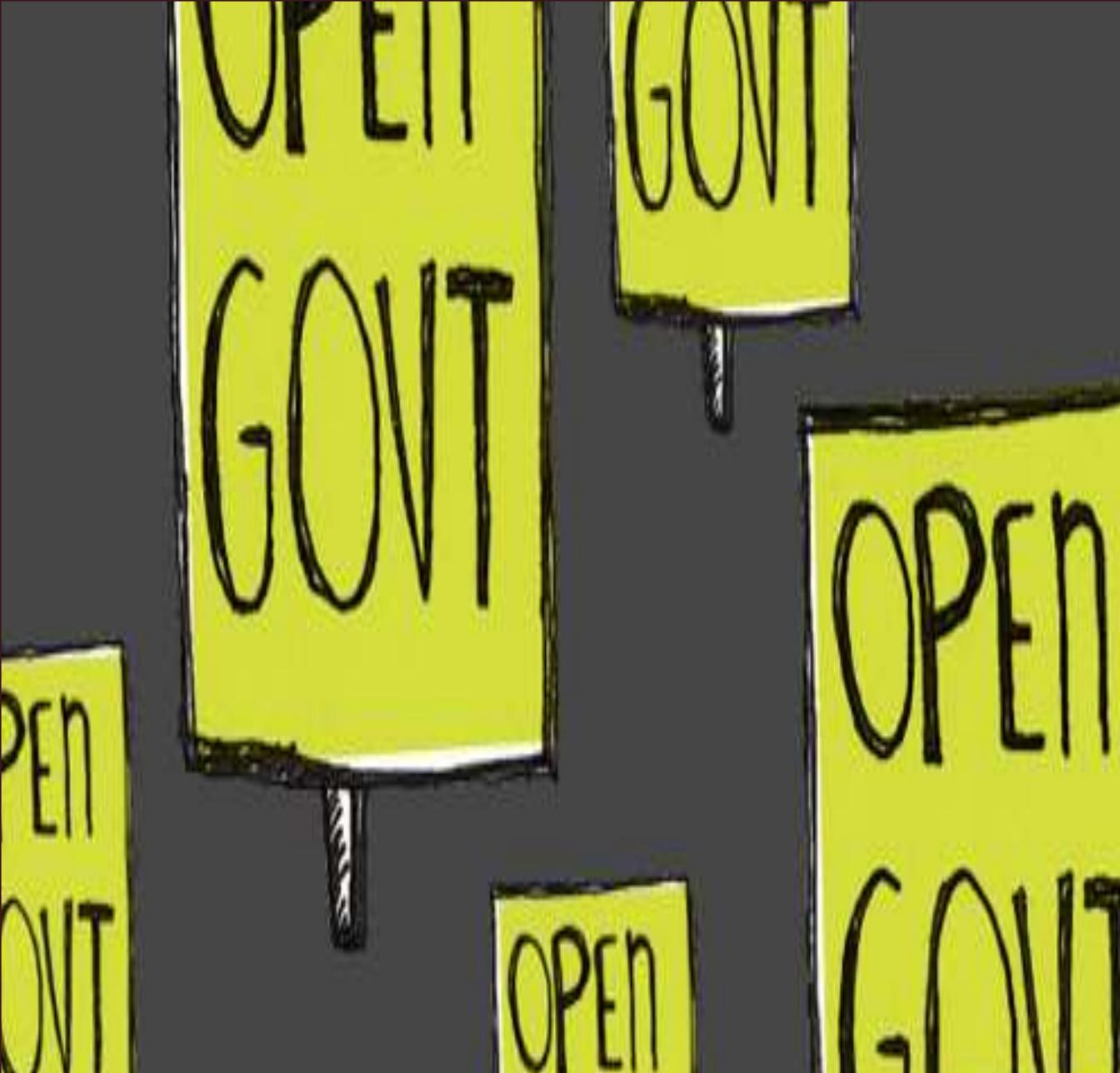
- What is the PRA and why should you care?
- Local government records responsibilities and challenges
- Understanding the definition of “public record”
- Responding to public records requests
- Records retention
- Open Public Meetings Act refresher
- Risk management strategies and takeaways
- Additional resources

What is the PRA and why should I care?

A large, semi-transparent watermark of the Washington State Capitol building is centered in the background. The building is made of light-colored stone and features a prominent central dome with a copper roof. The foreground is a grassy area with some trees and a paved walkway.

The PRA is “a strongly worded mandate for broad disclosure of public records to ensure “full access to information concerning the conduct of government on every level,” while remaining “[m]indful of the right of individuals to privacy.”

Bellevue John Does 1-11 v. Bellevue School Dist. #405, 164 Wn.2d 199 (2008).



- PRA requires agencies to make public records available for inspection and copying
- Important for all agency employees **and officials** to be familiar with the PRA and use consistent procedures when dealing with PRRs. Plus, training is required! (RCW 42.30.205/42.56.150)
- PRA violations (even inadvertent ones) can come with hefty penalties
- Staying apprised of PRA and record requirements may help avoid litigation, or better prepare for litigation that may arise



Local government responsibilities and challenges

Agency Responsibilities

- Adopt and publish a PRA policy
- Appoint and publicly identify a Public Records Officer (PRO)
- Ensure PRO and all members of agency's governing bodies complete PRA training
- Publish and maintain a list of exemptions outside of the PRA
- Maintain a public records index
- Adopt a public records fee schedule
- Track, log, and report public records request information
- Retain and maintain records in accordance with State retention requirements

Common Challenges Faced by Agencies

- Keeping up with technology
 - Ensuring agency has a way to capture/retain public records created on new technology/programs (ex. Zoom chats, Slack, texts, etc.)
- Funding/staffing levels
- Dealing with serial or difficult requestors
- Maintaining consistent documentation
- Maintaining public records held by third-parties (consultants/contractors, agency volunteers, etc.)

Understanding the definition of “public record”

“Public record” is broadly defined:

“[I]ncludes 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.”

- Includes email, paper files, recordings, web content.
- Includes public records created on **personal electronic devices or non-agency email accounts.**
- May include social media posts.

RCW 42.56.010(3)

Requests for Records vs. Information

- Records defined as 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 public agency regardless of physical form or characteristics
- Record must be “identifiable,” meaning one that is existing at the time of the request and which agency staff can reasonably locate

- Requests that merely ask questions or seek information are not requests for records
- Agencies not required to respond to requests for explanations about records or to conduct research on behalf of the requestor

RCW 42.56.010(3); RCW 42.56.080; WAC 44-14-04002(2)



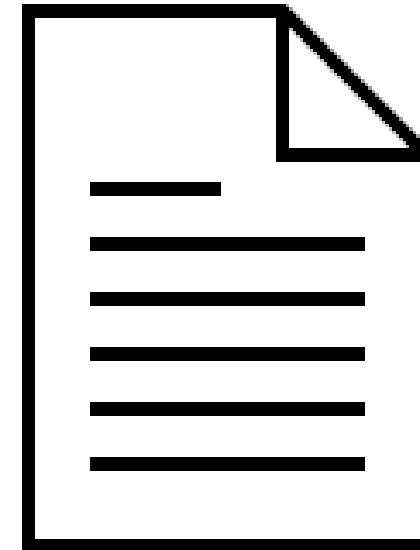
RESPONDING TO PUBLIC RECORDS REQUESTS

So you received a PRR—now what?

- PRO receives request, or request forwarded from another employee/official to PRO
- Agency must respond to the requestor within **5 days** of receipt of the request
- If records readily available, provide the records
- If records not readily available, **MUST** provide “reasonable estimate of time” required to respond
- Search for records
- Provide responsive records; may provide records in installments and extend estimate of time, if needed
- Document closing of request

Initial Response: The 5-Day Letter

- 1) Provide the record
- 2) Provide an internet address and link to the **agency's** website
 - If the requestor notifies the agency that they do not have access to the internet, agency must provide copies or allow the requestor to view copies using an agency computer
 - Cannot direct the requestor to another agency's website
- 3) Acknowledge receipt of the request and provide a reasonable estimate of time needed to respond
- 4) Acknowledge receipt of the request, ask for clarification, and provide a reasonable estimate of time required to respond
- 5) Deny the request



RCW 42.56.520(1)

Calculating Estimate of Time

- Reasonableness will depend on specific facts and circumstances, such as:
 - Need to provide third-party notice*
 - Need for clarification
 - Large volume
 - Records in storage
 - Records contain potentially exempt information/require legal review
 - Workload considerations
- Avoid using blanket estimates for all requests (ex. 30 days)
- **Must include estimate of time**, even if the exact amount of time needed is unknown



RCW 42.56.520(1); *RCW 42.56.540

Seeking Clarification

- If a request is unclear, seek clarification to determine what records the requestor is looking for
- Requests for clarification **MUST** be accompanied by a reasonable estimate of time (“to the greatest extent possible”)
 - If requestor doesn’t clarify and the entire request is unclear, don’t have to process the remainder
 - Otherwise, must process the portions of the PRR which are clear
- Consider asking the requestor to suggest search terms or rephrasing the request in a way that makes sense and ask the requestor to confirm the agency’s understanding



RCW 42.56.520

Third Party Notice

- Agencies may provide notice to third parties with an interest in the release of records.
- Agencies must provide notice when;
 - The request is for records exclusively found in an employee's personnel file.
 - The request is for an investigation into workplace sexual harassment or stalking. (Applies to State agencies but local agencies may want to provide notice anyway).
 - If a collective bargaining agreement requires it.
- Provide a reasonable time to obtain an injunction. Model Rules suggest 10 business days.
- Notify the requester when records will be available if no injunction is obtained and stick to that date!

Searching for Records

- An agency must conduct an **adequate search** for responsive records
 - Consider all formats (paper, electronic, etc.)
 - Consider records of current staff/officials, former staff/officials, and contractors/consultants
 - Consider possible locations (e.g., file cabinets, agency website, audio files, etc.)
 - Search personal devices and accounts when necessary
- 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
- Don't rely solely on search terms and computer searches—think about the context of records



WAC 44-14-04003(8)

EXEMPTIONS

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 the Public Records Act or other laws



RCW 42.56.050, RCW 42.56.210 - .510, RCW 42.56.550

Right to Privacy?



- There is no general “privacy” exemption in the PRA.
- If privacy is an express element of another exemption, privacy is invaded only if the disclosure would be:
 1. “Highly offensive to the reasonable person” and
 2. “Not of legitimate concern to the public.”

~ RCW 42.56.050

TEXTS, SOCIAL MEDIA, AND OTHER ELECTRONIC RECORDS



Texts and Social Media Records

- Text messages and social media posts on personal devices and accounts *may* constitute an agency's public records subject to disclosure under the PRA if the record:
 - (1) relates to the conduct of government, and
 - (2) was prepared within the scope of employment or official capacity (when the position requires it, the public agency directs it, or when it furthers the agency's interests.)
- Consider adopting policies regarding usage and retention of text messages and social media postings and invest in software for retention of such records
- Must fill out a "Nissen" affidavit when searching for records on personal accounts/devices

Nissen v. Pierce County, 183 Wn.2d 863, 357 P.3d 45 (2015) (text messages on personal device); *West v. City of Puyallup*, 2 Wash. App. 586, 410 P.3d 1197 (2018) (personal Facebook pages)

Providing Electronic Records

- If a requestor requests records in a particular format or electronically, the agency should comply if it is reasonable and feasible
- Reasonableness and feasibility will vary depending on the agency
- Agencies are not required to purchase any particular software, licenses, or other equipment to process PRRs--BUT update software and equipment if able.
- Agencies may provide records in an alternative electronic format--this does not constitute "creating" a new record
- Exempt records might not be provided in their desired format
- May charge for customized service if communicated in advance
- Consider digitizing high retrieval records

RCW 42.56.120; WAC 44-14-050; WAC 44-14-05001-05004;
Mechling v. City of Monroe, 152 Wn. App. 830, 222 P.3d 808 (2009)



TYPES OF PUBLIC RECORDS LEGAL CHALLENGES

Judicial Enforcement

- Public Records Act enforced by courts
- Court can order a variety of remedies, such as:
 - Civil penalties up to \$100 per day
 - Award of attorneys' fees/cost to prevailing requestors
 - Disclosure of all or part of the withheld record, or **non-disclosure** of part or all of the record
- Outside of the PRA, there can be criminal liability for willful destruction or alteration of a public record
- One year statute of limitations for PRA lawsuits
 - From the date an agency claims an exemption, or
 - When agency last produces records on an installment basis
 - Begins upon agency's final, definitive response



RCW 42.56.550; Ch. 40.14 RCW

Review in Superior Court

- Cause of action under the PRA include:
 - Denial of opportunity to inspect or copy a public record (or portion thereof)
 - Failure to provide a reasonable estimate of time/estimate unreasonable
 - Failure to provide a reasonable estimate of charges/estimate unreasonable
- Suit filed in the county where the records are maintained
- Burden of proof is on the agency
- Agency or third-party can also seek an injunction to prevent the release of records

RCW 42.56.540-.550



FEES & PENALTIES

Charging for Records

- Agencies can charge for records, including electronic records, using either:
 - Default fees set forth in PRA; or
 - Actual costs pursuant to an established and published policy.
- Agencies *can* require a deposit.
- No charge to inspect public records during normal business hours.
- Agency must make its facilities available for a requestor to make copies, unless doing so would be unreasonably disruptive.
- PRA does not provide a mechanism to collect on unpaid PRR balances.

RCW 42.56.080(2); RCW 42.56.090; RCW 42.56.120

Penalties Generally

- Court can impose civil penalties up to \$100 per day per record to be awarded to the requestor
- Court may group records together for penalty assessments—or may calculate penalty on a per page basis
- Court may consider the size of the agency and often analyze the amount of the assessment per resident on a per capita basis
- No proof of damages is required
- Must consider any mitigating or aggravating factors that may reduce or increase a penalty
- Failure to provide 5-day letter not subject to penalties
- In addition to attorneys' fees that may be awarded to prevailing requestor
- Penalty awards reviewed by appeals courts using an "abuse of discretion" standard



Aggravating Factors (Increased Penalty)

- A delayed response by the agency, especially in circumstances making time of the essence.
- Lack of strict compliance by the agency with all procedural requirements and exceptions.
- Lack of proper training and supervision of the agency's personnel.
- Unreasonableness of any explanation for noncompliance by the agency.
- Negligent, reckless, wanton, bad faith, or intentional noncompliance by the agency.
- Agency dishonesty.
- Foreseeable public importance of the issue to which the request is related
- Any actual personal economic loss resulting from agency misconduct, where the loss was foreseeable to the agency.
- A penalty amount necessary to deter future misconduct considering the facts and the size of the agency.
- The inadequacy of an agency's search for records.



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

Mitigating Factors (Decreased Penalty)

- A lack of clarity in the public records request.
- The agency's prompt response or legitimate follow-up inquiry for clarification.
- The agency's good faith, honest, timely, and strict compliance with all procedural requirements and exceptions.
- Proper training and 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; Neighborhood Alliance v. Spokane County*



Retaining Public Records

Records Retention, Ch. 40.14 RCW

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

PRA Strategies & Takeaways

- **Stay current on changes** to the PRA, records, and technology.
- **Establish a culture of compliance** starting with agency leadership.
- **Know the law.** Ensure staff and officials are trained about PRA requirements and how to respond to records requests.
- Be mindful of what you put in writing! **Avoid making records** you don't want to see on the front page of the paper.
- **Documentation** and **communication** are KEY!
- **Protect records.** Ensure systems are in place to file, track, retrieve and preserve records, especially with staff changes.
 - **Retain important records** by transferring them to State Archives.
 - **Promptly destroy records** that have met their retention schedule.
- **When in doubt**, contact your legal counsel, RMSA, MRSC, or [Washington AG's Local Government PRA Consultation Program](#).



OPEN PUBLIC MEETINGS ACT CH. 42.30 RCW

Open Meeting Requirement

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 the OPMA.

What is a “Governing Body”?



“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

What is a “Meeting”?

Quorum + Action = Meeting.

“Meeting” means meetings at which action taken.

Action = Transaction of official business, including decision making (“final action”), deliberation and discussion.

No quorum = no meeting (with exceptions).

What constitutes a “action”?

RCW 42.30.020(3)

- “**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, review, 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. Final action MUST be taken in a meeting open to the public.

Examples of Meetings



Email conversations, serial phone calls, texting and messaging involving quorum and city business will probably be considered a meeting.



A quorum at a parking lot, late night dinner, cocktail party or site visit will probably be considered a meeting.

- A serial meeting occurs when the majority of a governing body have a series of smaller gatherings or communications that results in a majority collectively taking action, even if a majority is never part of any one communication.
- Requires a “collective intent to meet” in addition to a series of communications between a majority of the governing body. *Citizens Alliance v. San Juan County*, 184 Wn.2d 428, 359 P.3d 753 (2015).
- “Mere passive receipt of information” by itself is not a violation of the OPMA. *Wood v. Battle Ground School Dist.*, 107 Wash. App. 550, 27 P.3d 1208 (2001).
- “[I]f a quorum of a legislative body, such as the city council, collectively commits or promises to each other to vote – as a group – in favor of or in opposition to a piece of pending legislation at a future public meeting, then such a commitment may be evidence that a majority of the body attended a “meeting” with the collective intent to take an ‘action’ in violation of the OPMA.” *Egan v. City of Seattle*, 14 Wn. App. 2d 594, 471 P.3d 899 (2020).

What's a serial meeting and what is prohibited?

Right to Attend

1. Right to Attend Not = Right to Testify.
2. Right to Attend Not = Right to Disrupt.
3. Can't condition attendance on signing in, filling out questionnaire or requiring any other information.
4. Recording allowed unless disruptive

Special meetings

- Special Meeting = Not regularly scheduled.
- 24 hours before a special meeting, written notice of meeting time, place and agenda
- Can only take final action on agenda items.
- Notice is not required for a meeting to address an emergency if impending injury or damage.

Agendas

Agenda of all regular meetings must be available on-line 24 hours in advance of a meeting.

Does not:

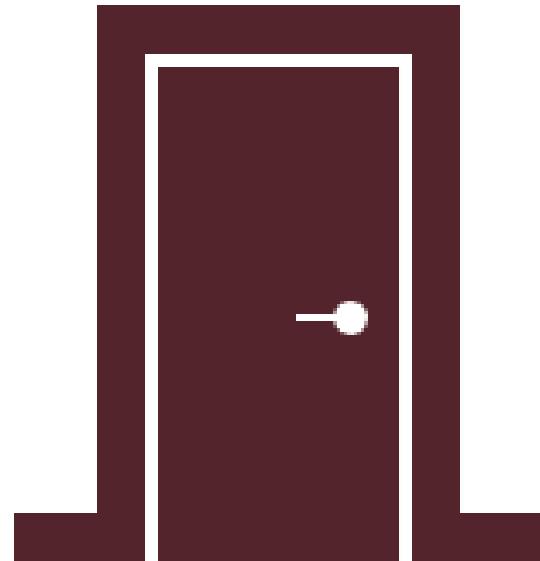
- Apply to agencies that do not have websites or employ fewer than 10 full-time employees.
- Restrict agencies from later modifying an agenda.
- Invalidate otherwise legal actions taken at a regular meeting where agenda was not posted 24 hours in advance.



OPMA Executive Sessions – RCW 42.30.110

Agencies may hold an executive session during a regular or special meeting only for limited purposes listed in OPMA, including:

- **Personnel issues** to review complaints/charges, qualifications and performance.
- **Litigation, potential litigation and legal risks.** As to legal risks, an open discussion must present a danger of adverse legal or financial risk to agency.
- **Real estate negotiations or publicly bid contracts** when public discussion would increase costs.



Executive Sessions may only occur if:

- Before convening the executive session, the presiding officer must announce the purpose and the time the executive session is over.
- Discussion may take place behind closed doors, but decisions must occur within a meeting.
- Secret ballots are not allowed.

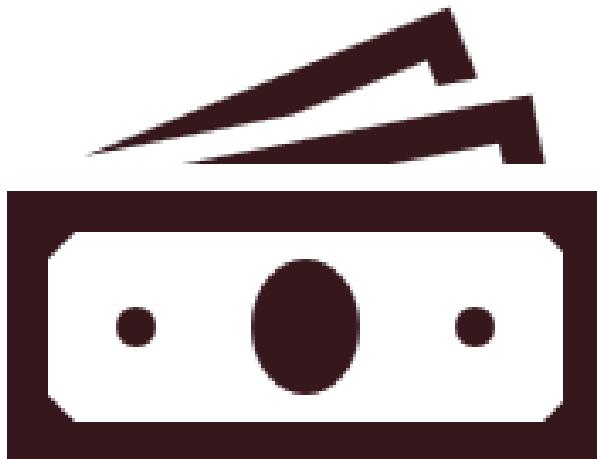
Test for OPMA Violation

Conduct constitutes an OPMA violation when:

- (1) a majority of the council “meet;”
- (2) with the collective intent to transact official business; and
- (3) during the “meeting,” the council members take “action” as defined by the OPMA.

Egan v. City of Seattle, 14 Wn. App. 2d 594, 471 P.3d 899 (2020).

Penalties for Violating the OPMA



- A court can impose \$500 civil penalty against each member (personal liability) for first violation and \$1,000 per subsequent 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
- Loss of the public trust

What are the penalties for OPMA violations?

Actions null and void. Any action taken at a meeting in violation of the OPMA is null and void. *RCW 42.30.060(1).*

Personal liability. Each governing body member who attends a meeting in violation OPMA ***with knowledge of the fact*** is subject to **personal liability** in the form of a civil penalty of \$500 (first offense) or \$1,000 (subsequent offense). *RCW 42.30.120. Can be used as grounds for recall.*

Agency liability. Any person who prevails against an agency in courts for an OPMA violation will be awarded ***all costs, including attorney fees.*** *RCW 42.30.120(2).* Prevailing agency only awarded reasonable expenses and attorney fees if the action was "frivolous and advanced without reasonable cause." This is a high bar and rarely occurs.

A photograph of an open notebook with horizontal ruling lines. A silver fountain pen lies across the pages. The notebook is resting on a dark, textured wooden surface. The lighting is warm and focused on the notebook.

BEST PRACTICES AND OTHER CONSIDERATIONS

- ❑ Meet more frequently.
- ❑ Use the city administrator or another staff person as a resource to filter information through.
- ❑ Do not discuss city business with more than two other councilmembers outside of an open public meeting.
- ❑ If you have discussed a matter in a group of three councilmembers, make sure you don't then discuss the same matter with a fourth member.
- ❑ When in doubt, discuss in an open public meeting!

Find ways to communicate within the confines of the law

Be careful with executive sessions

- ❑ Don't overuse executive sessions.
- ❑ Stay on topic during an executive session.
- ❑ Always let the public know if you might take action following an executive session.
- ❑ Discuss matters publicly after executive session prior to voting.
- ❑ Don't discuss what happened in executive session. RCW 42.23.070(4) provides, in part, that "no municipal officer may disclose confidential information gained by reason of the officer's position." RCW 42.23.050 provides for a \$500 penalty and the potential forfeiture of office.

Avoid text messaging during meetings.

- The public can see you and wonders what you're doing.
- Exchanging text messages regarding City business with a quorum of board members would constitute a meeting in violation of the OPMA.
- Having private conversations via text or email during meetings may give the appearance of trying to hide something, which can invite lawsuits.
- Remember that text messages about City business are subject to public disclosure and records retentions laws.

Be careful when using social media

- Remember that your social media posts are also public records and that you can take "action" in violation of the OPMA via social media, too.

Avoid situations that may present the appearance of an OPMA violation or impropriety

Additional Resources

Records retention and destruction

Washington State Archives site—Records Management:
<http://www.sos.wa.gov/archives/RecordsManagement/>

On-line training course for public officials (Washington State Archives):
<http://www.sos.wa.gov/archives/RecordsManagement/PublicOfficialsandPublicRecords/index.html>

Public Records Act

Washington State Attorney General's video on the PRA:
<http://www.atg.wa.gov/OpengovernmentTraining.aspx#.UyDPQfldWqs>

Washington State AG's Local Government PRA Consultation Program:
<http://www.atg.wa.gov/pra-consulting-program>

MRSC publication: "Public Records Act for Washington Cities, Counties and Special Purpose Districts": <http://www.mrsc.org/publications/pra13.pdf>

Open Public Meetings Act

MRSC (Basics, Forms): [MRSC - Open Public Meetings Act Basics](#)

Attorney General's Office Open Government Training: [LESSON 3: OPEN PUBLIC MEETINGS ACT - RCW 42.30 | Washington State](#)

Questions?

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