

Fish and Wildlife Commissioner Legal Training

The Legal Environment in Which the Fish and
Wildlife Commission Operates

4/6/2023

Joe Panesko, Senior Counsel

Lead advisor to the Commission

Amy Dona, AAG

Wildlife lead; backup advisor to the Commission

Role of the Attorney General's Office

- ▶ Constitutionally created state office, advisor to state officers & agencies. Also codified at RCW 43.10.040
- ▶ AGO has 27 divisions.
 - ▶ Public Lands & Conservation Division - Phil Ferester
 - ▶ Division advises DNR, WDFW, State Parks, 3 Sections
 - ▶ I am Section Chief for the Fish Wildlife & Parks Section
 - ▶ 9 attorneys total in our section

Role of the Attorney General's Office

- ▶ Our Section does NOT handle:
 - ▶ Labor & Personnel matters (human resources, discipline, collective bargaining)
 - ▶ Tort lawsuits (personal injury) against WDFW
 - ▶ Other unique circumstances: Environmental Protection Division; Bankruptcy
- ▶ We do handle everything else. Affirmative/defensive litigation; client advice
- ▶ Specific statutory mentions of the AGO:
 - ▶ RCW 77.15.065 - criminal prosecutions of F&W crimes
 - ▶ RCW 77.12.220 - purchase/sale of property
 - ▶ RCW 77.55.440 - actions to recover HPA penalties

Role of the Attorney General's Office

- ▶ Who is the client? Role of the AAG vis-à-vis individual commissioners & the full commission
- ▶ Options-based legal advice
- ▶ Legal input, risk analysis vs. policy decisions
- ▶ Behind the scenes advisors

History of WDFW

- ▶ Questions do come up about legal role of Commission and scope of its authority. The history of the agencies informs our legal analysis on those questions, but we don't have time to discuss here.
- ▶ 1921 Administrative Code: Newly created Department of Fisheries and Game
- ▶ 1932 Initiative Measure 62, passes 53% to 47%, separates the agencies
 - ▶ Department of Fisheries -director appointed by governor. Food Fish
 - ▶ Department of Game - director appointed by governor, but game commission also created. Wildlife incl. game fish
- ▶ 1947 Game Code: Commission structure, commission hires director
- ▶ 1987: Dept. of Game re-named Dept. of Wildlife, director hired by Gov.
- ▶ 1993: Law directing departments to merge in 1994. Gov-appt. Director
- ▶ 1995 Referendum 45: current Commission form.

Department structure

- ▶ RCW 77.04.020 “The department consists of the state fish and wildlife commission and the director. The commission may delegate to the director any of the powers and duties vested in the commission.”
- ▶ Some rulemaking authority is specific to the Commission
- ▶ Some Commission rulemaking authority has been delegated to the Director
- ▶ Some RCWs assign particular rules to the Director, some to the Department

Statutes and Rules

- ▶ RCW Title 75 had been Fisheries Code; Title 77 Game Code.
- ▶ WAC Title 220 had been Fisheries Rules; Title 232 Game Rules
- ▶ Now: Title 77 RCW (merged in 2000). Title 220 WAC (merged in 2017).
 - ▶ Small handful of statutes at RCW 43.300
 - ▶ Vestiges of separation remain, e.g., distinction btw. “food fish” & “game fish”

Agency authority

- ▶ Agencies carry out the authority expressly granted in statute, and any additional authority necessarily implied
- ▶ Agencies can engage in rulemaking when authorized by statute, rules can further clarify or fill in the gaps of RCWs
- ▶ Rules cannot contradict RCWs
- ▶ Rules carry the force of law

Procedural Laws

- ▶ Public Records Act (PRA)
- ▶ Open Public Meetings Act (OPMA)
- ▶ Administrative Procedure Act (APA)
- ▶ State Environmental Policy Act (SEPA)
- ▶ Regulatory Fairness Act (RFA) (involving small business economic impact statements)
- ▶ Ethics in Public Service

ADMINISTRATIVE PROCEDURE ACT

Chapter 34.05 RCW

- ▶ Purpose: Provide clarity and consistency to procedures used by administrative agencies
- ▶ Three general types of agency actions:
 - ▶ Rule makings
 - ▶ Adjudications
 - ▶ Other agency actions

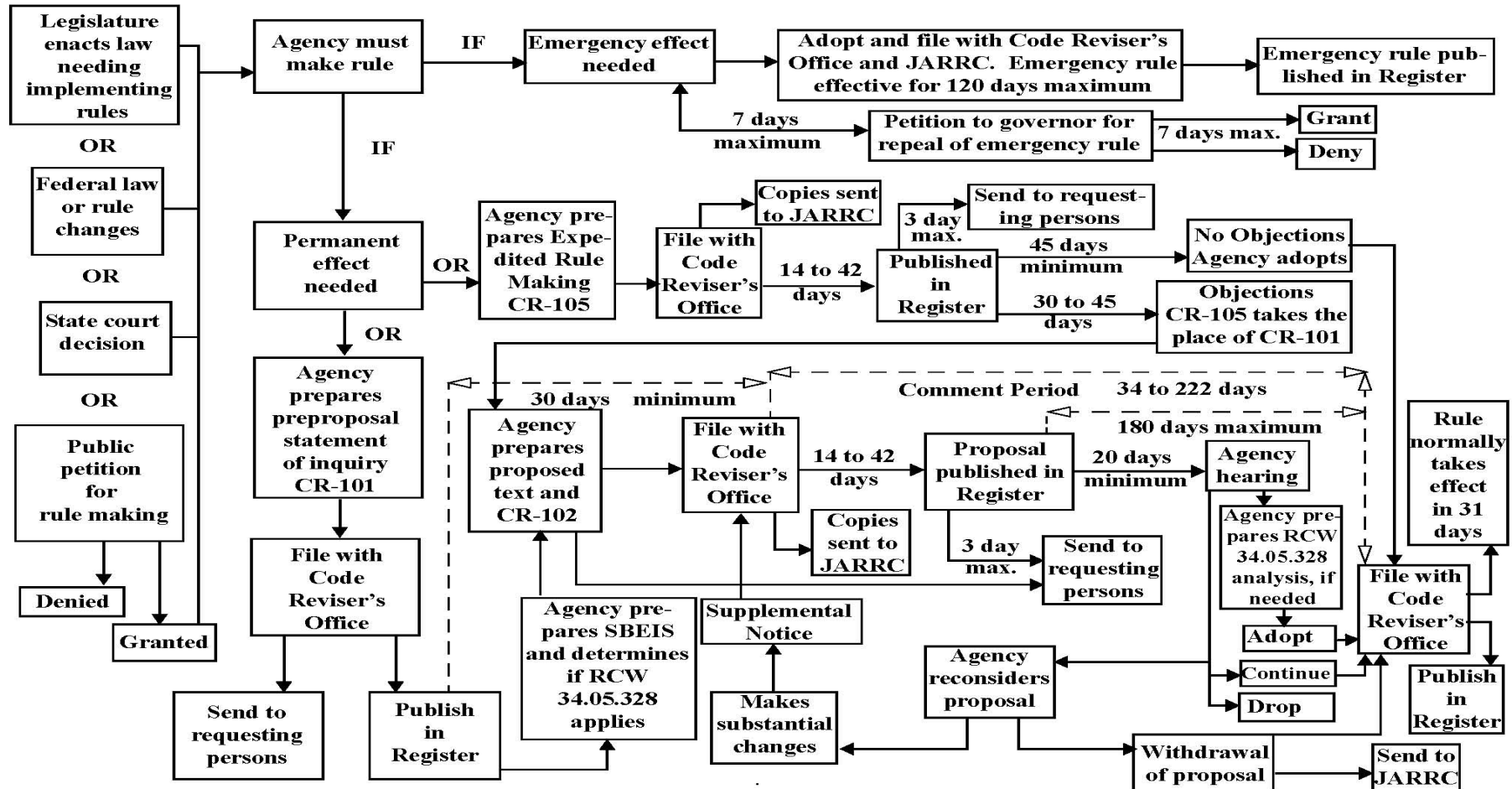
Rule Making Procedures - an Overview

- ▶ Permanent rules
 - ▶ Notice to public:
 - ▶ Prenotice inquiry (Code Reviser Form CR-101)
 - ▶ Proposed rule (Code Reviser Form CR-102)
 - ▶ Consider public comment:
 - ▶ Written comment
 - ▶ Oral public hearing
 - ▶ Final rule adoption, CR-103P filing, and Concise Explanatory Statement
 - ▶ Response to comments
 - ▶ Limited variation from proposed rule
- ▶ Procedures vary for emergency rules



Rule Development Detailed Procedures

RULE-MAKING PROCESS



Rule Adoption – Some Key Principles

- ▶ Rules are dependent on statutory authority
- ▶ Rules grant or restrict privilege
 - ▶ e.g., fishing seasons vs. internal commission policy on allocation
 - ▶ Many WDFW rules are annual or longer periodic reviews
 - ▶ Other permanent rules revisited only as needed
- ▶ Rules should be clear and enforceable

STATE ENVIRONMENTAL POLICY ACT (SEPA)

Chapter 43.21C RCW

SEPA RULES, Chapter 197-11 WAC

- ▶ Purpose: Inform agency decisions by evaluating potential adverse environmental impacts of a proposed action

SEPA applies if there is an “action” ... unless a categorical exemption applies.

Two types of SEPA “actions”: Project actions v. non-project actions.

- ▶ Project action, e.g., issue a permit
- ▶ Non-project action, e.g., promulgate a rule (WAC)

SEPA, continued

- ▶ Types of SEPA documents:
 - ▶ SEPA Checklist
 - ▶ Threshold Determination
 - ▶ Nonsignificance
 - ▶ Mitigated Nonsignificance
 - ▶ Significance
 - ▶ Environmental Impact Statement (Supplemental EIS; EIS Addendum)
- ▶ Baseline for SEPA analysis is “existing condition of the environment”

REGULATORY FAIRNESS ACT

Chapter 19.85 RCW

- ▶ Purpose - Inform agency decisions about potential costs that would be imposed by a proposed rule on small businesses, and where legal and feasible, reduce costs on small businesses
- ▶ If proposed rule would impose more than “minor costs” on small businesses, the agency will prepare a “small business economic impact statement”(SBEIS) with the proposed rule (CR-102)
 - ▶ “Small business” - 50 or fewer employees
 - ▶ “Minor costs” - a cost per business that is less than three-tenths of one percent of annual revenue or income, or one hundred dollars, whichever is greater, or one percent of annual payroll
- ▶ This is not a “cost-benefit analysis”

ETHICS IN PUBLIC SERVICE ACT

RCW 42.52

- ▶ See Governor's Office Training Materials:
 - ▶ Conflicts of Interest
 - ▶ Use of State Resources
 - ▶ Confidential Information
 - ▶ Receipt of Gifts, Gratuities, and Favors

Washington's Open Public Meetings Act (OPMA)

- Passed by the Legislature in 1971.
- Nationwide effort to make government affairs more open, accessible and responsive.
- 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.

Transparency builds public confidence in government.

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.

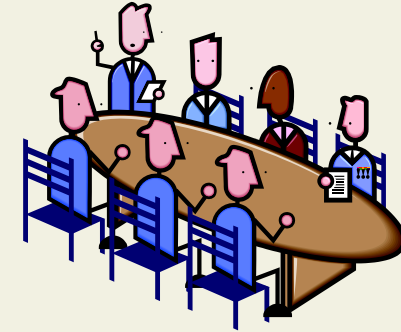
Their actions are to be taken openly and deliberations conducted openly.

RCW 42.30.010

The 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 FWC whenever there is a quorum of 5 or more

OR

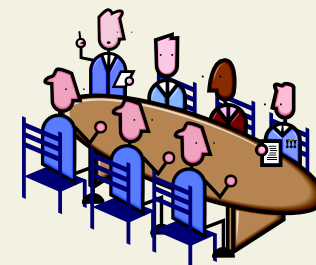
Any committee *when*:

- the committee acts on behalf of the Commission,
- conducts hearings, or
- takes testimony or public comment.

RCW 42.30.020

What is a Public Agency

- The Fish and Wildlife Commission clearly fits the definition



The OPMA Does Not Apply To

These entities:

- Courts
- Legislature
- Agencies not defined as “public agency” in OPMA, such as agencies governed by a single individual
- Private organizations

Certain activities:

- Quasi-judicial matters
- Matters governed by the Washington Administrative Procedure Act, RCW 34.05
- Collective bargaining

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.”)

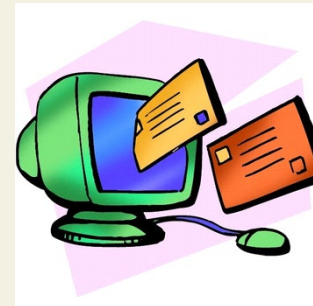
“Meeting” (Cont.)



- 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.



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.



New requirement: Public input

- RCW 42.30.240 enacted in 2022, no longer just attendance.
- Public comment must be allowed before or at every regular meeting where final action occurs. Spoken testimony, or written.
- For written testimony, governing body can set reasonable deadline for submission prior to meeting, and all writings must be distributed to the members before the meeting.
- Keep in mind, this does not apply to APA hearings, which are not governed by OPMA, and APA has its own requirements for testimony.

Travel and Gathering

- A majority of the members of a governing body may travel together or gather for purposes other than a regular meeting or a special meeting, so long as no action is taken.
- Discussion or consideration of official business would be action, triggering the requirements of the OPMA.



OPMA MEETING TYPES



Regular

Special

Emergency

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

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.



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:
 - 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.
 - Provide a basis to award attorneys fees or seek court order under OPMA if agenda is not posted in accordance with this law.

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**.
- Prominently **displayed at the main entrance** of the agency’s principal location and the meeting site (if not that same location).



Special Meetings (Cont.)

Notice - contents

The special meeting notice must specify:

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



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

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.



Public Attendance

A public agency can't place conditions on public to **attend** meeting subject to OPMA:

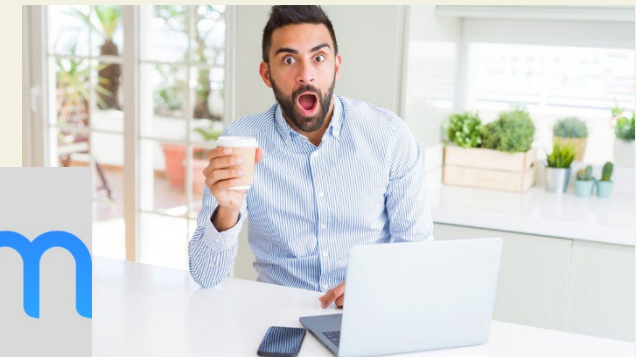
- For proceedings governed by OPMA, cannot require people to:
 - Register their names or other information,
 - Complete a questionnaire, or
 - Otherwise fulfill any condition precedent to attendance .

Reasonable rules of conduct can be set (see upcoming slide on disruptive conduct).

Cameras and tape recorders are permitted unless disruptive.

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.



Executive Session

- Part of a regular or special meeting that is closed to the public.
- Limited to specific purposes set out in the OPMA.
- 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.



Executive Session (Cont.)

Specified purposes set out in OPMA. Includes, for example:

Real estate

- Site selection or acquisition of real estate
 - Lease or purchase
 - Public knowledge would likely increase price

Sale or lease

- Public knowledge would likely decrease price
- Final action selling or leasing public property must be taken in open meeting

Publicly bid contracts

- Review negotiations on performance
- Public knowledge would likely increase costs

Evaluate qualifications of applicant for public employment

National security

Other purposes listed in RCW 42.30.110

Executive Session (Cont.)

Specified purposes set out in OPMA. Includes, for example:

Discuss Agency Enforcement Actions, Litigation or Potential Litigation

Three Requirements:

- Purpose is to discuss 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.
- Public knowledge regarding discussion likely to result in an adverse legal or financial consequence to the agency.
- Legal counsel representing the agency is present. This executive session is not permitted just because legal counsel is present.

Other purposes listed in RCW 42.30.110



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.



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.
- Written minutes + recordings?



Risk Management Tips

- Establish a culture of compliance with the OPMA.
- Receive training on the OPMA.
- Review available resources; institute best practices.
- Keep updated on current developments in OPMA; correctly apply law.
 - *Remember: the OPMA can change through amendments, or develop through case law.*
 - *Remember: other laws can govern an agency's meeting procedures.*
- Consult with agency's legal counsel.



OPMA Training Requirements

- The “Open Government Trainings Act” requires OPMA training for every member of a governing body within 90 days of taking their oath or assuming their duties. Refresher training occurs no later than every 4 years.
- Training can be taken online, in person, or by other means.

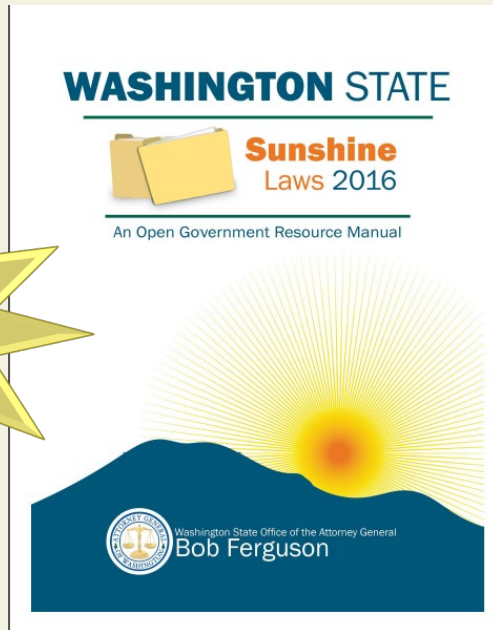


- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General’s Office’s, Open Government Training web page: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

AGO OPMA Resources



AGO Open Government Resource Manual

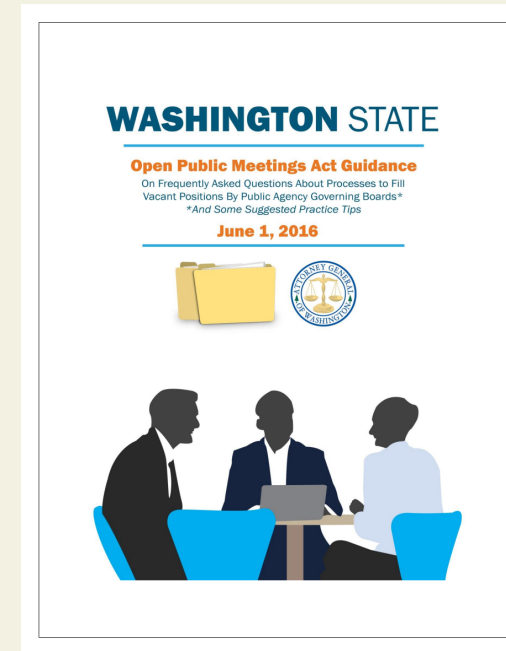


Updated
October
31, 2016**

****Does not yet include statutory changes resulting from 2017-18 sessions.**

*** <http://www.atg.wa.gov/open-government-resource-manual>**

AGO Guidance Document on Filling Vacant Positions



Linked document within the AGO Open Government Resource Manual or ask your AAG for assistance.

MRSC OPMA Resources

Municipal Research & Services Center – Another Resource

OPMA – AGENCY OBLIGATIONS: A STARTING POINT

PRACTICE TIPS
For Local Government Success

The basic requirement of the Open Public Meetings Act (OPMA) is that meetings of governing bodies be open and public. Use these practice tips to guide your agency's OPMA compliance.* For more information and resources visit www.mrsc.org/opmapra.

Basic Requirements

- All meetings open and public. All meetings of governing bodies of public agencies must be open to the public, except for certain exceptions outlined in the OPMA, RCW 42.30.030.
- Quorum. Generally, a meeting occurs when a quorum (majority) of the governing body is in attendance and action is taken, which includes discussion or deliberation as well as voting. RCW 42.30.020(2) & (3).
- Attendees. All persons must be permitted to attend and attendees cannot be required to register their names or other information as a condition of attendance. Disruptive and disorderly attendees may be removed. RCW 42.30.040 & .050.
- No secret ballots. Votes may not be taken by secret ballot. RCW 42.30.060(2).
- Adoption of ordinances. Ordinances, resolutions, rules, regulations, and orders must be adopted at a public meeting or they are invalid. RCW 42.30.060(1).

Position in Agency	Required to Comply
Member of a governing body <ul style="list-style-type: none"> City or Town Councilmember or Mayor County Commissioner or County Councilmember Special Purpose District Commissioner/Board Member 	Yes
Member of a subagency created by ordinance or legislative act, e.g.: <ul style="list-style-type: none"> Planning Commission Library Board Parks Board Civil Service Commission 	Yes
Member of a committee <ul style="list-style-type: none"> Committees that act on behalf of the governing body, conduct hearings, or take testimony or public comment 	Yes
Agency staff	No

Penalties for Noncompliance

- Actions null and void. Any action taken at a meeting which fails to comply with the provisions of the OPMA is null and void. RCW 42.30.080(1).
- Personal liability. Potential personal liability of \$100 for any member of a governing body who attends a meeting knowing that it violates the OPMA. RCW 42.30.120(1).
- Agency liability. Any person who prevails against an agency in any action in the courts for a violation of the OPMA will be awarded all costs, including attorney fees, incurred in connection with such legal action. RCW 42.30.120(2).

OPMA Training Requirements, Effective July 1, 2014

- Every member of a governing body of a public agency must complete training requirements on the OPMA within 90 days of assuming office or taking the oath of office.
- In addition, every member of a governing body must complete training at intervals of no more than four years as long as they remain in office.

*DISCLAIMER: These practice tips are meant to provide summary information on basic agency obligations of the OPMA; the practice tips are not intended to be regarded as specific legal advice. Consult with your agency's legal counsel about this topic as well. May 2014

OPMA – NOTICE REQUIREMENTS

PRACTICE TIPS
For Local Government Success

Under the Open Public Meetings Act (OPMA), to ensure that agency deliberations and other actions are conducted and taken openly, agencies are required to provide sufficient public notice of their meetings. Use these practice tips as a starting guide for OPMA notice requirements.* For more information and resources visit www.mrsc.org/opmapra

Definition	Regular Meetings (RCW 42.30.070)	Special Meetings (RCW 42.30.080)
Notice and Agendas	<p>Held in accordance with a schedule fixed by ordinance, resolution, bylaw, or other rule.</p> <p>Effective June 12, 2014, agendas must be made available on the agency's website at least 24 hours in advance of the meeting unless the agency:</p> <ol style="list-style-type: none"> Doesn't have a website; or Employs fewer than 10 full-time equivalent employees. <p>There are no other notice requirements for regular meetings in the OPMA. However, other relevant laws apply to some local governments. For example, cities and towns are required to establish a procedure for notifying the public of the preliminary agenda for the forthcoming council meeting (although not necessarily online) as well as regarding upcoming hearings. RCW 35A.12.160; RCW 35.22.280; RCW 35.23.224; RCW 35.27.360. There are no similar requirements for counties or special purpose districts related to preliminary agendas.</p>	<p>Anything other than a regular meeting. May be called by the presiding officer or a majority of the members of the governing body.</p> <p>The special meeting notice must specify the date, time, and place of the special meeting, and the business to be transacted.</p> <ul style="list-style-type: none"> Personal notice. Written notice must be delivered personally, by mail, fax, or e-mail at least 24 hours before the meeting to: <ol style="list-style-type: none"> Each member of the governing body unless the member submits a written waiver of notice in advance with the clerk, or the member is actually present at the meeting; and Each member of the news media who has on file with the governing body a written request for notice of special meetings. Website notice. Notice must be posted on the agency's website 24 hours in advance of the meeting, unless the agency: <ol style="list-style-type: none"> Doesn't have a website; or Employs less than 10 full-time equivalent employees; or Doesn't employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the website. Notice at agency's principal location. Notice must be prominently displayed at the main entrance of the agency's principal location and the meeting site if the meeting isn't held at the agency's principal location.
Emergencies	In an emergency situation (e.g., fire, flood, earthquake, or other emergency), a meeting may be held at a site other than the regular meeting site, and the notice requirements under the OPMA are suspended during such an emergency.	The notices required for special meetings aren't required if a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage.
Holidays	Regular meetings shall not be held on holidays. If a regular meeting falls on a holiday, the meeting must be held on the next business day.	Although not specifically addressed by the OPMA, we recommend that special meetings not be held on holidays out of consideration for public participation.
Business Transacted	There are no restrictions on the type of business that may be transacted at regular meetings.	Final disposition cannot be taken on any matter not listed in the special meeting notice.

*DISCLAIMER: These practice tips are meant to provide summary information on the notice requirements of the OPMA; these tips are not intended to be regarded as specific legal advice. Consult with your agency's legal counsel about this topic as well. May 2014

OPMA – EXECUTIVE SESSIONS

CHECKLIST
For Local Government Success

The Open Public Meetings Act (OPMA) requires specific steps be taken in order to hold an executive session. Use this checklist to guide your agency's compliance with the OPMA related to executive sessions.* For more information and resources visit www.mrsc.org/opmapra

Requirement	Completed/ Applicable
Meeting An executive session can only be held as part of a regular or special meeting.	<input type="checkbox"/>
Purpose The presiding officer announces in open session the purpose of the executive session.	<input type="checkbox"/>
End Time The presiding officer announces in open session the time the executive session will end.	<input type="checkbox"/>
Legal Counsel Legal counsel is present during the executive session, if required. (See topics below and on the next page for discussions that require the presence of legal counsel.)	<input type="checkbox"/>
Confidentiality At the start of the executive session, participants are reminded that discussions are confidential.	<input type="checkbox"/>
Topics Related to local governments, the following topics set forth in RCW 42.30.110(1) can be discussed in executive session:	
<ul style="list-style-type: none"> Matters affecting national security. RCW 42.30.110(1)(a) Lease or purchase of real estate if there's a likelihood that disclosure would increase the price. RCW 42.30.110(1)(b) Consideration of the minimum offering price for sale or lease of real estate if there's a likelihood that disclosure would decrease the price. RCW 42.30.110(1)(c) <ul style="list-style-type: none"> Note: Final action setting or leasing public property must be taken in open session. Negotiations on the performance of a publicly bid contract. RCW 42.30.110(1)(d). See back of page. Complaints or charges brought against a public officer or employee. RCW 42.30.110(1)(f) <ul style="list-style-type: none"> Note: At accuser's request, discussion must be in open session. Qualifications of an applicant for public employment. RCW 42.30.110(1)(g). See back of page. Performance of a public employee. RCW 42.30.110(1)(i). See back of page. Qualifications of an applicant/candidate for appointment to elective office. RCW 42.30.110(1)(n). See back of page. Agency enforcement actions. RCW 42.30.110(1)(o). See back of page. <ul style="list-style-type: none"> Note: Requires presence of legal counsel. Current or potential litigation. RCW 42.30.110(1)(p). See back of page. <ul style="list-style-type: none"> Note: Requires presence of legal counsel. Legal risks of current or proposed action. RCW 42.30.110(1)(q). See back of page. <ul style="list-style-type: none"> Note: Requires presence of legal counsel. 	
Intended End Time If the executive session is not completed by the originally announced end time, the presiding officer announces the extended end time in open session before returning to executive session.	<input type="checkbox"/>
Completion Open session is not resumed until after the announced end time.	<input type="checkbox"/>
Log Date Form Completed By _____	

*DISCLAIMER: This checklist is meant to provide summary information on executive sessions; the checklist is not intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well. May 2014

OPMA QUESTIONS?



Public Records Act

Fish and Wildlife Commissioner Training

4/6/2022

Public Records Act Overview

RCW 42.56

- ▶ Agencies must make any “public record” available for public inspection and copying upon request, unless a specific exemption applies
- ▶ Exemptions are listed in the public records act, but other statutes may also exempt records from public disclosure

Public Records Act Overview

RCW 42.56: Public Record

- ▶ 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

Public Records Act Overview

RCW 42.56: Writing

- ▶ 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

Public Records Act Overview

RCW 42.56: Requests

- ▶ No particular form of request is required (oral request permitted), but preference is for requests to be written
- ▶ Requests may be made to anyone within WDFW
- ▶ Often accompany other lawsuits, such as civil forfeiture cases
- ▶ Requests must seek identifiable records
- ▶ The agency can request clarification if the request is vague or broad but cannot deny the request for these reasons

Public Records Act Overview

RCW 42.56: Response

- ▶ Agencies must conduct searches that are “reasonably calculated” to locate responsive records
- ▶ Search must include all places where responsive records are reasonably likely to be located and must be effective to locate records (e.g. effective keywords)
- ▶ Agency is responsible for trying to locate and provide responsive records (that had been used or relied upon by the agency) but that are not in the agency’s physical possession

Public Records Act Overview

RCW 42.56: Response

- ▶ Potentially responsive records must be preserved pending a complete response to the request (even if otherwise destructible)
- ▶ Responsive records located must be gathered and produced, but may be produced in installments
- ▶ Production need not happen within a specified time but timeframe must be reasonable
- ▶ Agencies may charge duplication fees, but not staff time costs

Public Records Act Overview

RCW 42.56: Response

- ▶ *Nissen v. Pierce County, et al.*, 183 Wn.2d 863, 357 P.3d 45 (2015)
 - ▶ Records prepared, owned, used, or retained by agency employees in the scope of employment was “prepared, owned, used, or retained by a state or local agency”
 - ▶ Records an agency employee prepares, owns, uses, or retains on a private cellular telephone within the scope of employment can be a “public record”
 - ▶ Content of work-related text messages sent and received by county prosecutor were “public records,” and
 - ▶ Public employees are responsible for self-segregating private and public records contained on their private devices

Public Records Act Overview

RCW 42.56: Exemptions

- ▶ Agencies are not relieved of their duties to respond to requests because part of the document is covered by an exemption. They must delete or redact the exempt information and disclose the rest
- ▶ Exemptions are construed narrowly in favor of production
- ▶ Exemption logs

Public Records Act Overview

RCW 42.56: Exemptions

- ▶ No general “privacy” exemption
- ▶ Some exemptions incorporate privacy as an element
- ▶ Violation of a person’s right to privacy only occurs when disclosure
 - ▶ (1) would be highly offensive to a reasonable person, and
 - ▶ (2) is not of legitimate concern to the public

Public Records Act Overview

RCW 42.56: Exemptions

- ▶ Attorney-client communications. RCW 5.60.060(2)(a)
- ▶ Investigative records. RCW 42.56.240
- ▶ Personal information, including financial account numbers, social security numbers, names, addresses, and phone numbers. RCW 42.56.230, RCW 42.56.250
- ▶ Certain WDFW records. RCW 42.56.430

Public Records Act Overview

RCW 42.56: Penalties

- ▶ Failure to timely respond to a request, adequately search for records, improperly withholding
- ▶ Requestor dissatisfied with agency's response can sue in superior court
- ▶ Penalties are assessed on a per-record/per-day basis, \$0 to \$100 depending on mitigating and aggravating factors
- ▶ Courts must award attorney fees and costs

Public Records Act Overview

RCW 42.56: Procedures

- ▶ Set aside ample time to conduct a thorough search, include hard copy and electronic files
- ▶ Follow public records coordinator's instructions carefully and be sure to ask questions
- ▶ When in doubt, forward potentially responsive documents to your coordinator, even if you think exemption applies
- ▶ Communicate and Document

Public Records Act vs. discovery in litigation

- ▶ There is significant, and confusing, overlap.

What do we mean by “privileged”?

- ▶ RCW 5.60.060 - attorney-client privileged communications
- ▶ CR 26(b)(4) and case law - attorney work product

Attorney-Client privilege

RCW 5.60.060(2)(a)

A record is protected as attorney-client privileged if it is:

- ❑ a communication;
- ❑ made between privileged persons;
- ❑ in confidence;
- ❑ for the purpose of obtaining or providing legal assistance to the client.

Attorney work product: CR 26(b)(4)

- ▶ Documents and tangible things
- ▶ **otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ...**
- ▶ **The court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.**

Litigation Holds

- ▶ A litigation hold requires every record to be preserved, even after the record retention period for that type of record has passed
- ▶ The litigation hold describes the records to be withheld and provide instruction on how to preserve the records
- ▶ Litigation holds are appropriate whenever there is “reasonable anticipation” of a lawsuit to which a record could be relevant or could lead to relevant evidence
- ▶ Failure to preserve records subject to a litigation hold could result in discovery sanctions

Records Retention Act Overview

RCW 40.14

- ▶ How long to retain a record depends upon the type of record
- ▶ Some records may be immediately discarded/deleted (transitory records), while others must be preserved indefinitely
 - ▶ Except: litigation holds and pending public records requests
- ▶ General and specific records retention schedules, they are long and complicated.
- ▶ Criminal penalties for wrongful destruction of records

Thank you!

- ▶ “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.”

~ *RCW 42.56.030 (PRA)*

That this is not a formal opinion of the Attorney General, but expresses my carefully considered legal opinion based upon current law, which is subject to change.