

Planning Commission Protocols: Open Public Meetings, Public Records, & Appearance of Fairness Doctrine

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Presentation Overview:

- Open Public Meetings Act (OPMA) Requirements
 - Chapter 42.30 RCW
- Public Records Act (PRA) Requirements/Retention
 - Chapter 42.56 RCW
- Appearance of Fairness Doctrine requirements
 - Chapter 42.36 RCW



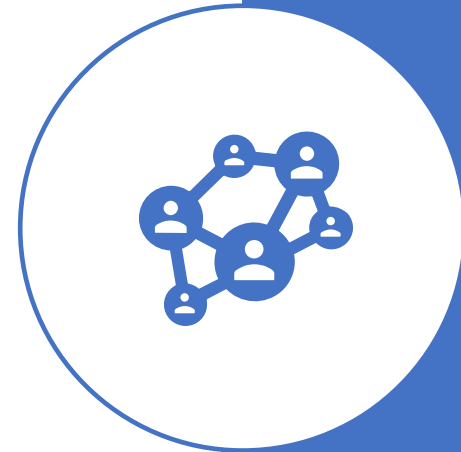
Open Public Meetings Act (OPMA) Chapter 42.30 RCW

Legislative Declaration

- “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.”

Rules

- Meetings declared open and public.
- All Meetings of the Governing Body Shall be Open and Public – Gavel to Gavel
- All Persons Shall be Permitted to Attend any Meeting of the Governing Body, Except as Otherwise Provided by Law
- The Purpose of the OPMA is to Allow the Public to View the “Decision-making Process”



Open Meetings

Important Definitions:

- **Meetings** – All meetings under State Statute are considered Regular Meetings if codified at a regular date, place, and time. Any other meeting is considered a Special Meeting. **Meetings are considered to occur when a quorum of the Membership takes “Action.”**
- **Action** – Means the Transaction of Official Business
 - Public Testimony; All Deliberations; Discussions; Considerations; Reviews; Evaluations
 - Final Actions – the OPMA is in Effect Whether or Not “Final” Action is Taken



- Regular Business Meetings
- Study sessions, workshops, retreats, etc.
- Special Meetings
- Executive Sessions
- Attendance at Others' Meetings
- Attendance at Social Events
- Serial Meetings

Types of Meetings



Serial Meetings

- Serial meetings, or rolling meetings, occur when a quorum of councilmembers take “action” (which includes discussion) on city business.
- These would be covered by the OPMA.
- This can happen with emails, text messages, phone calls, in-person meetings, etc.
- A quorum of members does not need to be on the same email chain or phone call – successive discussions creating a “tree” would be inappropriate.
- The only way it is permissible is if one member emails the other members for the purpose of providing relevant information and those other members merely “passively receive” the information and no discussion follows either directly in response or in other communication lines



Open Meetings

Use of Social Media

- When conducting city business using social media, use disclaimers (or link)
- Clearly distinguish your personal view from official City / entire Commission position on a topic
- Avoid a quorum of the Commission discussing city business using the same social media platform or post



HB 1329 Updates to the OPMA

- Location of Meetings: all meetings of a governing body of a public agency be held in a physical location where the public can attend, with two exceptions.
- Remote Attendance by Members of the Governing Body: while the meeting must be held in a physical location and must allow the public to attend in-person (absent an emergency), any or all members of the governing body can choose to attend the in-person meeting remotely.
- Public Comment: offering the public the opportunity to comment at regular meetings of a governing body of a public agency where final action is taken is now a requirement.
 - RCW 32.30.020(3): “Final Action” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.



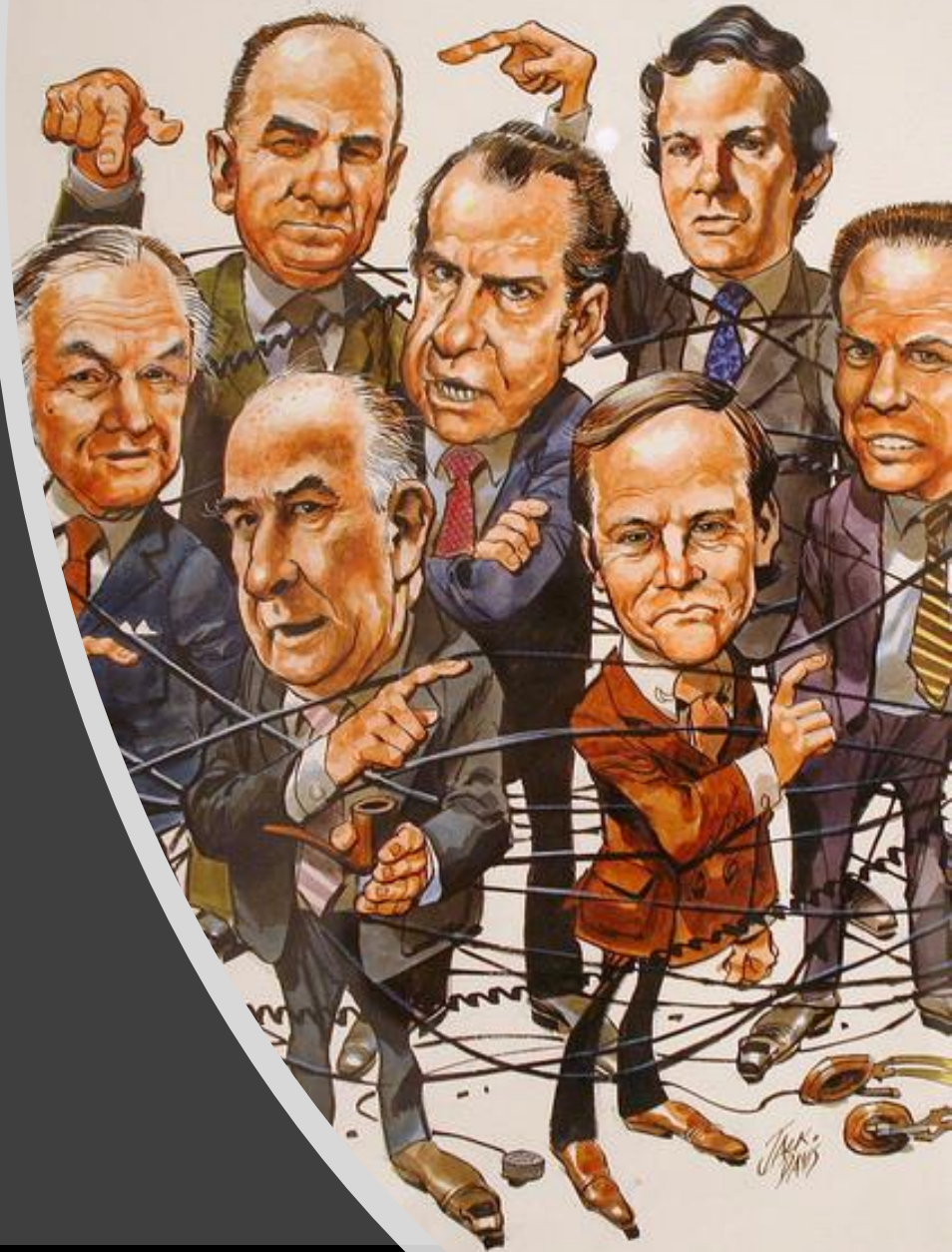
Public Comment

- Public Meetings v. Public Hearings
 - **Public Meetings**: public comment only taken at or before regular meeting which final action is taken or is otherwise required by state law
 - **Public Hearings**: public comment taken before a significant decision is made in order to provide due process or when a specific statute or regulation requires one.
- Purpose: one-way communication for members of public to provide testimony to governing body on the record.

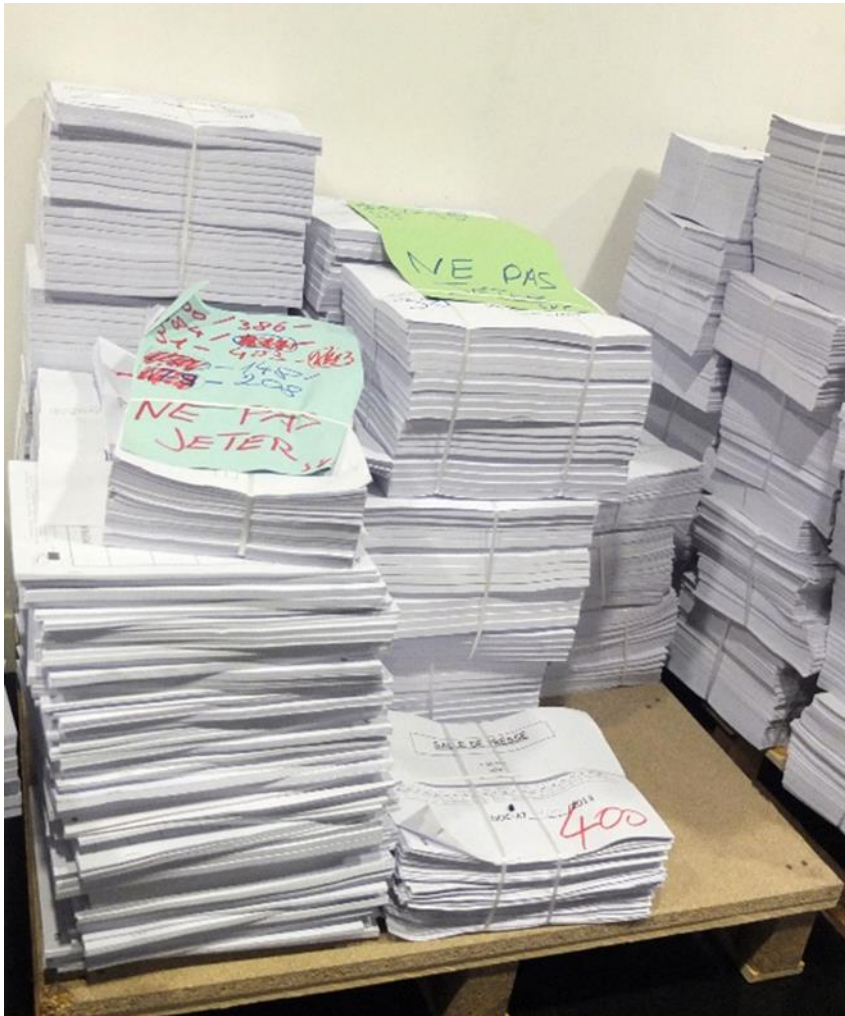


Public Records Act Chapter 42.56 RCW

- PRA is “a strongly worded mandate for broad disclosure of public records.” *Hearst v. Hoppe*, 90 Wn. 2d 123 (1978).
- Requires all agencies to disclose public records unless an exemption applies.
- Imposes fines for non-compliance.
- Act requires strict compliance



What does the PRA require agencies to do?



- Appoint a Public Records Officer
- Adopt rules of procedure that address production, proper keeping, and fullest and timely assistance in response
- Publish procedures describing certain agency organization, operations, rules, and other items listed in PRA
- Publish PRA fee schedules
- Provide for a review
- Procedure for any denial of records
- Publish information related to where requests must be submitted

What does the PRA apply to?

“AGENCY”

An “agency” is defined as all state agencies and all local agencies (and all their employees and appointed officials) in Washington. RCW 42.56.010(1).

“PUBLIC RECORD”

A “public record” is “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 and characteristics.” RCW 42.56.010(3).

Searching and Providing Records

- Searches
 - Agency must conduct adequate search – consider all forms, all locations, all possible search terms, all possible forms of records
 - Search criteria; time taken to produce records, and areas searched must all be documented
- Installments
 - Records can and should be provided in installments if the request is very large or time-consuming



Statutory Exemptions



- Exemptions
 - Not all records, or parts of records, are disclosable – depends on the information contained in the record and if a legal exemption applies
 - Exemptions are narrowly construed
 - An Exemption Log must be prepared and given to requestor noting legal reason record/part of record was redacted
- Privacy:
 - There is no general “privacy” exemption in the PRA
 - Privacy is considered invaded only if (1) highly offensive to the reasonable person and (2) not of legitimate concern to the public



Duty to Preserve Records

Legal Penalties, Including Fines and Imprisonment

RCW 40.16.010 Injury to public record. Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both.



Enforcement and Penalties

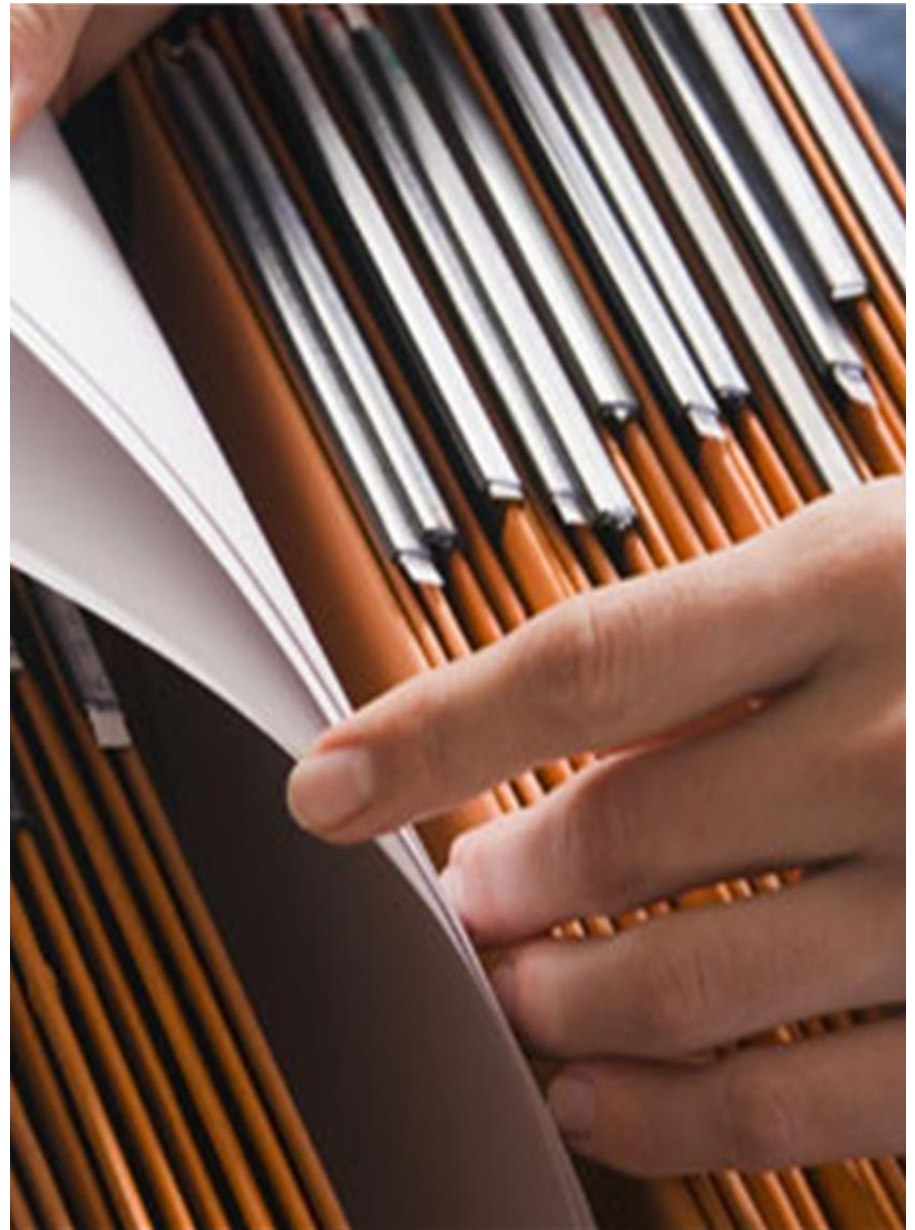
RCW 42.56.550(4) Judicial review of agency actions.



- Requestors – Awarded Attorney Fees
- Discretion of the court to award such person an amount not-to-exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

Records Retention

- Maintenance of Records:
<https://www.sos.wa.gov/archives/recordsmanagement/managing-city-records.aspx>
- Local Gov't Common Records Retention Schedule (CORE)
- Records in Native File Format
- Records Born Electronically
- As noted earlier, there can be criminal liability for willful destruction or alteration



Duty to Produce Records

- **Business Records (Public) vs. Personal Records (Private)**
 - When Creating a Record as a Member vs. as an Individual
 - Records Kept on City Equipment vs. Personal Equipment
 - Business Records Received or Sent Outside of City Resources
- **What Do You Need to Keep?**
 - Primary Records vs. Secondary Records
 - Cc'd Copies That You Do Not Proliferate as a New Record
 - Transitory Records – Have No Retention Value
 - What About Everything Else?
 - Commission Archive

Appearance of Fairness Doctrine: Chapter 42.36 RCW

Legal Standard

- Would a reasonable person
- Apprised of the totality of a member's personal interest or involvement
- Be reasonably justified in thinking
- That the involvement might affect the member's judgment?

Swift v. Island Co.,
87 Wn. 348 (1976)



Distinctions between Decisions

Legislative Decisions

- Prospective: Make Law to Achieve Broad Policy Objectives
- Set Direction and Policy; Dynamic Behavioral/Conduct Changes
- Limited Procedural Safeguards

Quasi-Judicial Decisions

- Retrospective: Conform Conduct to Existing Law
- Contested Case Setting with Identified Parties
- Procedural and Substantive Due Process Safeguards

Appearance of Fairness Doctrine

Applies to Quasi-judicial Actions

- Acting like a judge
- Making judicial-like decisions

Quasi-judicial Characteristics

- Retrospective
- Includes specific parties
- Applies existing law to facts and situations
- Determines rights, duties or privileges

Appearance of Fairness Doctrine

Rule: No *ex parte* contacts with opponents or proponents during pendency of quasi-judicial action

Remedy: (1) Disclose the substance of communication, (2) Offer an opportunity for rebuttal & objection

Consequences of AFD Violations:

- Action Taken Will be Void
- Civil Damages May be Available
- Abuse/misuse of authority
- Delay of decision/action

QUESTIONS?

