

# LEGAL DO'S AND DON'T'S FOR COUNTY ELECTED OFFICERS

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# Presenters



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# Agenda

Four general topic areas:

- Public Records Act (Sara)
- Ethics and Conflict of Interest (Oskar)
- Appearance of Fairness Doctrine (Oskar)
- Open Public Meetings Act (Oskar)



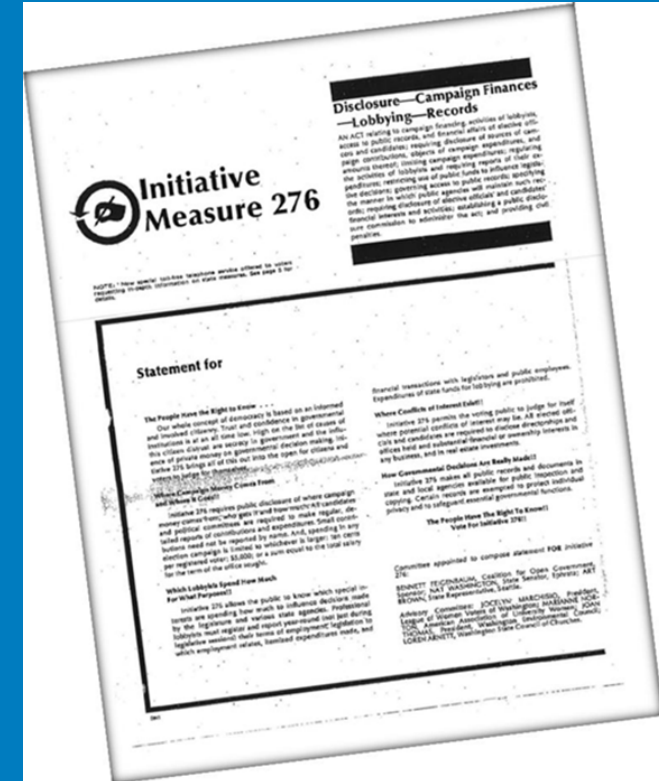


# Public Records Act 101

## Passed in 1972 – Initiative 276

# 72 percent of the popular vote

# RCW 42.56 (formerly RCW 42.17)





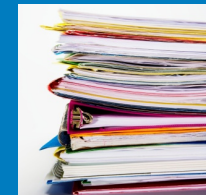
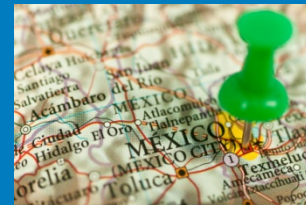
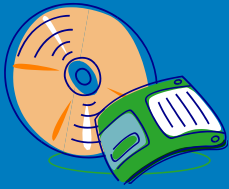
# What is a Public Record?

Simply stated, a “public record” is any record which contains information related to the conduct of County business or the performance of any County function. RCW 40.14.010



- 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 42.56.030





# Requests for Public Records

- “**identifiable**” public records
  - Requester can use agency public records request form.
  - If agency request form not used, requester must provide “fair notice” that he/she is seeking public records.
  - A request for “information” is not a request for “records” under the PRA.
  - At minimum, requester must **identify documents with sufficient clarity to allow the agency to locate them**. “Agencies are not required to be mind readers.”
- Requesters can ask to ***inspect*** records, or request ***copies*** of records.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.

~ RCW 42.56.520; RCW 42.56.080, RCW 42.56.040, RCW 42.56.100; *Hangartner v. City of Seattle*; *Bonamy v. City of Seattle*; *Hobbs v. State*.



## **1. GATHER**

**The agency must collect all records that are potentially responsive.**

## **2. REVIEW**

**The agency must examine all potentially responsive records to determine if they are truly responsive and to determine if any information should be redacted or withheld.**

## **3. PRODUCE**

**The agency must make all responsive records available to the requestor.**

## **4. RETAIN**

**The agency must keep a complete copy of all responsive records in a separate file, in both their redacted and unredacted forms.**



# What are your responsibilities regarding public records?



You, as an elected official,

- are responsible for understanding and engaging in records management for your paper and electronic records;
- are responsible for providing public records to your agency's public records person when requested.

# Exemption Basics



- Records are presumed open
- If a record, or part of a record, is withheld from the public, the agency must cite to an “**exemption**” in law and give a brief explanation.
- Exemptions are **narrowly construed**.
- The general rule is the agency withholds only the exempt information, and releases the rest.
- Exemptions must be authorized in law --- in PRA or other laws.

# More Exemption Basics



- When withholding part (redacting) or all of a record, agency must **describe record** by date, type, authors/recipients, and total number of pages.
- Agency must **list exemption and give brief explanation.**
- This information can be provided to the requester in an **“exemption log”** or in other formats, so long as the required information is provided.
- Agencies are not generally authorized in the PRA to provide lists of individuals for commercial purposes.
- The **agency bears the burden of proof** to justify the exemption.

# What do we need to search for on personal mobile devices?



- Text messages
- Call/text logs (bills)
  - Did the county use it? Example: reimbursement request
- Affidavit of search
  - Must be “reasonable detailed, nonconclusory”
  - Detail the nature and extent of search
  - Must include “facts sufficient to show the information is not a ‘public record’”

# Text Messages



- **They are bad. Period.**
- **Limitations on storage/collection**
- **What is the native format of a text message?**
- **How do we get them off of the phone?**

# Social Media



- **Agency social media sites must be archived.**
- **Personal social media sites should not be used for government business.**
- **Do not comment on social media in an official capacity.**
- **Elected officials must be extra cautious. If the social media post is in your official capacity or relates to the conduct of government, it is a public record. Be cautious about your role as an elected official, a candidate, and a private citizen.**
- **Consider a social media policy governing posts to agency social media and prohibiting employee conduct of government on personal social media.**

# Enforcement & Penalties



- PRA enforced by courts for claims listed in PRA.
- A court can impose civil penalties. No proof of “damages” required.
- Up to \$100/day. Within court discretion to award per page penalties. *Wade’s Eastside Gun Shop v. L & I.*
- A court is to consider the factors in requiring an agency to pay a penalty. Called “the Yousoufian factors”.
- 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.

~ RCW 42.56.550, RCW 42.56.565; *Yousoufian v. Sims*; *Wade’s Eastside Gun Shop v. Department of Labor and Industries*



# Why Should You Care?

- Maintenance of public records is every agency employee's responsibility and almost everything you do at work creates a public record.
- Your agency's insurance fund does not pay for public records violations.
- You may have only one public records person and he/she can't do it all...you are responsible for keeping your records organized and searchable because your failure to do so can be a factor used to increase the penalty your agency has to pay if the law is violated.
- You are in a prominent position and may be held to a higher standard.





# Ethics and Conflicts of Interest

- Ethics and conflicts of interest for local government officials are addressed in [chapter 42.23 RCW](#). This chapter applies to “municipal officers,” which includes elected county officers.
- Also, check if your county has local code provisions or rules that also address ethics and conflicts of interest.
- MRSC has a webpage on [ethics and conflict of interest](#) and a publication called [Knowing the Territory](#), with a chapter on potential conflicts and ethical guidelines.
- Chapter 42.23 RCW addresses “prohibited contract interests” and “prohibited acts.”



# Prohibited Contract Interests

- “No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer...” [RCW 42.23.030](#).
- This language prohibits a county official from directly or indirectly receiving a financial benefit from a contract if the contract is made by, through, or under his or her supervision.
- The prohibition applies broadly to members of the governing body, who are generally responsible for approving contracts, regardless of whether they voted on the contract or not.



# Contract Interests--Exceptions

- There are numerous exceptions to this prohibition in [RCW 42.23.030](#) that are quite specific. There are too many to list! Examples include:
  - **Utility service (terms must be similar to general public);**
  - **School bus drivers and substitute teachers in school districts (terms and pay must be similar).**
- RCW 42.23.030(6) provides an exception for contracts in which a municipal officer receives less than \$1,500 per month, but that exception does not apply to counties with a population of over 125,000.
- Even if an exemption applies, the officer must disclose his or her interest to the governing body and it must be noted in the minutes. He or she may not vote on the contract.



# Contracts—Remote Interests

Under [RCW 42.23.040](#), certain types of contract interests are “remote interests,” which include:

- Contracts with a non-profit when the officer is a non-salaried officer of the non-profit;
- Contracts with an officer’s employer if the officer’s compensation consists entirely of fixed wages or salary;
- Leases where the contracting party is a tenant or landlord of the officer;
- Officer holds less than 1% of the shares of a corporation which is a contracting party.

The remote interest must be disclosed and noted in the minutes. The vote must be approved by a majority without counting the vote of the remote interest holder.

# Prohibited Acts



Prohibited acts are listed in [RCW 42.23.070](#) and include:

- Securing special privileges or exemptions for yourself or others;
- Receiving a gift for a matter connected with or related to your service as a municipal officer;
- Accepting employment or engaging in business activity that induces you to disclose confidential information;
- Disclosing confidential information gained by reason of your position, or using such information for personal gain.

# Prohibited Acts—Special Privileges



Securing privileges or exemptions for yourself or others—what does this include? Examples include the following:

- Reduction or waiver permit fees;
- No special rates or fees for county services;
- Expedited permit processing;
- Priority treatment—e.g., an officer cannot ask for expedited snowplowing on his or her street.



# Prohibited Acts--Gifts

- There is no exemption for local officials for gifts below a certain dollar amount. As written, the statute applies to all gifts received in connection with your role as a municipal officer.
- State law differs for state officials, who, under [RCW 42.52.150](#), may receive certain types of gifts with an aggregate value of less than \$50.
- The best practice is to follow the more restrictive provision of [RCW 42.23.070\(2\)](#). However, it appears that the SAO, from a practical standpoint, applies the state standard to local officials.
- For more, see MRSC blog post, “[Oh Boy! A Gift!](#)”

# Prohibited Acts--Confidential Information



- Confidential information can include executive session discussions and attorney-client privileged communications.
- [RCW 42.23.070\(3\)](#) prohibits employment or business relationships that would require disclosure of such confidential information.
- [RCW 42.23.070\(4\)](#) more generally prohibits disclosure of confidential information gained by reason of the official's position.





# Penalties for Violation

[RCW 42.23.050](#) sets forth various consequences for violations of the chapter:

- The contract is **void**;
- The officer is liable for a penalty in the amount of \$500, in addition to other applicable civil or criminal penalties;
- The violation by any officer of the provisions of this chapter may be grounds for forfeiture of his or her office.
- Talk to your legal counsel ahead of time if you have specific questions or concerns.



# Appearance of Fairness Doctrine

- The appearance of fairness doctrine applies to “quasi-judicial” decisions made by a governing body—typically in the context of land use.
- A legislative act refers to policy decisions covering a broad class of individuals or businesses. Legislative acts include comprehensive plan adoption, zoning code amendments and “area-wide” rezones.
- Quasi-judicial actions are those dealing with a particular permit or enforcement action involving specific property. Examples include subdivisions, variances and rezones of a specific site.



# Appearance of Fairness--Purpose

- The appearance of fairness doctrine requires government decision-makers to conduct quasi-judicial hearings in a way that is fair and unbiased in both appearance and fact.
- It was developed by the courts to ensure judicial due process protections, which apply in courtroom settings, extend to quasi-judicial administrative hearings, such as site-specific rezones.
- The doctrine attempts to make sure that all parties to an argument receive equal treatment.
- The doctrine is codified under state law at [chapter 42.36 RCW](#).



# Appearance of Fairness--Triggers

There are several areas that can trigger appearance of fairness concerns:

- Personal interest, such as financial gain, property ownership or family or social connections with an interest in the outcome;
- Prejudgment of the issues, such as telling an applicant testifying at a hearing that you “are just wasting your time.”
- Showing partiality or favoritism to a party.
- Having *ex parte* contact with a party while the matter is pending, provided that the officer may participate if he or she discloses the nature and substance of the communications and gives the parties a chance to respond. See [RCW 42.36.060](#).



# Appearance of Fairness--Violations

- If the decision is challenged and a court finds an officer violated the doctrine, the decision will be invalidated.
- This is true even if the result would have been the same without the officer's participation. The bias of one member is presumed to influence the actions of other members. See [\*Buell v. City of Bremerton\*](#), 80 Wn.2d 518, 525, 495 P.2d 1358, 1362 (1972).
- For further reading on the doctrine, see MRSC's Appearance of Fairness [webpage](#) and [publication](#).

# OPMA--Overview



The Open Public Meetings Act (OPMA) is in [chapter 42.30 RCW](#).

- **General Rule:** All meetings of the governing body of public agencies must be open to the public;
- **Public Agencies:** Include all local governments;
- **Governing Body:** Means the policy or rule-making body of a public agency;
- **Meetings:** Occur when the governing body conducts the official business of the public agency.

# OPMA—Key Questions



## Three key questions to ask yourself to comply with the OPMA:

- Is there a quorum or more of the governing body conducting agency business?
- Is there a serial meeting?
- Is there just passive receipt of information related to agency business?



# Key Question 1

**Key Question #1:** Is there a quorum or more of the governing body conducting agency business?

**Key Takeaway:** If there is, then the OPMA's general rule applies, and agency business may only be conducted in an open public meeting.

- A quorum is generally a majority of the entire governing body—for example, a quorum of a nine member body is five.
- Agency business is broadly defined to include receiving testimony, and deliberating, discussing or considering issues of concern to the agency. See [RCW 42.30.020\(3\)](#).



# Quorum



**Question:** You are on the board of county commissioners; the board consists of a total of three commissioners. Can you ever meet in private with one of the other commissioners to discuss county business?

**Answer:** No. It is an OPMA violation for two members of a three member governing body to meet in private to discuss agency business.

# Quorum—Emails and Social Media



**Question:** Are email and social media communications between members of a governing body subject to the OPMA?

**Answer:** Yes! Communications between a quorum of a governing body about agency business would violate the OPMA. This is true regardless of whether the communications between the members is in person, by email, by phone or text, or through social media.

# Key Question 2



**Key Question #2:** Is there a serial meeting?

**Key Takeaway:** “Serial meetings” can occur when a quorum participates in a series of messages, even when there is not a quorum in any particular message in the series. Serial meetings can occur in person, by email, through social media, or through any combination of these communications methods.

# Key Question 3



**Key Question #3:** Is there just passive receipt of information related to agency business?

**Key Takeaway:** If there is, then the OPMA's general rule does not apply, even if the same information is passively received by a quorum or more of a governing body.



# Passive Receipt of Information

**Question:** If a concerned citizen emails all the members of the governing body, should a member use “reply all” when responding?

**Answer:** No. The passive receipt of information by members is not an issue under the OPMA, so the citizen’s email is not a problem. Even the “reply all” response would not be an OPMA violation, because there has not yet been two-way communication between members. But it is a bad idea, because it creates a possible violation if any other member continues the discussion.

# Violations



Compliance with the OPMA is important because it fosters government transparency. In addition, there are significant consequences for OPMA violations including:

- Fines against individual members and agencies who violate the OPMA under [RCW 42.30.120](#);
- Actions that violate the OPMA are void under [RCW 42.30.060](#);
- Violation of the OPMA is a potential grounds for recall.



# Further Reading

- MRSC has a number of OPMA resources, including an [OPMA publication](#), and an [OPMA webpage](#). MRSC has also published numerous OPMA blog articles, including topics not addressed in this presentation, like [executive sessions](#) and [special meetings](#).
- Governing body members are required to take OPMA training within 90 days of taking office under [RCW 42.30.205](#).
- The AGO has OPMA training--including on-line options—on its [open government training page](#).
- Remember to document your training!

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