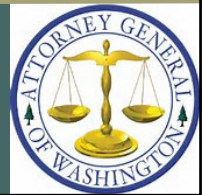




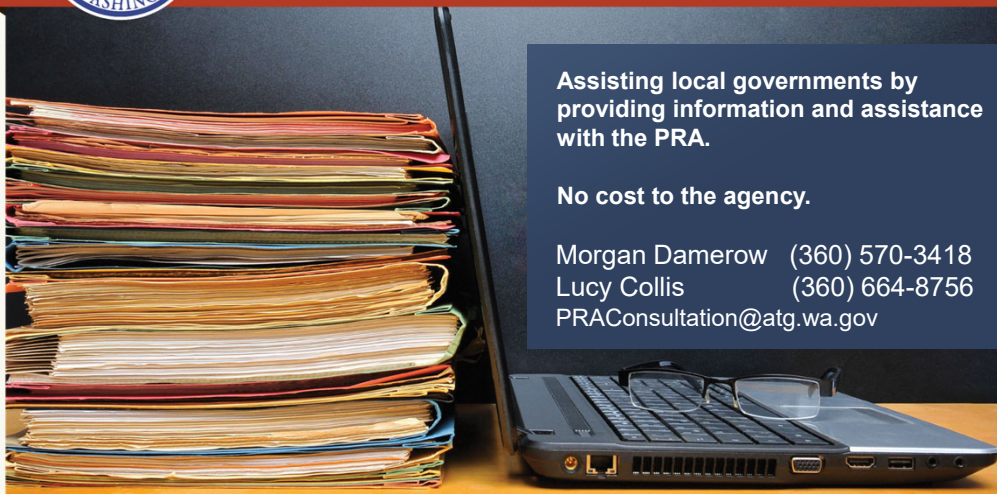
OPMA and PRA in a Time of COVID

October 21, 2021

Training Prepared by Washington State Attorney General's Office



Local Government Public Records Consultation Program



Assisting local governments by providing information and assistance with the PRA.

No cost to the agency.

Morgan Damerow (360) 570-3418
Lucy Collis (360) 664-8756
PRAconsultation@atg.wa.gov

[2]

Technical Assistance – Training – Risk Mitigation – Best Practices

Overview

- OPMA & PRA Refresher
- Deep Dive on advances in technology and changes to OPMA & PRA

This presentation is educational only and is not legal advice or a legal opinion. The PRA changes over time. Later court decisions or changes in statutes can impact these decisions and an agency's obligations.

{ 3 }

The Purpose of Today's Conversation

PRA training is your path through the forest.



1. A little knowledge goes a long way.
2. Training helps keep your agency out of court; it informs and reminds us of our OPMA & PRA duties.
3. Introduce various technology improvements and discuss the challenges and strengths these advances.
4. Identifies areas to improve OPMA & PRA processes and responses.

The court found that "proper training and supervision of the agency's personnel" was a mitigating factor. CP at 905 (boldface omitted); *Yousoufian II*, 168 Wash.2d at 467, 229 P.3d 735. The court found that "[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." *Id.* at 905. The record bears this out.

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

{ 4 }

Why You Should Care About the OPMA and PRA

"Sunlight is the best disinfectant."



U.S. Supreme Court Justice
Louis Brandeis

Open Government Laws like the OPMA and the PRA are often called "Transparency Laws" or "Sunshine Laws" because they "shine light" on government.

The Leader PTSD settles lawsuit over public records

School district is latest hit by legal action from chronically litigious Whidbey resident



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

\$1.77 M – City of Tacoma



\$12,500 – Pt. Townsend School District

{ 5 }

Part #1 Open Public Meetings Act

Washington's Open Public Meetings Act (OPMA)

- The Open Public Meetings Act ("OPMA"), chapter 42.30 RCW, was passed by the Legislature in 1971.
- It was part of a nationwide effort to make government affairs more open, accessible and responsive.
- It was modeled on a California law known as the "Brown Act" and a similar Florida statute.
- Requires meetings to be open to the public, gavel to gavel.
- Codified at chapter 42.30 RCW.
- Replaced prior "open meetings law" at chapter 42.32 RCW which was far more limited in its scope.

[7]

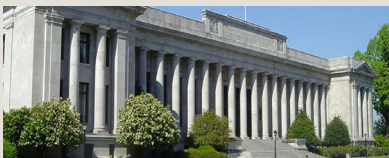
Purpose

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

Public commissions, boards, councils, etc. listed in OPMA are agencies of this state that exist to aid in the conduct of the people's business.

Their actions are to be taken openly and deliberations conducted openly.

RCW 42.30.010



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

Washington State Supreme Court

[8]

The OPMA Applies To

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

But not in these circumstances:

- Licensing/permitting for businesses, occupations or professions or their disciplinary proceedings
- Quasi-judicial matters
- Matters governed by the Washington Administrative Procedure Act, RCW 34.05
- Collective bargaining

9

What is a 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.

10

RCW 42.30.020

What is a Meeting?

- “Meeting” means meetings at which the public agency takes “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.”)

[11]

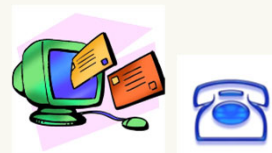
RCW 42.30.020; *Citizens Alliance for Property Rights Legal Fund v. San Juan County*

“Meeting” (Cont.)

- A “meeting” of a governing body occurs when a majority of its members (quorum) gathers with the collective intent of transacting the governing body’s business.
 - Physical presence not required – a meeting can occur by phone or email.
 - An exchange of email could constitute a meeting if, for example, a quorum of the members participate in the email exchange & discuss agency business. Simply receiving information without comment is not a meeting.

Wood v. Battle Ground School District; Citizens Alliance for Property Rights Legal Fund v. San Juan County

- Does not need to be titled “meeting” – OPMA also applies to “retreats,” “workshops,” “study sessions,” etc.
- No meeting occurs if the governing body lacks a quorum.



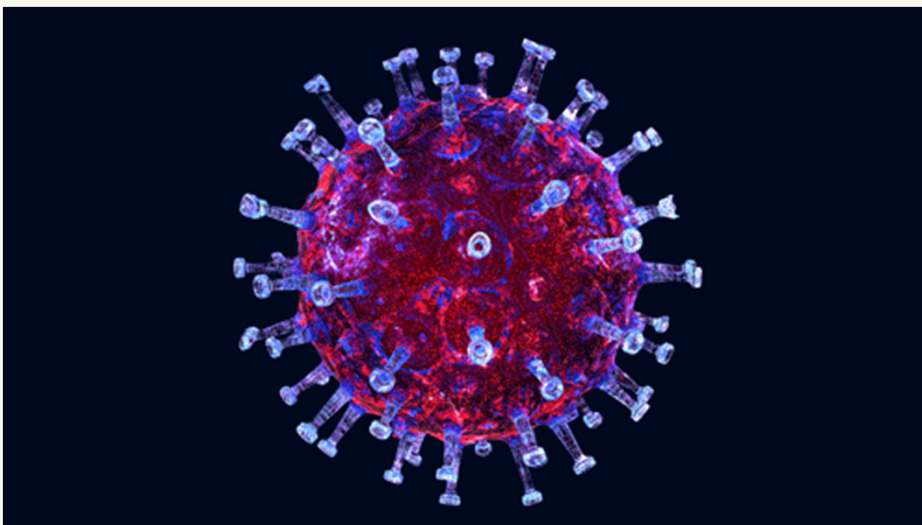
[12]

Public Attendance

- A public agency can't place conditions on public to **attend** meetings subject to OPMA:
 - For proceedings governed by OPMA, cannot require people to:
 - Register their names or other information,
 - Complete a questionnaire, or
 - Otherwise fulfill any condition precedent to attendance
- Reasonable rules of conduct can be set (see upcoming slide on disruptive conduct).
- Cameras and tape recorders are permitted unless disruptive.
- Public Comment
 - No "public comment" period required by OPMA.
 - Agency specific statute may require "public comment."



COVID-19 Shifted the Landscape





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.

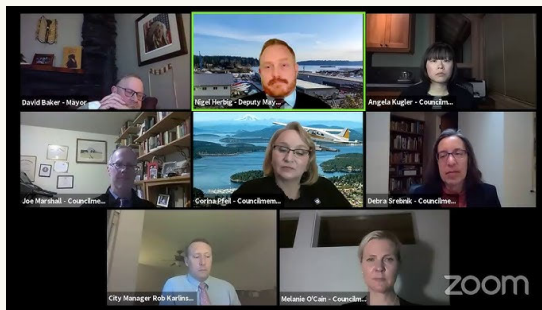
(15)

Agencies were forced to implement measures to maintain Open Government Meetings while limiting social contact. Public meetings shifted to internet platforms such as Zoom or Teams.

And This



Became This



And all of the thoughts that came with it . . .

I thought the mayor was taller than that?

Lucky that sea plane missed her head.

I think I've seen this shot in an Alfred Hitchcock movie.

(16)



The Response

PERSONAL



LEGISLATIVE

Washington State Legislature 2021-22 Session

ESHB 1056

Concerning open public meeting notice requirements and declared emergencies.

HB 1180

Concerning public testimony at public meetings, including virtual meetings.

ESHB 1329

Concerning public meeting accessibility and participation.

On the plus side - Increased Public Participation



ACLU
Massachusetts

ADVOCACY ORGANIZATIONS CALL FOR PERMANENT REMOTE ACCESS OPTION FOR ALL PUBLIC MEETINGS

"By requiring a remote access option to participate in local government, we 'opened up' our Open Meetings. As a result, area residents can more easily participate in decisions about their schools, towns and cities. Parents and caregivers, residents who cannot drive or have no transit access, people who are temporarily out of town, or people with disabilities all benefit from having a way to participate in government without having to physically get to a municipal building to do so," said **Deirdre Cummings, Legislative Director, MASSPIRG**. "We must ensure this critical civic tool continues after the pandemic."

As COVID-19 drives Licking County governments online, public participation climbs

Craig McDonald Newark Advocate
Published 5:22 a.m. ET Dec 5, 2020

However constituent engagement seems to have greatly grown in recent months, as those viewing from home have at times ranged in the several-hundreds in real-time for some recent council and various county school board meetings – audience numbers that would have required special venues to accommodate capacity if the same number of people attended those meetings in-person.

On the negative side, ZOOM-bombing

The New York Times

'Zoombombing': When Video Conferences Go Wrong

Zoom-bombing Victims

- Chipotle forced to end chat with musician Lauv.
- Venture capitalist Hunter Walker and journalist Casey Newton shut down their "work from home happy hour" two times in one week.
- Journalists Kara Swisher and Jessica Lessin's event focused on challenges women tech founders face shut off after 15 minutes.

Default settings allowed public to share screens and microphones.

Steps to help prevent Zoom-bombing

1. Don't use Personal Meeting ID, use per meeting ID's
2. Disable join before host.
3. Disable screen share for non-hosts.
4. Disable remote control function.
5. Require pre-registration for public comment. Can't require registration for viewing/listening.
6. Restrict unmuting by viewers.
7. Restrict/Hide video by viewers.

(19)

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.



(20)

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.
- Watch out for chat and Q&A.



RCW 42.30.060, RCW 42.30.020

[21]

OPMA MEETING TYPES



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

[22]

Regular Meetings

“**Regular meetings**” are recurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws or other rule.

- A state public agency must:
 - Yearly, file with Code Reviser a schedule of regular meetings, including time and place.
 - Publish changes to regular meeting schedule in state register at least 20 days prior to rescheduled date.



[23]

RCW 42.30.070; RCW 42.30.075; RCW 42.30.077

Regular Meetings (Cont.)



Agenda notice requirements apply to regular meetings.

- RCW 42.30.077 requires governing bodies to make the agenda of each regular meeting of the governing body available online no later than 24 hours in advance of the published start time of the meeting.
- This law does not:
 - *Apply to agencies that do not have websites.*
 - *Apply to agencies that 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.
 - Satisfy public notice requirements established under other laws.
 - Include information for public access - links and phone numbers.

[24]

Special Meetings

A “**special meeting**” is a meeting that is not a regular meeting (not a regularly scheduled meeting).

Called by presiding officer OR majority of the members.



Notice - timing: 24 hours before the special meeting, written notice must be:

- Given to each **member** of the governing body (unless waived).
- Given 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).

[25]

RCW 42.30.080

Special Meetings (Cont.)

Notice - contents

The special meeting notice must specify:

- Time
- Place
- Business to be transacted (agenda)



Include links and phone numbers for public attendance.

Final disposition shall not be taken on any other matter at such meeting.

[26]

RCW 42.30.080

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.



[27]

RCW 42.30.080(4)

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.

[28]

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.
- 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.



[29]

RCW 42.30.035, Formerly RCW 42.32.030

Penalties for Violating the OPMA

- 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.



[30]

RCW 42.30.120; RCW 42.30.130; RCW 42.30.060

OPMA Assistance

- Consult your Attorney.
- The Washington State Attorney General's Office may provide information, technical assistance, and training on the OPMA.
- The Attorney General's Office may issue formal opinions about the OPMA for qualified requesters.
- The Attorney General's Office has helpful materials about the OPMA and on other open government topics and resources, on its website at: <http://www.atg.wa.gov/Open-Government>.



[31]

RCW 42.30.210

Lesson #2 PRA Refresher

Touchstone



- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g., exemption in law).
- Exemptions must be “narrowly construed.”
- Non-exempt public records must be disclosed.
- Location does not matter. Public record can be located in/on agency files/accounts/servers, or non-agency files/accounts/servers.
- Public records must be retained pursuant to records retention laws.

33

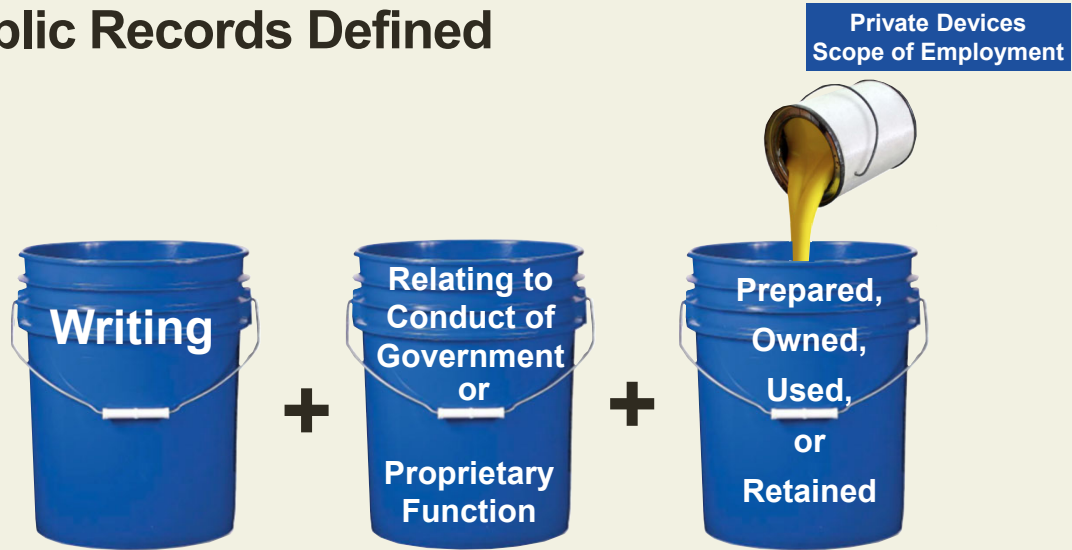
General PRA Procedures

Under PRA, agencies must:

- ✓ Appoint a public records officer.
- ✓ Publish procedures describing certain agency organization, operations, rules of procedure, and adopt/enforce rules/regulations that:
 - Provide full public access to public records.
 - Protect public records from damage/disorganization.
 - Prevent excessive interference with other agency functions.
 - Provide fullest assistance to requesters.
 - Provide most timely possible action on requests.
- ✓ Publish fee schedule. No fee to inspect records.
- ✓ Maintain a list of laws the agency believes exempts or prohibits disclosure.
- ✓ Provide certain 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 and make hours known by other public means.

34

Public Records Defined



Regardless of physical form or characteristics.

RCW 42.56.010(3), SEIU 925 v. Univ. of Wash, 193 Wn.2d 860, 447 P.3d 534 (2019)

35

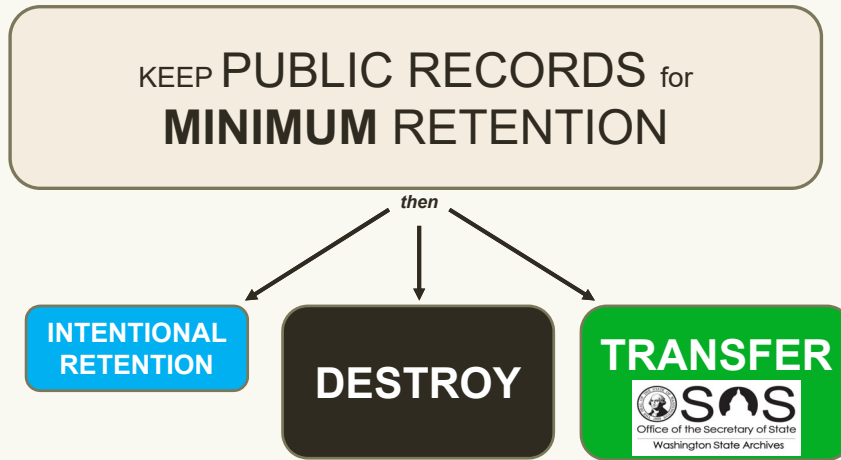
Personal Devices – Text Messages

- A record that an agency employee prepares, owns, uses, or retains within the scope of employment is a record “prepared, owned, used or retained by a state or local agency” under the PRA.
 - Scope of employment:
 - *when the job requires it,*
 - *the employer directs it, or*
 - *it furthers the employer’s interests.*
- This inquiry is always case and record specific.
- Personal Device and Account Litigation.
 - *Nissen v. Pierce County* (2015) – Text Messages
 - *West v. Vermillion* (2016) – Website and Email
 - *West v. Puyallup* (2018) – Social Media
 - *West v. Clark County* (2021) – Social Media



36

Records Retention – Abridged



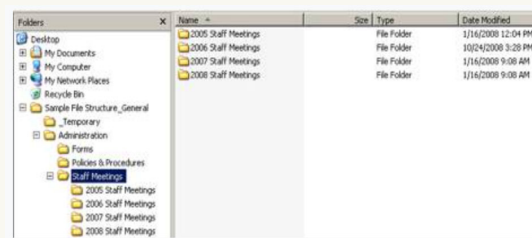
Records Evolution

Records have evolved over the last few decades as society increasingly relies on computers, this accelerated with COVID-19 and the need to work from home. Many agencies have implemented scan and toss.

And this...



Became this...



Records Evolution Contd.



Pros

- Increased accessibility from non-office locations.
- Automated retention and destruction.
- Reduced office space needs.
- Increased productivity and time saving.
- Lower storage costs.
- PRA tasks are easier and take less time.
- Responses to PRA requests can be faster with easier access to records.

Cons

- “Out of sight, out of mind” – increasing records and challenging records management. Do we really need to record every zoom meeting or save every draft?
- Challenges to finding records due to increased locations and complexity.
- Cybersecurity risks.
- Potential for data loss.

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. At minimum, requester must identify documents with sufficient clarity to allow the agency to locate them.
- A request for “information” is not a request for “records” under the PRA.



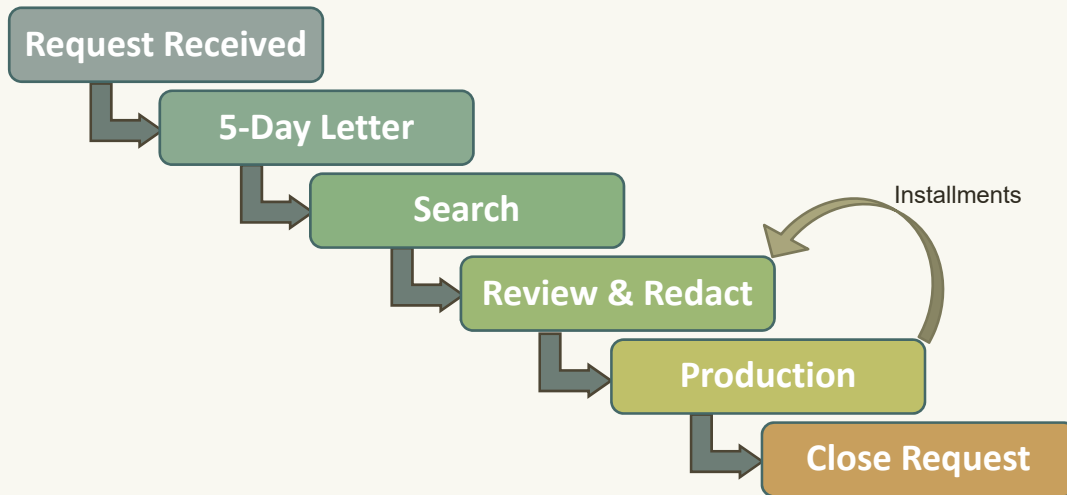
BEST PRACTICE

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



[41]

PRA Processing Changes

Processing PRA requests has necessarily changed to keep up with the increase in electronic records and changing work environments. Changes include;

- Advanced searching tools - automation.
- Redacting tools – no more blacking out with a sharpie.
- PRA Tracking software.
- Utilization of cloud storage to provide access to records. During the COVID-19 emergency some agencies used cloud storage as a substitute for in-person inspection of records.



[42]



Proclamation 20-28.15

Open Public Meetings Act and Public Records Act

Suspends identified PRA provisions related to in-person contact:

- In person records inspection.
 - In person records requests.
 - Five day response requirement for requests not received electronically.
- Suspends certain OPMA requirements.

Proclamation 20-64.5

Public Records Act Contact Tracing Information

Suspends disclosure requirements of identified records of public agencies from PRA requests or the disclosure of records for any discretionary purpose not related to public health.

PRA During COVID-19

As agencies implemented work from home due to the COVID-19 emergency technology played a larger role in PRA request responses.

- Agencies were limited in how they could receive and respond to requests – Governors Proclamation 28.64:
 - No in-person inspection of records.
 - No in-person requesting of records.
 - No need to respond in 5 business days to non-electronic requests.
- Request processing essentially became entirely electronic pushing many agencies into adopting the electronic PRA processing tools earlier than they had planned on.
 - Especially in embracing electronic methods of records delivery.

Records Search Responsibilities

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

- Plan for records searches:
 - What records will be searched centrally? (e.g., email)
 - What records will be searched by a designated division representative? (e.g., databases)
 - What records are individuals responsible for? (e.g., file cabinets or network folders)
- Cast a wide net and document all of your search efforts including:
 - Search terms used.
 - Locations searched (accounts/devices).
 - Description of records produced & how.
 - Description of records not produced.
 - Other relevant information.



“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.”

45

Public Records May Include Contractors’ Records

- **Agency contractors’ records** are another possible location depending upon the request and the circumstances.
- Public records may be agency records even if agency never possessed them (public records **“Prepared, Owned, Used or Retained”** by agency.)
- **Agency contract terms** – Put contractor on notice about PRA and contractor’s responsibilities to preserve and provide public records.
- If it is reasonably possible that contractors have responsive records, **notify the contractor** of the PRA request immediately.
 - See also RCW 42.56.540 (third party notice).



46

Concerned Ratepayers Ass’n v. Clark County PUD No. 1
Telford v. Thurston County Board of Comm’rs (four-part test for when contractor is “functional equivalent” of public agency for PRA purposes; see also Cedar Grove Composting v. City of Marysville)

Some Basics About Exemptions

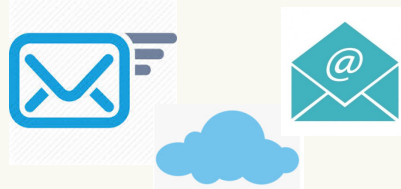
- Records are presumed open.
- An exemption must exist in law (state or federal; PRA or other laws).
- The agency bears the burden of proof to justify the exemption.
- Exemptions are narrowly construed.
 - There is no PRA general exemption for a “draft.”
 - There is no general “privacy” exemption in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

[47]

RCW 42.56.050; RCW 42.56.210 - .510; RCW 42.56.550

Production of Records

When and How



- If requestor asked 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.
 - Use of cell phone to take pictures of pages?
- If records are to be produced:
 - Inform requestor of fee (if any) and provide time 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.

[48]

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.
- A court is to consider factors in requiring an agency to pay a penalty.
- 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.



[49]

RCW 42.56.550, RCW 42.56.565;
Yousoufian v. Sims

QUESTIONS?



Local Government Public Records Consultation Program

Assisting local governments by
providing information and assistance
with the PRA.

No cost to the agency.

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

[50]