



# Open Government Training

## City of Tumwater Elected Officials

January 25, 2022

Training Prepared by Washington State Attorney General's Office



# Local Government Public Records Consultation Program



*Assisting local  
governments with  
PRA best practices.*

Morgan Damerow (360) 570-3418  
Lucy Collis (360) 664-8756  
[PRAConsultation@atg.wa.gov](mailto:PRAConsultation@atg.wa.gov)

*Technical Assistance – Training – Risk Mitigation – Best Practices*

# Overview

- Significance of Open Government & Transparency
- Open Public Meetings Act
- Public Records Act

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 these laws and an agency's obligations.

**Training is your path  
through the forest.**

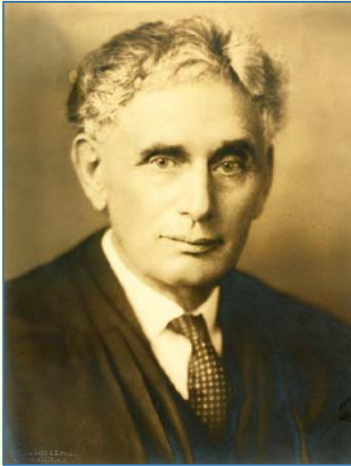


[The] “proper training and supervision of the agency’s personnel” was a mitigating factor ... “[T]he evidence demonstrates an on-going and consistent process of education, supervision, and access to legal counsel to seek assistance,” with “both internal and external training available to employees.”

*Hoffman v. Kittitas County*, Decided Sept. 26, 2019

# Why You Should Care About Transparency Laws

*"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

**ACLU**  
Washington

Judge fines Tacoma Police Department for withholding public records about invasive surveillance device

**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



Part 1

# Open Public Meetings Act

Chapter 42.30 RCW

The purpose of the OPMA is to allow the public to view the “decision making process.”

*Washington State Supreme Court*





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 of a public agency.

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



# Public Agency

- 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 State.
- 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.

# 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.”)

# Public Attendance

- A public agency can't place conditions on public to **attend** meetings subject to OPMA.
- Reasonable rules of conduct can be set.
- Cameras and tape recorders are permitted unless disruptive.



## Public Comment

- No “public comment” period required by OPMA.
- Agency specific statute may require “public comment.”



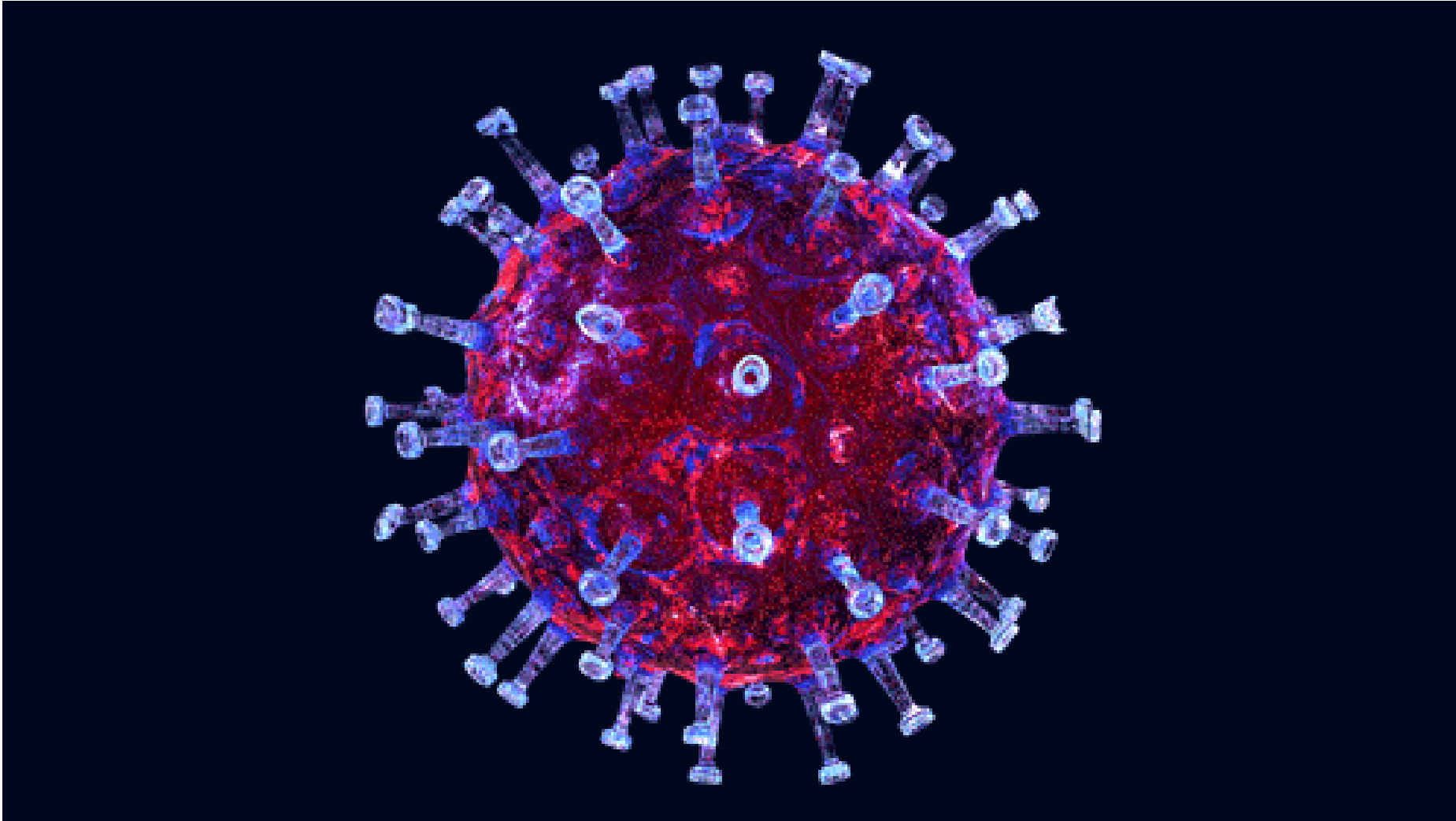
# Final Action

- **“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***



# COVID-19 Shifted the Landscape



# 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.
- With meetings going remote, consider adding relevant information to the minutes about how you have satisfied the remote participation requirement.
  - Links & phone numbers.
  - Number of viewers.





# Proclamation 20-28.15

## Open Public Meetings Act and Public Records Act

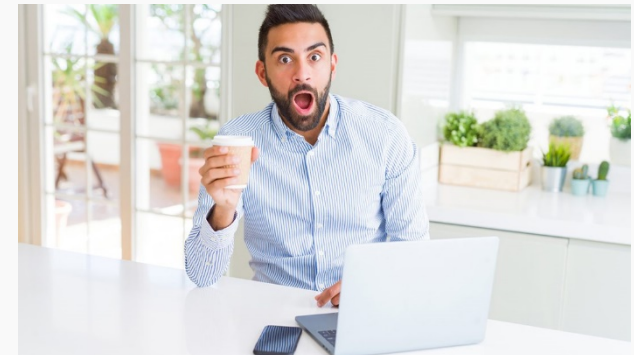
- First issued March 24, 2020. Current version Proclamation 20-28.15. See Proclamation 20.28-14 for operative language.
- Focus is on reducing in-person contact.
- Prohibition on conducting a public meeting subject to RCW 42.30 unless:
  - (a) the meeting is not conducted in-person and instead provides an option(s) for the public to attend the proceedings through, at minimum, telephonic access, and may also include other electronic, internet or other means of remote access, and
  - (b) provides the ability for all persons attending the meeting to hear each other at the same time.
- Counties Safe Start phase in Safe Start plan may impact the ability for governments to resume some public meetings.
- Proclamation will remain in effect until either the termination of the state of emergency pursuant to RCW 43.06.210 or until rescinded, whichever occurs first.



# Interruptions and Disruptions

- The OPMA provides a procedure for dealing with situations where a meeting is being interrupted, 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.

**DISRUPTION**



# OPMA MEETING TYPES



**Regular**

**Special**

**Emergency**

Notice and agenda requirements vary based on the type of meeting.

# Regular Meetings



- 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.
  - You can modifying an agenda.
  - Invalidate otherwise legal actions taken at a regular meeting where agenda was not posted 24 hours in advance.
- Include information for public access - links and phone numbers.



# Special Meetings

Called by presiding officer OR majority of the members.

Notice:

- ☐ 24 hours before the meeting
- ☐ Written
- ☐ Time
- ☐ Place
- ☐ Business to be transacted (agenda)



How:

- ☐ To each member of the governing body (unless waived).
- ☐ 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).

Include links and phone numbers for public attendance.



# Emergency 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.



# Executive Session



- 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.
- 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.

# Executive Session



- Real estate
- Sale or lease
- Publicly bid contracts
- Evaluate qualifications of applicant for public employment

- **Discuss Agency Enforcement Actions, Litigation or Potential Litigation**
  1. Legal counsel representing the agency is present;
  2. For purpose of discussing 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; and
  3. Public knowledge regarding discussion is likely to result in an adverse legal or financial consequence to the agency.

# OPMA Penalties

- 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 attorneys fees to a successful party seeking the remedy.
- Action taken at meeting can be declared null and void.



# OPMA Assistance

- Consult your Attorney.
- The Washington State Attorney General's Office.
- The Attorney General's Open Government webpage.





Part 2

# **The Public Records Act**

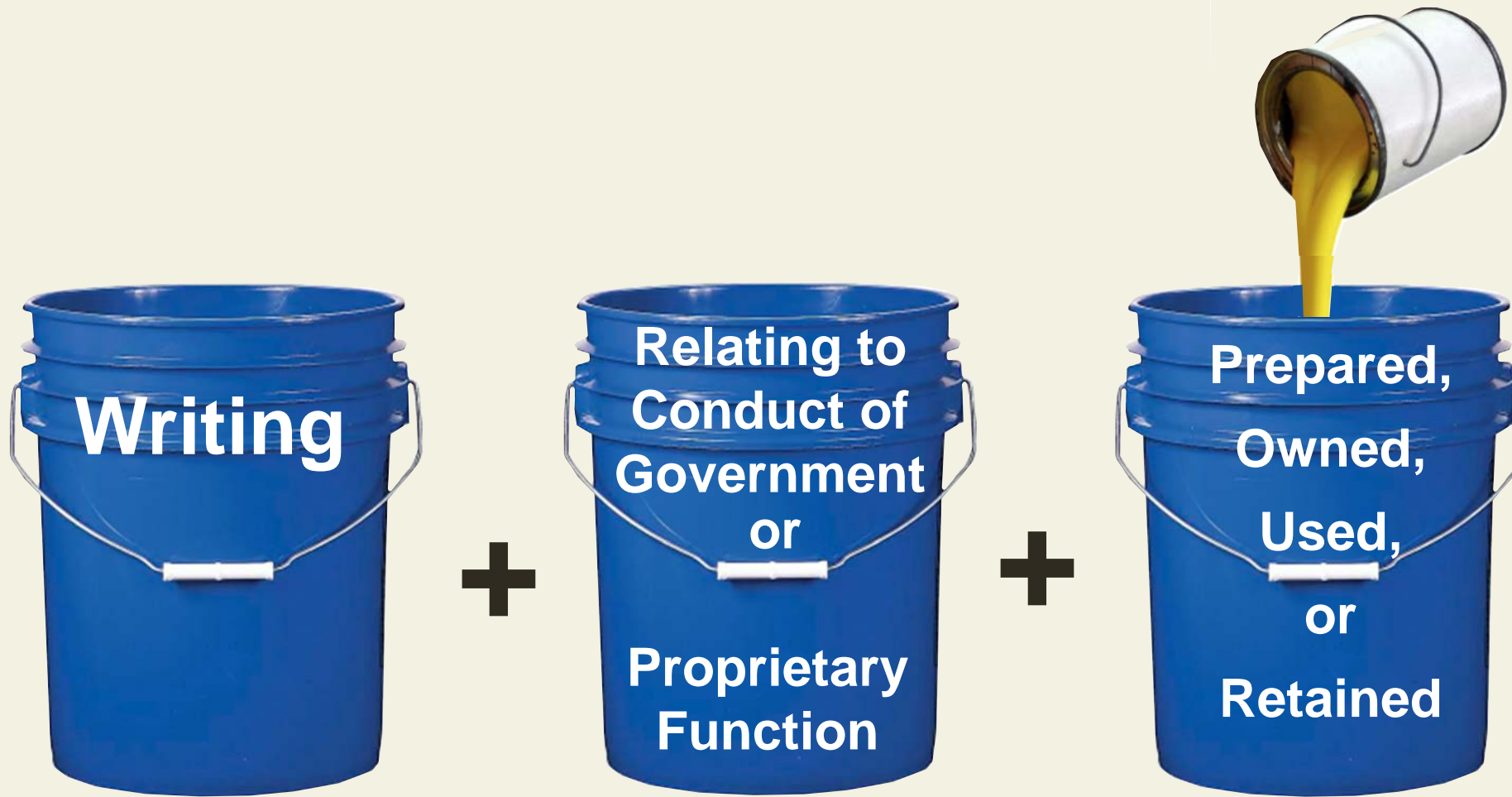
Chapter 42.56 RCW

# Under PRA, agencies must:

- ✓ Appoint a public records officer.
- ✓ Publish procedures describing agency organization, operations, rules of procedure, and adopt/enforce rules/regulations.
- ✓ Publish fee schedule. No fee to inspect records.
- ✓ Maintain a list of laws the agency believes exempts or prohibits disclosure.
- ✓ Provide 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.
- ✓ Maintain a Public Records Request Tracking Log.

# Public Records Defined

Private Devices  
Scope of Employment



Regardless of physical form or characteristics.

# Personal Devices & Accounts

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

## **Scope of Employment**



The job requires  
it



The employer  
directs it



It furthers the  
employer's interests

---

Bottom Line

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



# Records Retention

KEEP PUBLIC RECORDS FOR  
**MINIMUM RETENTION**

*then*

**INTENTIONAL  
RETENTION**

**DESTROY**

**TRANSFER**



The Bottom Line – They are agency records, not personal records.

# 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.
- Must request identifiable public records.
- A request for “information” is not a request for “records” under the PRA.



## **BEST PRACTICE**

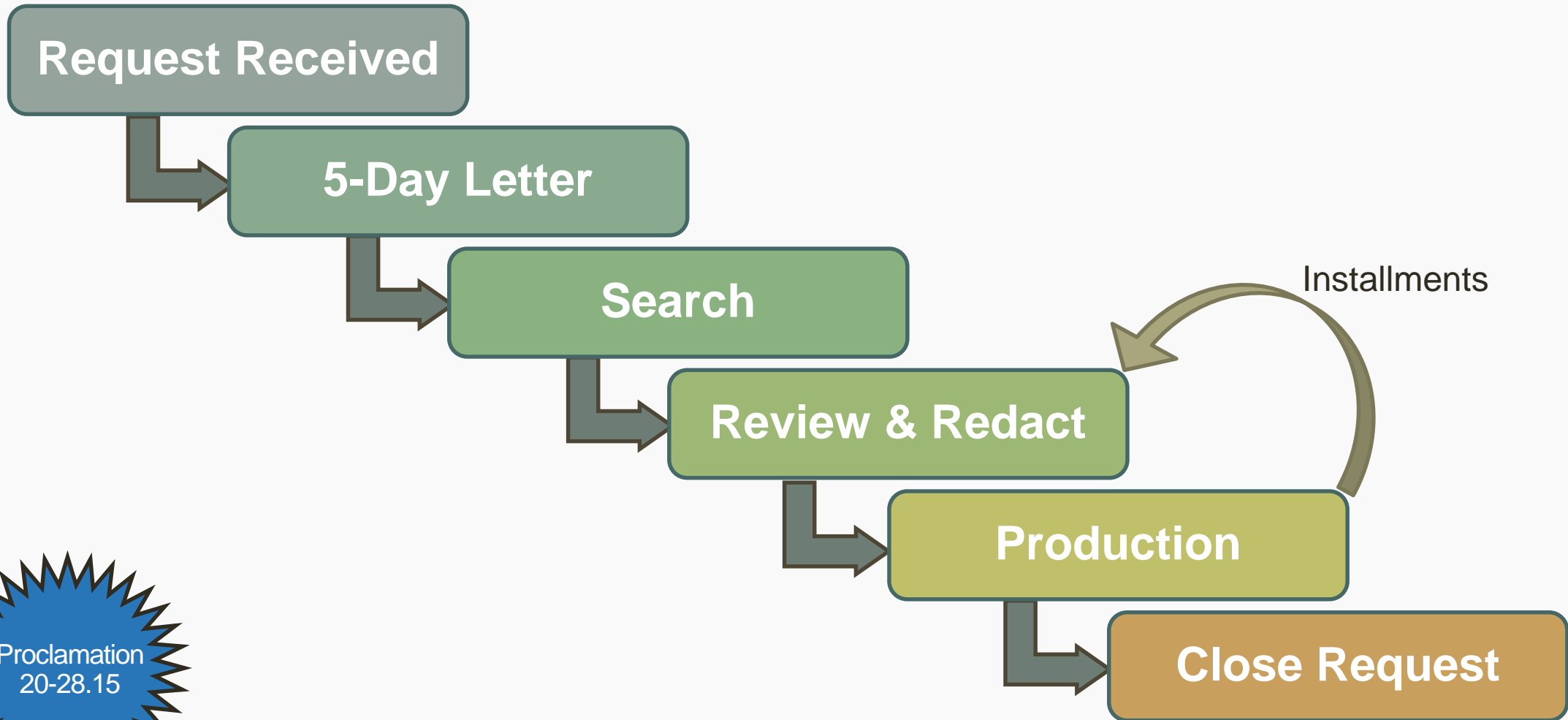
**REFER PERSONS TO PUBLIC RECORDS OFFICER.**



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



# The Public Records Production Process



# Records Search Responsibilities

***“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.”***

Duty: To search for records in locations where it is reasonably anticipated there may be records.

Plan searches:

- What records will be searched centrally?
- What records will be searched by a designated division representative?
- What records are individuals responsible for?

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.



# Some Basics About Exemptions

- Records are presumed open.
- An exemption must exist in law (state or federal; PRA or other laws).
- The agency bears the burden of proof to justify the exemption.
- Exemptions are narrowly construed.
  - There is no PRA general exemption for a “draft.”
- 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.”

# 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).

# Production of Records



- If requestor asks to inspect records:
  - Notify requestor of records availability and how long they will be available. (30 days per WAC 44-14-040.)
  - The PRA prohibits any charge for inspection of records.
- If records are to be produced:
  - Inform requestor of fee (if any) and provide timeline for requestor to pay.
  - Provide records to requestor.
  - Agencies can produce records in installments, particularly for larger requests.
  - Agencies can provide an installment by providing links to records on its website.

# 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.**
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.



# Touchstone



- 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.

# Local Government Public Records Consultation Program



*Assisting local  
governments with  
PRA best practices.*



OPMA Training



PRA Training

Morgan Damerow (360) 570-3418  
Lucy Collis (360) 664-8756  
[PRAConsultation@atg.wa.gov](mailto:PRAConsultation@atg.wa.gov)