

PUBLIC RECORDS AND OPEN PUBLIC MEETINGS TRAINING

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OPEN PUBLIC MEETINGS AND PUBLIC RECORDS TRAINING



INTRODUCTION

Purpose:

- Give Commissioners and staff knowledge of their obligations under important open government laws: the Open Public Meetings Act (OPMA) and the Public Records Act (PRA)
- Promote compliance with the PRA and OPMA
- Meet the requirements of the Open Government Trainings Act, which mandates Open Public Meetings Act training for Boards/Commissions



OPEN PUBLIC MEETINGS AND PUBLIC RECORDS TRAINING



OPMA AND PRA BASICS

- **OPMA: RCW Chapter 42.30; PRA: RCW Chapter 42.56**
- **Both the OPMA and the PRA are open government “sunshine” laws intended to make sure the public can oversee the conduct of public business**
- **Both apply to the Commission and Commissioners individually; the PRA also applies to agency staff**
- **Both are to be construed liberally in favor of openness, transparency, and public access**
- **Both impose substantial penalties for non-compliance**
- **But there are key distinctions between the two Acts**



OPMA - BASICS

Purpose of the OPMA: Public business be conducted in public

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. 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. The people insist on remaining informed so that they may retain control over the instruments they have created.

RCW 42.30.010 (emphasis added).



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OPMA - REQUIREMENTS

Basic 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



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OPMA - DEFINITIONS

What is a “governing body” of a “public agency”?

- Defined in RCW 42.30.020 (1) and (2)
- Fish and Wildlife Commission is a “governing body” of a “public agency” for purposes of the OPMA



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OPMA - DEFINITIONS

What is a “meeting”?

- **RCW 42.30.020(4):** “‘Meeting’ means meetings at which action is taken.”
- “Meeting” requires a quorum of the body (5 for F&W Commission)



OPMA - DEFINITIONS

What is “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, reviews, evaluations, and
 - “final actions”



OPMA - DEFINITIONS



Definition of “meeting” and “action” construed broadly such that nearly any interaction between a quorum of the body at which official business is discussed may be considered a “meeting” subject to the OPMA. If a quorum is present:

- Informal conversations might be a “meeting”
- Phone conference might be a “meeting”
- Email discussion might be a “meeting”
- Social media interactions might be a “meeting”



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OPMA - OPEN MEETINGS

Meetings must be open to the public:

- **RCW 42.30.030:** *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.*
- **Body generally cannot place conditions on attendance**
- **But the OPMA provides procedures for dealing with disruptions, including ejecting disruptors and (in certain cases and with certain limitations) clearing the meeting room or adjourning to another location**



OPMA - EXEC. SESSION

Limited exception to the open meeting requirement: executive session

- OPMA allows a governing body to conduct certain business in closed session on a limited basis
- Executive session is held in private; essential staff and legal counsel may be present
- Presiding officer must announce purpose of exec. session and the time the body will return to regular (open) session (although the time may be extended by the presiding officer)
- Final action cannot be taken in exec. session (no secret voting); body must come out of exec. Session to take final action



OPMA - EXEC. SESSION

Topics that may be discussed in exec. session:

- Real estate acquisitions or sale/lease pricing;
 - Negotiations on certain public contracts;
 - Complaints against public employees or officers;
 - Candidate qualifications in the process of hiring a public employee;
 - Performance of a public employee;
 - Certain legal matters, including litigation or potential litigation and legal risks to the agency
 - Others that don't pertain to WDFW
- Note: these are distinct from PRA exemptions



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OPMA - REQUIREMENTS

Meeting notice requirements

- Notice must be given of a meeting of the body
- “Regular” meetings: Schedule of regular meetings must be published in the State Register. Any business may be conducted at regular meeting
- “Special” meetings: Notice of special meeting must be printed in newspaper, posted on agency’s website, and physically displayed at agency HQ and meeting site. Such notice must be given 24 hours in advance of the meeting. Notice must state business of special meeting; meeting is limited to that business
- “Emergency” meetings: special meeting to “deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage.” 24-hour notice requirement does not apply if impractical and would increase the likelihood of injury or damage.



OPMA - PENALTIES

OPMA provides for penalties against individual members of the governing body for violations

- *Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision [the OPMA] applicable to him or her, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of five hundred dollars. One thousand dollars for any subsequent violation.*
- **Any person may bring a legal action to enforce the OPMA. If successful, he/she is entitled to attorneys fees and costs**



OPMA

OPMA questions?



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PRA - BASICS

Purpose of the PRA: Public business be subject to public scrutiny through examination of public records

The people of this state do not yield their sovereignty to the agencies that serve them. 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. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030 (emphasis added).



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PRA - REQUIREMENTS

Basic requirement:

Public agencies must make any public record available for public inspection and copying upon request, unless a specific exemption applies



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PRA - DEFINITIONS

What is a “public agency”

- **RCW 42.56.010(1):** “ ‘Agency’ includes all state agencies and all local agencies.
 - **"State agency"** includes every state office, department, division, bureau, board, commission, or other state agency
 - **"Local agency"** includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency
 - Includes entities that are the “functional equivalent” of an agency
- **Fish and Wildlife Commission/WDFW** is a “state agency” for purposes of the PRA



PRA - DEFINITIONS

What is a “public record”

- RCW 42.56.010(3): “Public record” includes 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(4): “Writing” means 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.



PRA - DEFINITIONS

What is a “public record” (cont.)

- The definition is broad, so a “public record” is basically *any* physical medium containing information relating to the conduct of government or performance of government functions, whether hard copy or electronic, if it is prepared, owned, or used by an agency, including:
- A record may be a “public record” that must be produced by the agency upon request even if not in the physical possession of the agency



PRA - REQUESTS

A member of the public may request to inspect or to receive a copy of any identifiable public record

- **Requests generally made to the agency's public records officer, but not necessarily**
- **Request need not take any particular form (although agencies can by rule impose some limited requirements)**
- **A request must seek "identifiable" public records; a request for information does not fall under the PRA**
- **A request cannot be denied because it is overly broad**



PRA – AGENCY RESPONSE

An agency must promptly respond to public records request. Within 5 business days the agency must:

- **Acknowledge receipt of the request and provide a reasonable estimate for a further response**
- **Fulfill the request (which may be accomplished by providing an internet address and link to the records on the agency's website)**
- **Seek clarification**
- **Deny the request with an accompanying written statement of the specific reasons**



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PRA – AGENCY RESPONSE

Searching for, preserving, gathering, and producing responsive document:

- Upon receipt of a public records request, an agency must conduct a search for responsive public records; the search must be “adequate” –i.e. “reasonably calculated” to locate responsive records
- Search must include all places where responsive records are reasonably likely to be located
- Since responsive records may not be in the agency’s physical possession, but the agency is still responsible for attempting to locate and obtain them, the search may need to include non-agency locations
- This could include personal computers, mobile phones, cloud storage services, etc. used by agency staff and Commissioners.
- Search should be documented in detail, including the where and how of the search



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PRA – AGENCY RESPONSE

Searching for, preserving, gathering, and producing responsive document (cont.):

- Potentially responsive records must be preserved pending a complete response to the request (even if they would otherwise have been subject to destruction under the applicable retention schedule)
- Responsive records located through the search must be gathered and produced to the requester
- Records may be provided to the requester in “installments” as they become available for production
- Production need not happen within any specified time, as long as the time it takes to complete production is “reasonable” under the circumstances, including the agencies other work
- An agency may charge a fee for reproducing records and for mailing (but not for searching for records)



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PRA – EXEMPTIONS

Responsive records must be produced to the requester, unless a specific exemption applies

- **The PRA itself provides for certain exemptions; other statutes (both state and federal) may also provide exceptions**
- **Fewer exemptions than you might think; for example, no general “privacy” exemption (although specific exemptions reflect privacy concerns)**
- **Exemptions must be construed narrowly in favor of production and only exempt portions of a record may be withheld (by redaction), if possible**
- **When invoking an exemption, agency must provide an “exemption log” that identifies the exempt record and explains how the claimed exemption applies**



PRA – EXEMPTIONS

Common exemptions:

- Attorney-client privilege and attorney work product
- Draft documents that reflect staff opinions (until document finalized)
- Agency personnel files (except findings of misconduct)
- Trade secrets
- Real estate appraisals (until transaction is complete)

Note: PRA exemptions differ from OPMA exec. session topics



PRA – PENALTIES

The PRA provides for potentially severe penalties for violations of the Act:

- Violations can include failure to timely respond to a request, failure to adequately search for records, or improper withholding of records
- Requester dissatisfied with agency's response can sue the agency in superior court
- Penalties are assessed on a per-record/per-day basis from between \$0 and \$100, depending on mitigating and aggravating factors; penalties can be substantial
- Requester is entitled to attorneys' fees and costs if successful in a PRA lawsuit



RECORDS RETENTION

Preservation and destruction of public records is governed by a separate statute, RCW Chapter 40.14

- Under the records retention statutes, whether a public record must be retained, and if so, for how long, depends on the type (or class) of the record
- Some records may be immediately discarded/deleted while others must be preserved indefinitely
 - Example: “transitory” records may be immediately disposed of while certain historical documents must be preserved
- Each agency (including WDFW) has records retention “schedules” approved by the Secretary of State that define classes of records and set forth the retention requirements for each class
 - But retention schedule may be overridden by a pending public records request or “litigation hold notice”
- Criminal penalties for wrongful destruction of records



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RECORDS RETENTION

Records retention: bedrock principles

- Records retention requirements apply to the agency, not to individuals (although you, as an individual, may sometimes be responsible for retaining a record on behalf of the agency)
- A **SINGLE** copy of a record must be retained by the agency pursuant to the applicable retention schedule; duplicates need not be retained
 - But a copy of a record that has been substantively altered (by handwritten notes, for example) is a unique record unto itself that is subject to retention requirements
- Best records management practices dictate that records that do not need to be retained should be deleted/destroyed when no longer needed



RECORDS RETENTION

Particular record retention “schedules” applicable to Commission materials:

- For Commission meeting materials . . .
 - Records comprising the “official” Commission record of Commission meeting (GS 10004)
 - Must be retained 6 years, then transferred to state archives
 - Meeting materials – members copies/notes (GS 09026)
 - Can be deleted/destroyed when no longer needed
- For communications to/from members of the public (not including Tribes*) . . .
 - Community & external relations - client/customer feedback, complaints (GS 09016)
 - Must be retained for 3 years, then may be destroyed
 - Stakeholder group relations (GS 05010)
 - Must be retained for 2 years after the end of the calendar year, then destroyed

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*Tribal Relations: WDFW 82-04-29817 (Retain for 11 years after end of calendar year, then transfer to archives)



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RECORDS RETENTION

Particular record retention “schedules” applicable to Commission materials:

- For records related to your travel for Commission business . . .
 - Travel – arrangements, reimbursements (GS 07001)
 - Must be retained for 6 years after fiscal year in which the travel occurred, then may be destroyed
- For performance evaluations (e.g., of the Director) . . .
 - Performance evaluations of an employee (GS 03002)
 - Must be retained for 3 years from date of next evaluation, then may be destroyed
 - Performance evaluation preparation materials (notes, etc.) (GS 03024)
 - Must be retained until the evaluation is complete or performance issues identified are resolved, then may be destroyed



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RECORDS RETENTION

Particular record retention “schedules” applicable to Commission materials:

- For public records requests you are asked to respond to . . .
 - Public records requests (GS 05001)
 - Must be retained for 2 years after request fulfilled, then may be destroyed
- For records about legislation related to the agency . . .
 - Records related to agency request legislation and legislation (state or federal) affecting the agency (GS 19001)
 - Must be retained for 2 years after the end of the legislative session, then transferred to archives



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RECORDS RETENTION

Particular record retention “schedules” applicable to Commission materials:

- For records related to legal advice on Commission matters . . .
 - Legal advice and issues (GS 18003)
 - Must be retained for 6 years after issue resolved and until no longer needed for agency business, then may be destroyed
- For almost every other record that is not “transitory” and does not fall into one of the categories above . . .
 - Provision of advice, assistance, or information (GS 09022)
 - Must be retained for 2 years after communication sent/received, then may be destroyed



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RECORDS RETENTION

Records retention recommended best practice:

- To the extent possible, rely on agency staff for retention or records
- CC or transmit records to appropriate staff for retention, then delete/destroy when no longer needed:
 - Commission meetings, commission business – Tami Lininger
 - Wildlife Program – Erick Gardner
 - Real estate – Cynthia Wilkerson
 - CAMP – Tim Burns
 - Fish Program – Ron Warren
 - Enforcement – Chief Steve Bear
 - Fiscal, business – David Giglio
 - Licensing – Peter Vernie
 - Legislative – Raquel Crosier
 - Personnel – Susan Meenk
 - Public records requests – Anne Masias
 - Other – Tami Lininger



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RECORDS MANAGEMENT - BEST PRACTICES

Compliance with the PRA is aided by good records management: records should be created, managed, stored, and discarded/deleted with the PRA and retention requirements in mind

- Don't unnecessarily create records
- Thoughtfully manage and store records for easy search and retrieval; store records by subject in discrete locations
- Transmit records to appropriate staff for retention
- Discard/delete records according to applicable retention schedule and when no longer needed (remember: records (including copies) responsive to a PRA request cannot be discarded/deleted pending fulfillment of the request; records (including copies) subject to a litigation hold notice cannot be discarded/deleted until the hold is lifted)



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PRA – BEST PRACTICES



Storing records on personal electronic devices (personal computer, tablet, smartphone, cloud storage site) can create situation where the agency may be obligated to search those devices for records. To minimize this possibility:

- Utilize agency email system as opposed to personal email
- Avoid storing agency records on personal devices, or always store records in a discrete location or device that is secure and searchable
- Delete records that can be deleted under the applicable retention schedule



PRA

PRA questions?



OPEN PUBLIC MEETINGS AND PUBLIC RECORDS TRAINING



OPMA AND PRA BASICS

- **Both the OPMA and PRA are based on the imperative of openness and transparency to the public**
 - **Meetings (any interaction between a quorum of the Commission related to official business) must generally be open to the public**
 - **Public records must generally be made available for public inspection and copying**
- **Don't mix up OPMA and PRA**
 - **An email is a public record, even if exchanged between less than a quorum of the commission**
 - **Permissible exec. session topics under the OPMA are distinct from PRA exemptions**



OPMA AND PRA

Final questions?



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