

WASHINGTON STATE



Sunshine Laws 2015

An Open Government Resource Manual



Washington State Office of the Attorney General

Bob Ferguson

A Message from Attorney General Bob Ferguson



Greetings. Welcome to the Washington State Attorney General's Office 2015 Open Government Resource Manual.

This manual provides you information about our state's Sunshine Laws. I am committed to enhancing transparency in government. Open government is vital to a free and informed society, and this updated guide will help both public officials and the people they serve understand our state's open government laws.

This manual modernizes the prior online manual to reflect the past several years' developments in the state's Public Records Act and Open Public Meetings Act, and court decisions interpreting those laws. The manual includes summaries of and links to relevant statutes, court decisions, formal Attorney General Opinions, and Public Records Act Model Rules.

The manual was produced by my office with the assistance of attorneys representing media and requesters, and local and state government organizations. If you have questions or comments about the contents of this manual, please contact Nancy Krier, the Assistant Attorney General for Open Government at nancyk1@atg.wa.gov.

My office seeks to be a resource for the public and for government entities on the state's Public Records Act and the Open Public Meetings Act. Please explore our website for training and other open government information at <http://www.atg.wa.gov/open-government>.

Thank you for your interest in open transparent government. I hope you find the open government manual informative and useful.

Bob Ferguson

Washington State Attorney General

Open Government Resource Manual

Last revised: October 1, 2015

The Attorney General's Open Government Resource Manual describes Washington's open government laws as of the last update in 2015. The manual was previously updated in 2007 by the Attorney General's Office with the assistance of Allied Daily Newspapers of Washington and local and state government organizations. Readers should be aware that court decisions issued or statutes enacted after the last revised date of the manual or a particular chapter may impact the law as summarized here.

The manual has an introduction and three chapters:

[Introduction](#)

[Chapter 1: Public Records Act – General and Procedural Provisions](#)

[Chapter 2: Public Records Act – Exemptions](#)

[Chapter 3: Open Public Meetings Act](#)

The manual provides links to cited statutes, cases, Attorney General's Opinions and rules. More information on open government is available at the Attorney General's Office [Open Government Web page](#), the [Washington Coalition for Open Government](#), the [Municipal Research and Services Center](#), and other sources.

The current manual was written and edited by:

Nancy Krier, Assistant Attorney General for Open Government (Ombuds).

Bob Meinig, Legal Consultant with the Municipal Research and Services Center, which provides legal advice and other services to Washington local governments.

Kristal Wiitala, Public Records Officer for the Department of Social and Health Services. Ms. Wiitala manages and coordinates the DSHS public records request program for the agency.

Katherine George, Attorney at the Harrison-Benis law firm. Ms. George is a former reporter who works with and represents requesters and others on open government cases and issues.

If you have any questions or comments about the content of this manual, please contact the Attorney General's Office [Assistant Attorney General for Open Government](#).

Introduction

Introduction last revised: October 1, 2015

The purpose of this Open Government Resource Manual is to provide summary information about the Public Records Act (PRA), [chapter 42.56 RCW](#) and the Open Public Meetings Act (OPMA), [chapter 42.30 RCW](#). These laws are often called “sunshine laws.” This manual is a resource for members of the public and state and local agencies. Referenced statutes and cases are linked. Click on the links to read more information, including the full language of the statutes. This manual is only an overview of some of the provisions of these two laws and is not legal advice. This manual also provides some hypothetical case examples, based on certain facts. If the facts are different, or if the laws or court precedents have changed since this manual was prepared, the analysis in a hypothetical may not apply. This manual also references Attorney General’s Office non-binding [Model Rules](#), which are linked and are also available on the Attorney General’s website. This manual is not an Attorney General Opinion, but several formal opinions are referenced and linked.

Remember: Laws change and courts can issue decisions explaining the PRA and OPMA. In the case of a difference between this manual and statutes or court decisions, the laws govern.

Notes:

On July 1, 2006, the PRA was moved from chapter 42.17 RCW to chapter 42.56 RCW. Therefore, this manual uses the current chapter 42.56 RCW citations. Some of the cases and older Attorney General Opinions cited in this manual use the former citations in chapter 42.17 RCW. A [recodification conversion chart](#) is available on the Attorney General’s website.

And, as described above, links are provided to the referenced court decisions. The links direct the reader either to copies of the decisions on the Municipal Research and Services Center’s [website](#), or for decisions beginning in 2014-2015, to copies of the decisions on the Washington State Courts [website](#). The Washington State Courts website has a search function for court opinions [here](#).

Finally, this manual discusses records and meetings of state and local agencies. Courts are not subject to the Open Public Meetings Act or Public Records Act, and access to court records is governed by court rules and Article I, Section 10 of the Washington State Constitution. The relevant rules are on the [Washington State Courts website](#). See, for example, [General Rule \(GR\) 31](#) and [GR 31.1](#) (adopted October 18, 2013, effective January 1, 2016). Records of the Washington State Legislature are defined at [RCW 42.56.010\(3\)](#) and [RCW 40.14.100](#). Discussion of court and legislative records is outside the scope of this manual.

Chapter 1

PUBLIC RECORDS ACT – GENERAL AND PROCEDURAL PROVISIONS

Chapter last revised: October 1, 2015

1.1 The Public Records Act (PRA) is Interpreted in Favor of Disclosure

The PRA was enacted by initiative to provide the people with broad rights of access to public records. The PRA declares that it must be "liberally construed" to promote the public policy of open government:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed to promote this public policy and to assure that the public interest will be fully protected. In the event of a conflict between [the PRA] and any other act, the provisions of [the PRA] shall govern. RCW 42.56.030.

Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. RCW 42.56.550(3).

Courts interpret the PRA liberally to promote the purpose of informing people about governmental decisions. WAC 44-14-01003 (summarizing how PRA is interpreted by courts).

1.2 "Public Record" Is Defined Broadly

The definition of a public record (other than a record of the Legislature) contains three elements. RCW 42.56.010(3) and (4); WAC 44-14-03001. First, the record must be a "writing," which is broadly defined in RCW 42.56.010(4) to include any recording of any communication, image or sound. A writing includes not only conventional documents, but also videos, photos, and electronic records including emails and computer data.

Second, the writing must relate to the conduct of government or the performance of any governmental or proprietary function. Virtually every document a government agency has relates in some way to the conduct of government business or functions. "Proprietary" refers to where an agency function is similar to a private business function or venture.

Third, the writing must be prepared, owned, used or retained by the agency. West v. Thurston County, (2012); Nissen v. Pierce County (2015). A writing may include data compiled for the issuance of a report (as well as the report itself), even though the agency had not intended to make the underlying data public. Yacobellis v. City of Bellingham (1989); see also O'Neill v. City of Shoreline

(2010) (agency must produce non-exempt metadata when it is requested). An agency need not possess a record for it to be a “public record.” Concerned Ratepayers v. Pub. Util. Dist. No. 1 (1999) (records held by out-of-state private vendor were “public records” because they were “used” by agency); see also Forbes v. City of Gold Bar (2012); O’Neill v. City of Shoreline (2010) (agency records on city officials’ personal computers subject to PRA); Nissen v. Pierce County (2015) (agency records on cell phones). Although this element is broad, it is not limitless. Compare 1983 Att’y Gen. Op. No. 9 (list of customers of public utility district is a public record) with 1989 Att’y Gen. Op. No. 11 (registry of municipal bondholders is not public record because it was compiled by trust company and never prepared, possessed or used by county).

The PRA applies only to “public records.” Oliver v. Harborview Med. Ctr. (1980); Nissen v. Pierce County (2015). The definition of “public record” is to be liberally construed to promote full access to public records. *Id.*

Case Example: *A public agency hires a consultant to help resolve a specific problem. The consultant prepares a report and transmits the report to the agency. After reviewing the report and before receiving a public records request for the report, the agency returns all copies to the consultant. Is the report a public record?*

Resolution: *Yes, because the agency “used” the report. A record outside the possession of the agency can be a “public record.” The agency should require the consultant to return the report to the agency for public records processing (reviewing for exempt information, redacting, copying, etc.). See Concerned Ratepayers v. PUD No. 1 (1999).*

1.3 The PRA Applies to State and Local Agencies

As noted above, only the records of an “agency” are covered by the PRA. The PRA’s definition of “agency” is broad and covers all state agencies and all local agencies. RCW 42.56.010(1); WAC 44-14-01001. Courts have interpreted that definition to include a city’s design and development department (Overlake Fund v. City of Bellevue (1991)); a county prosecutor’s office (Dawson v. Daly (1993)); a city’s parks department (Yacobellis v. City of Bellingham (1989)); and a public hospital district (Cornu-Labat v. Hospital Dist. No. 2 of Grant County (2013)). Some non-government agencies (such as an association of counties) that perform governmental or quasi-governmental functions can be considered the functional equivalent of an “agency” if they meet certain criteria. 2002 Att’y Gen. Op. No. 2; Telford v. Thurston County Board of Commissioners (1999); Clarke v. Tri-Cities Animal Care Control Shelter (1999). Under the exceptional circumstances of one case, certain records of a contractor acting as the functional equivalent of a public employee were subject to a PRA request. Cedar Grove Composting Incorporated v. City of Marysville (2015). Whether a group of public agencies operating together by agreement can be sued as separate legal entity under the PRA can be a mixed question of law and fact. Worthington v. WestNet (2014).

The PRA applies in a more limited form to the Washington State Legislature. Information about accessing legislative documents is available here.

The PRA does not apply to court case files; but those files are available through common law rights of access and court rules. *Nast v. Michels* (1986); see also *Cowles Publishing Co. v. Murphy* (1981); *Yakima County v. Yakima Herald-Republic* (2011) and *City of Federal Way v. Koenig* (2009). However, one court of appeals held that a request for judge's oaths to the superior court administrator was a disclosure request to be answered under the PRA. *Smith v. Okanogan County* (2000). Accordingly, there is authority for the proposition that the PRA does not apply to the judicial functions of the courts and only to its administrative functions, but there is no clear decision on that point. Records that are held by other agencies (non-judicial entities), even if they relate to court activities, are available under the PRA from those agencies unless they are subject to a protective order. See, e.g., *Morgan v. Federal Way* (2009) and *Yakima County v. Yakima Herald-Republic* (2011). As noted, court rules govern access to court case files. The [Washington State Courts website](#) has more information. See [General Rule \(GR\) 31](#) and [31.1](#) (when effective), and [these links](#) on the court's website.

1.4 An Agency's PRA Processes Must Assist Requesters

A. General PRA Procedures

The PRA requires agencies to implement several procedures for processing PRA requests. They include:

- Appointing a public records officer and making that information available to the public. [RCW 42.56.580](#).
- Adopting procedures for handling PRA requests. [RCW 42.56.040](#).
- Publishing a list of exemptions and prohibitions to disclosure. [RCW 42.56.070](#).
- Maintaining an index of records, with certain exceptions. [RCW 42.56.070](#).
- Adopting a PRA copying fee schedule. [RCW 42.56.070](#); [RCW 42.56.120](#).
- Providing a review procedure for denial of records. [RCW 42.56.520](#).

Agencies are to establish procedures to assist records requesters. [RCW 42.56.040](#); [RCW 42.56.580](#); [RCW 42.56.070\(1\)](#); [RCW 42.56.100](#); *Resident Action Council v. Seattle Housing Authority* (2013). A state agency is required to adopt rules to assist the public in obtaining information about that agency, and local agencies must make that information available at the central office. [RCW 42.56.040](#). See also [WAC 44-14-01002](#). The Attorney General's Office provides Model Rules for agencies to consider adopting for their procedures. See [ch. 44-14 WAC](#).

These PRA rules must provide for the "fullest assistance to" requesters and the "most timely possible action" on requests. [RCW 42.56.100](#); *Resident Action Council v. Seattle Housing Authority* (2013). An agency may not use its rules to create an exemption or other basis to withhold a record. *Hearst Corp. v. Hoppe* (1978). Agencies should have reasonable practices to allow them to promptly locate and produce requested documents if they are reasonably identifiable.

B. Public Records Officers

Agencies are required to appoint a public records officer and make the officer's contact information publicly available. [RCW 42.56.580](#). A list of state agency public records officers is available at the [Office of the Code Reviser](#). [WAC 44-14-020](#). The officer serves as the point of contact for a PRA request. The public records officer may have other persons assist in responding to requests. [WAC 44-14-02002](#).

1.5 Agencies Must Retain Records Once Disclosure is Requested

Other state laws require state and local agencies to retain certain records for varying lengths of time depending on the content. See generally [chapter 40.14 RCW](#), [state](#) and [local](#) government retention schedules, and [WAC 44-14-03005](#). The PRA does not require production of records destroyed in accordance with state records retention schedules. *Bldg. Indus. Ass'n of Wash. v. McCarthy* (2009). The fact that records do not exist because an agency inadvertently lost them before any request for their disclosure does not constitute a PRA violation. *West v. Department of Natural Resources* (2011). However, if an agency keeps a record longer than required — that is, if the agency still possesses a record that it could have lawfully destroyed under a retention schedule — the record is still a “public record” subject to disclosure. [RCW 42.56.010\(3\)](#) (“public record” includes writing “retained” by agency).

[RCW 42.56.100](#) also addresses the situation when a record scheduled for destruction is the subject of a pending request. The agency must suspend any planned destruction and retain requested records until the public records request is resolved. [RCW 42.56.100](#) requires agencies to adopt and enforce reasonable rules to protect public records from damage or disorganization.

1.6 The PRA Imposes Some Requirements on Requesters

The Attorney General's Model Rules for public records provide detailed information on the public records request process. See chapter [44-14 WAC](#).

A. Purpose of Request

A person making a public records request is not required to give a reason for the request, unless the request is for lists of individuals. *Dawson v. Daly* (1993); *Yacobellis v. City of Bellingham* (1992). An agency may ask if a request for “lists of individuals” is “for commercial purposes.” [RCW 42.56.070\(9\)](#). See also [1988 Att’y Gen. Op. No. 12](#) (access to list of individuals may be conditioned upon non-commercial use). The limitation on commercial-use requests has three elements: (1) “list of individuals,” (2) for a “commercial purpose,” and (3) disclosure is not “specifically authorized or directed by law.” [WAC 44-14-06002\(6\)](#). The word “individuals” refers to “natural persons - as opposed to business entities, committees, or groups.” [1975 Att’y Gen. Op. No. 15](#). A “list of individuals” can have other fields in it (such as addresses) and still be a “list of individuals.” [1980 Att’y Gen. Op. No. 1](#). “Commercial purpose” has its ordinary meaning – a “profit expecting” business

activity. 1998 Att’y Gen. Op. No.2; 1975 Att’y Gen. Op. No. 15. An agency may require a requester to sign a declaration that he or she will not use records listing individuals for a commercial purpose. 1988 Att’y Gen. Op. No. 12. An example of a disclosure “specifically authorized or directed by law” is RCW 84.40.020, which requires a county assessor’s real property tax rolls to be available for public inspection. 1980 Att’y Gen. Op.No. 1.

B. Identity of Requester

RCW 42.56.080 provides that agencies may not distinguish between requesters and must make records available to “any person.” However, the PRA recognizes that other statutes may limit which persons may receive records. RCW 42.56.080. For example, an agency may need to determine whether a particular requester is authorized to receive requested health care records pursuant to RCW 70.02.030. Also, a court order (including an injunction under RCW 42.56.565 or RCW 71.09.120(3) barring an inmate or sexually violent predator from receiving a record) may restrict an agency from releasing records to particular persons. RCW 42.56.080; WAC 44-14-04003(1). Therefore, depending upon the records requested and the laws that govern those records, sometimes an agency may consider the identity of a requester or need more information from a requester.

C. Form of Request

No particular form of public records request is required by the PRA. See RCW 42.56.080; RCW 42.56.100; Hangartner v. City of Seattle (2004); WAC 44-14-03006. However, a request must provide “fair notice” to the agency that it is a PRA request. Wood v. Lowe (2000); Germeau v. Mason County (2012). It must provide notice that it is a request made under the PRA. Hangartner v. City of Seattle (2004); Wright v. State (2013). The PRA specifically allows persons to make requests by mail, which includes email under current technology and practices.

Oral requests are not prohibited by the PRA, but they can be problematic. A written request is advisable for several reasons. It confirms the date on which the record is requested. It also clarifies what is being requested. Identification of the requesting party, with address and telephone number, will also facilitate a request for clarification by the agency of any ambiguous request or allow the agency to determine if a person has the right to a record that would normally be exempt. See WAC 44-14-03006. For these reasons, if a requester makes an oral request, an agency may need to follow up to confirm the request in writing.

Many agencies use public records requests forms, and make those forms available on their websites or at their offices. These forms typically identify what information the agency needs in order to process a request and search for records at that agency and thus can help expedite the request process. An agency’s rules for submitting public records requests must be reasonable and provide the fullest assistance to a requester. RCW 42.56.100.

Some laws outside the PRA require written requests for certain types of records.

D. “Identifiable Records” Requirement

To obtain records under the PRA, a requester must ask for existing “identifiable public records.” [RCW 42.56.080](#); [WAC 44-14-04002\(2\)](#).

A record must exist at the time of a request; a requester cannot have a “standing” request for records that may be available in the future. [Sargent v. Seattle Police Dep’t](#) (2011). An agency is not required to create a record to respond to a PRA request. [Smith v. Okanogan County](#) (2000); [Fisher Broadcasting v. Seattle](#) (2014). However, electronic databases may present unique issues. For example, there is not always a simple answer to when an agency is producing an existing document as compared to creating a new record. [Fisher Broadcasting v. Seattle](#) (2014). An agency needs to look at the specific facts of each case. [Fisher Broadcasting v. Seattle](#) (2014). An agency does not have broad duties to respond to questions, do research, or give information that is not an identifiable public record. [Limstrom v. Ladenburg](#) (2002).

A requester satisfies the “identifiable record” requirement when he or she provides a “reasonable description” of the record enabling the agency to locate the requested records. [Bonamy v. City of Seattle](#) (1998); [Hangartner v. City of Seattle](#) (2004); [Wright v. State](#) (2013); [WAC 44-14-04002](#). The request must be for identifiable records or classes of records, so the agency can search for potentially responsive records. [Fisher Broadcasting v. Seattle](#) (2014). A public records request must identify the records sought with “reasonable clarity.” [Wright v. State](#) (2013).

However, the requester need not identify the record with precision. A requester is not required to use the exact name of the record in a PRA request.

An agency has a duty that its procedures provide the “fullest assistance” to inquirers, [RCW 42.56.100](#), which may include assisting persons to fairly identify the documents requested. Agencies can ask a requester to clarify an unclear request. [RCW 42.56.520](#).

Case Example: *A person sends an email to an agency asking how it handles employment discrimination claims. A second person requests a copy of the agency’s policy for handling employment discrimination claims. Which of these requests is for “identifiable public records”?*

Resolution: *The second request is a request of “identifiable records” (the written policy). The first request is not for “identifiable records” but rather for information.*

E. Submitting PRA Requests

Requesters should send their PRA requests to the agency that has the records they seek. An agency can adopt rules explaining that requests are to be directed to a specific person (such as the public records officer) or to a specific address. See [RCW 42.56.040](#); [RCW 42.56.070\(1\)](#); [RCW 42.56.100](#); [Parmelee v. Clarke](#) (2008). This process ensures that the request is received in a manner that enables the agency to timely respond and to give the fullest assistance to a requester.

A requester should review the agency's procedures to see what agency address to use to submit the request. The request should be submitted to the agency's public records officer.

1.7 Agencies Have Duties in Responding to Requests

An overview of an agency's duties to process and respond to requests is available in [WAC 44-14-04003](#) and [WAC 44-14-04004](#), respectively.

A. Initial Response Within Five Business Days

An agency must respond to a request for public records within five business days of receipt of the request. [RCW 42.56.520](#). Under [RCW 1.12.040](#), the time allowed excludes the day of receipt from the computation. The initial response to the request must do one at least one of the following: (1) produce the requested records by making them available for inspection at agency offices or by mailing or emailing copies to the requester; (2) provide an Internet address and link on the agency's website to the requested records; (3) acknowledge receipt of the request and give a reasonable estimate of the time needed; or, 4) deny all or part of the request in writing. [RCW 42.56.520](#). Each type of initial response is discussed below.

A request for voluminous records does not excuse an agency's initial response within five business days, even if it may take longer to produce the records. [Zink v. City of Mesa](#) (2007) (requiring strict compliance). See discussion in [Chapter 1.7D](#) below regarding estimates of time for further response. While the PRA requires a written response only for denials of records (see also [RCW 42.56.210\(3\)](#)), agencies should nevertheless respond (or confirm a verbal response) in writing (by email or letter) in order to have a contemporaneous record of the response in case of a dispute. Also, if an agency does not find responsive records, it should explain, in at least general terms, the places searched. [Neighborhood Alliance v. Spokane County](#) (2011); see also [Fisher Broadcasting v. Seattle](#) (2014) (agency should show it attempted to be helpful).

Under case law, the failure to respond within the five business days is a violation of the PRA and entitles the requester to seek an award of attorneys' fees and statutory penalties. [West v. Department of Natural Resources](#) (2011).

B. Adequate Search

An agency must conduct an adequate search for requested records. [Neighborhood Alliance v. Spokane County](#) (2011); [Fisher Broadcasting v. Seattle](#) (2014); [Block v. City of Gold Bar](#) (2015). The search must be reasonably calculated to uncover all relevant documents. *Id.* See also [Nissen v. Pierce County](#) (2015) (searches for agency employees' relevant records on non-agency devices).

An agency is not required to go outside its own records in its search. [Limstrom v. Ladenburg](#) (2002); [Bldg. Indus. Ass'n of Wash .v. McCarthy](#) (2009). As noted, a requester must identify the documents

with sufficient clarity to allow the agency to locate them. *Hanqartner v. City of Seattle* (2004); *Hobbs v. State* (2014). An agency can ask a requester to clarify the request to assist in the search.

C. Producing Records

The PRA states broadly that an agency shall make available for inspection and copying all public records, unless a specific exemption applies. RCW 42.56.070. (The exemptions from disclosure are discussed below in [Chapter 2](#)). A requester has a right to inspect and copy records, but is not required to do both. WAC 44-14-07001(4). For example, a person may choose to inspect all public records on a certain subject but ask for a copy of only some of the records inspected. Also, a requester may ask for copies of records without first inspecting the records at agency offices.

Agencies can produce records in installments over time. RCW 42.56.550(6). However, even though some of the records requested may be readily available, the agency is not required to respond to a request in piecemeal fashion. *Ockerman v. King County Dept. of Dev. & Envtl. Servs* (2000).

1. Internet Link

Records can be made available for inspection and copying by providing a link to the records on the agency's website although, if the requester cannot access records through the Internet, the agency must provide either copies or access to the records from an agency computer. RCW 42.56.520. ("When an agency has made records available on its website, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.") Agencies are encouraged to make commonly requested records available on agency websites. Laws of 2010 c. 69 (see notes following RCW 42.56.520).

2. Inspection at Agency Offices

Public records must be made available for inspection and copying at agency offices during the normal business hours of the agency for at least 30 hours per week (except in weeks that include state legal holidays) unless the requester and the agency agree on a different time. RCW 42.56.090. The agency's customary business hours must be posted on the agency's website and also made known to the public by other means. *Id.*

Requesters who choose to inspect records at agency offices may ask to bring in their own copying equipment, which an agency may allow if its business is not disrupted and if redaction of records is not needed. Typically if copies are requested during an inspection, an agency promptly processes the request for copies and notifies the requester when the documents are ready. If the amount of requested documents is not voluminous, and if staff resources permit, the agency often may copy the documents while the requester waits. Use of an agency's copying facilities should not "unreasonably disrupt the operations of the agency." RCW 42.56.080.

3. Charging for Records

Under the PRA, no one may be charged a fee for the inspection of public records. RCW 42.56.070; WAC 44-14-07001(1). Consequently, no agency may charge a person for the time to search for records for inspection.

The PRA sets out the parameters for agency copying charges at RCW 42.56.120, RCW 42.56.070 and RCW 42.56.130. Other laws outside the PRA may also permit charges. RCW 42.56.130.

Expenses for copying records must be limited to "actual" costs of copying as set by the agency. These costs may include the paper, ink and cost per page for the use of copying equipment, together with staff salary expense incurred in copying. The costs may include scanning fees. WAC 44-14-05002, WAC 44-14-07003. The agency may also charge the actual cost of postage and any shipping or mailing container. General administrative or overhead charges may not be included in copying costs.

If an agency has not calculated its actual copying cost per page, it is limited to a charge of 15 cents per page. RCW 42.56.120; WAC 44-14-07001(2). An agency is not required to charge a fee for copying records but may waive its fees either on its own initiative or at the invitation of the requester. WAC 44-14-07005.

An agency may require a deposit of up to 10 percent of the estimated cost before copying records. RCW 42.56.120. Records may be provided in installments, and an agency may assess copying charges per installment. RCW 42.56.120. If an installment of records is not paid for or inspected, the agency need not continue its response to the request. RCW 42.56.120.

Case Example: *A person requests the opportunity to inspect and copy certain documents from an agency. The agency responds that some of the information in the records is exempt. The agency offers to allow inspection of redacted documents (with the exempt information deleted) if the requester will pay the costs of copying the redacted documents and the cost of the employee who must locate, redact and copy the documents. Is the agency's offer consistent with RCW 42.56.120 and .070(7) and (8)?*

Resolution: *No agency may charge for the right to inspect a document. Accordingly, it cannot ask the requester to pay the costs of locating and redacting records to make them available for inspection. An agency may charge for copies in accordance with its fee schedule.*

D. Reasonable Time Estimate

The PRA recognizes that an agency may need more than five business days to complete a request. Forbes v. City of Gold Bar (2012); Hobbs v. State (2014). In those situations, the agency must estimate the additional time needed to respond based upon time needed to: (1) clarify a request; (2) "locate and assemble" records to respond to the request; (3) contact a third party affected by the request; or (4) determine whether any records are covered by an exemption and should not be

disclosed in whole or in part. [RCW 42.56.520](#). See also [WAC 44-14-04002](#) and [WAC 44-14-04003](#). Each basis for needing additional time is discussed below.

The PRA does not require an agency to provide a written explanation of its time estimate. *Ockerman v. King County Dept. of Dev. & Env'tl. Servs* (2000). An agency may extend its initial estimate of time when more time is needed than first anticipated. *Andrews v. Wash. State Patrol* (2014). The "operative" word for the estimate of time is "reasonable." *Forbes v. City of Gold Bar* (2012).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. [WAC 44-14-04003](#). An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. *Id.* There is no standard amount of time for fulfilling a request so reasonable estimates should vary. *Id.*

The PRA authorizes lawsuits challenging the reasonableness of an agency's time estimate. [RCW 42.56.550\(2\)](#). The burden of proof is on the agency to show that its estimate was reasonable. *Id.* When a person prevails against an agency in an action seeking the right to receive a response to a public records request within a reasonable time, that person is entitled to an award of attorney fees and costs incurred in the action. [RCW 42.56.550\(4\)](#).

1. Requesting Clarification

An agency may need additional time to clarify the request. If an agency response seeks clarification of a request, the requester must clarify the intent or scope of the request. A requester's failure to clarify a request excuses the agency from responding to the unclarified request. [RCW 42.56.520](#); see also *White v. Skagit County and Island County* (2015).

2. Locating and Assembling Records

An agency may need additional time to locate and assemble records. And, the PRA recognizes that agencies have essential functions in addition to providing public records. [RCW 42.56.100](#); [WAC 44-14-04001](#); *Zink v. City of Mesa* (2007). The Model Rules comment at [WAC 44-14-04001](#) (cited in *Forbes v. City of Gold Bar* (2012)) describes in part:

Requesters should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. [RCW 42.56.100]. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

A court reviewing an agency's estimate of time for assembling records may consider "the circumstances" related to the request. Bartz v. Department of Corrections (2013). For example, the Bartz court considered the volume of potentially responsive records that needed to be reviewed, the agency's need to seek clarification, the agency's reasonable explanation for the timeframe, and the fact the agency provided records in installments. The court in Ockerman v. King County Dept. of Dev. & Envtl. Servs. (2000) considered that the records were in multiple locations and were being used by the prosecutor's office in litigation. The court in Forbes v. City of Gold Bar (2012) described the city's response as "reasonable in light of the difficulty the city had in retrieving the information and the efforts it expended to recover the information," and referenced the Model Rules. The court in West v. Department of Licensing (2014) considered that the request was "complex and broad." And the court in Andrews v. Wash. State Patrol (2014) said an agency may extend its time estimate if locating records takes more time than initially anticipated.

3. Contacting Third Parties

An agency may need additional time to contact third parties. RCW 42.56.540 gives agencies the "option" of notifying persons named in a record or to whom a record pertains, that the record has been requested, unless the law requires such notice. An agency may give such persons a reasonable amount of time to seek an injunction against disclosure before complying with a request for non-exempt records. WAC 44-14-04003(11).

4. Reviewing for Exempt Content

An agency may need additional time to review records for exempt content. Agencies are not relieved of their duties to respond to requests for public records because an exemption applies. RCW 42.56.210. An agency must determine if all or only part of a record is exempt. If only part of a record is exempt, an agency must withhold or redact only the exempt information and disclose the rest of the document. Hearst Corp. v. Hoppe (1978); see also WAC 44-14-04004(4)(b)(i). If an entire document is exempt, an agency must still provide the requester the basis for the exemption. (See more detailed discussion of exemptions in [Chapter 2](#)).

E. Denials

When denying access to records in whole or in part, agencies must do so in writing and specify the reasons for the denial. RCW 42.56.520; RCW 42.56.210(3). The written response must identify the specific statutes relied upon by the agency to exempt the record or part of a record from disclosure and must briefly explain how the exemptions apply to the records requested. RCW 42.56.210(3); City of Lakewood v. Koenig (2014); see also White v. Skagit County and Island County (2015).

In order to comply with the PRA and to create an adequate record for a reviewing court, the agency's response to a request for documents must include a way to identify any individual records withheld in their entirety. Progressive Animal Welfare Soc'y v. University of Wash. (1994) (PAWS II); see also

WAC 44-14-04004(4)(b)(ii). If challenged, an agency is not limited by the grounds in its initial written denial and it may argue additional reasons for nondisclosure on judicial review. *PAWS II*.

F. No Liability for Good Faith Response

A good faith decision by a public agency to comply with the PRA and release a public record relieves the agency or any public official or employee from liability arising from the disclosure. RCW 42.56.060. This immunity applies to claims by third parties for damages arising from the release of the records. For example, a third party named in a public record cannot successfully sue a public agency under the PRA for a good faith release of that record on the basis that the disclosure violated the subject's privacy. There may be rights to sue under other statutes which may require confidentiality provisions for certain types of records. The protection from liability by RCW 42.56.060 does not apply to the failure to disclose information that should have been disclosed. In that situation, a court may award penalties and attorneys' fees under RCW 42.56.550(4) to a prevailing party even if the agency acts in good faith. *Amren v. City of Kalama* (1997).

1.8 Agency Decisions May Be Reviewed Internally and In Court

A. Review by Agency of Its Own Denial

Agencies must establish procedures to promptly review decisions denying access to records in whole or in part. RCW 42.56.520. Final agency action that grants a requester the right to seek judicial review is deemed complete at the end of the second business day after an agency's denial of the right to inspect any portion of a record. This means that a requester may file a court case two business days after the initial denial regardless of whether the agency has completed its internal review. WAC 44-14-08001; WAC 44-14-08004. A requester should consult an agency's rules or procedures describing its internal reviews. And, a requester and an agency can agree to extend the time to permit an internal review. Note that an agency may cure a PRA violation by voluntarily remedying an alleged problem while the request remains open and the agency is actively engaging in efforts to fully respond to the request, so it is in the requester's interest to promptly communicate concerns about an agency's response. *Hobbs v. State* (2014).

B. Attorney General Review of Denial by State Agency

A requester may ask the Attorney General to review a state agency's claim that a record is exempt from disclosure. RCW 42.56.530. The Office of the Attorney General will respond in writing whether the record is exempt. The right of review by the Attorney General does not extend to a delay in producing records or failure to respond to the request. RCW 42.56.530 does not allow the Attorney General to formally review denials of requests by local agencies; however, the Attorney General's Office may provide information and technical assistance under RCW 42.56.155. The review is nonbinding and a requester is not required to seek review before going to court.

C. Third-Party Action to Prevent Disclosure

A third party who is named in a record, or who is the subject of a record, may seek an injunction to prevent the disclosure of a record. [RCW 42.56.540](#). An agency may also seek a judicial determination on whether a record should be disclosed. *Soter v. Cowles Publishing Co.* (2007). The action to prevent disclosure may be filed in the superior court where that party resides or where the record is kept. *Id.* The requester is a necessary (required) party. *Burt v. Department of Corrections* (2010).

The burden of proof is on the party seeking to block disclosure. *Confederated Tribes of the Chehalis Reservation v. Johnson* (1998). An injunction requires proving both that a PRA exemption applies and that disclosure “would clearly not be in the public interest and would substantially and irreparably damage any person, or ... vital governmental functions.” *Morgan v. City of Federal Way* (2009). See also *Progressive Animal Welfare Soc’y v. University of Wash.* (1994) (PAWS II).

Additional procedures may apply to injunctions regarding records requests from inmates or sexually violent predators. [RCW 42.56.565](#); [RCW 71.09.120\(3\)](#).

D. Filing Suit to Enforce the PRA

A records requester may go to court to obtain the requested records, or to challenge a response to a request or the reasonableness of an agency’s estimate of the time to provide the records. [RCW 42.56.550](#); see generally [WAC 44-14-04004\(4\)](#) and [-08004\(5\)](#). Note that an agency may cure a PRA violation by voluntarily remedying an alleged problem while the request remains open and the agency is actively engaging in efforts to fully respond to the request. Therefore, prior to going to court it is in the requester’s interest to promptly communicate with an agency if a requester has concerns about the agency’s action or inaction. *Hobbs v. State* (2014).

A person who has been finally denied the opportunity to inspect or copy a record requested under the PRA may file a lawsuit in the superior court of the county in which a record is kept (or, if the case is against a county, in the adjoining county). [RCW 42.56.550](#). See also [WAC 44-14-08004](#). The agency has the burden to prove that a specific exemption applies to the record or part of the record withheld from disclosure. *Id.*; *Hearst Corp. v. Hoppe* (1978). A court will interpret exemptions narrowly and in favor of disclosure, [RCW 42.56.030](#), and will order the disclosure of a non-exempt record “even though such examination may cause inconvenience or embarrassment to public officials or others” (language now codified at [RCW 42.56.550\(3\)](#)).

A person may also go to superior court and ask a judge to determine whether the agency’s estimate of time to provide the records is indeed “reasonable.” [RCW 42.56.550\(2\)](#). The burden of proof is on the agency to prove its estimate is “reasonable.” *Id.* See also [WAC 44-14-08004\(4\)](#).

The court’s review of the agency’s decision is *de novo* (meaning that the court reviews the matter on its own, without regard to the decision of the agency). [RCW 42.56.550\(3\)](#).

The procedure for judicial review is set forth in [RCW 42.56.550](#). Procedures may include a “show cause” hearing, but cases under the PRA may also be resolved through summary judgment. [Spokane Research and Defense Fund v. City of Spokane \(“Spokane Research IV”\)](#) (2005). The court’s rules will also govern the proceedings. More information about PRA court procedures is in [RCW 42.56.550](#) and the Model Rules at [WAC 44-14-08004](#). Court procedures are also described in the court’s [Civil Rules](#). Some courts have adopted local rules for PRA proceedings. See, e.g., [Thurston County Local Rule 16](#). And, a brochure on the [courts’ website](#) explains civil proceedings in superior court for parties unrepresented by attorneys (“pro se” parties).

Requesters must start these PRA actions against agencies within a year of when the agency claims an exemption or when it last produces records on an installment basis. [RCW 42.56.550\(6\)](#); see also [Rental Housing Association of Puget Sound v. City of Des Moines](#) (2009) and [Klinkert v. Washington State Criminal Justice Commission](#) (2015). Some decisions applied a two-year statute of limitations to PRA claims ([Tobin v. Worden](#) (2010); [Reed v. Asotin](#), 917 F.Supp.2d (E.D.Wash. 2013)); however, see [Bartz v. State Department of Corrections](#) (2013) (applying one-year statute of limitations).

E. Attorneys' Fees, Costs, and Daily Penalty

A party who "prevails" against an agency in a lawsuit seeking either to disclose a record or to receive an appropriate response within a reasonable time is entitled to recover costs and reasonable attorneys' fees. [RCW 42.56.550\(4\)](#). In addition, the court may award a statutory penalty of up to \$100 for each day that the agency denied the requester the right to inspect or get a copy of a public record. *Id.* The penalty range is \$0 to \$100. See also [WAC 44-14-08004\(7\)](#). Penalties may not be awarded to an inmate unless the court finds the agency acted in bad faith. [RCW 42.56.565](#).

A requester is the "prevailing party" if the final court hearing the matter determines that the record or portion of a record “should have been disclosed on request,” [Spokane Research & Defense Fund v. City of Spokane \(“Spokane Research IV”\)](#) (2005), or that some other violation of the PRA occurred. [Doe I v. Washington State Patrol](#) (1996). The requester also prevails if the agency “voluntarily” provides the records improperly withheld after being sued. The award of reasonable attorneys' fees to a prevailing party is mandatory, although the amount is within the court's discretion. [Progressive Animal Welfare Soc'y v. University of Wash.](#) (1994); [Doe I v. Washington State Patrol](#) (1996); [Lindberg v. Kitsap Cy.](#) (1996); [Amren v. City of Kalama](#) (1997).

Penalties are not mandatory and can be awarded within the court’s discretion. [RCW 42.56.550\(4\)](#). A court is to consider a nonexclusive list of factors when assessing a penalty. [Yousoufian v. Office of Ron Sims](#) (2004); [Neighborhood Alliance v. Spokane County](#) (2011). There are factors that can increase (aggravate) a penalty and factors that can decrease (mitigate) a penalty.

1.9 Other PRA Provisions

Other provisions of the PRA include:

- **Training.** Effective July 1, 2014, public records officers and elected local and elected statewide officials must receive PRA training within 90 days of assuming their duties, and must receive refresher training no later than four years later. [RCW 42.56.152](#). The Attorney General’s Office has an [Open Government Training Web page](#) with more resources and information.
- **Indexing.** There are certain records indexing requirements, and the requirements depend upon whether the agency is a state or local agency. [RCW 42.56.070](#). The requirement to keep indices of public records set forth in [RCW 42.56.070\(3\)](#) is excused if a local agency makes an affirmative finding that maintaining such an index would be "unduly burdensome." [RCW 42.56.070\(4\)](#). A state agency must have a rule on its system for indexing certain types of records as listed in [RCW 42.56.070\(5\)](#), including records it indexed before 1990. A public record may be "relied on, used, or cited as precedent by an agency against a party" only if that record has been included in an index available to the public or if the affected party has timely actual or constructive notice of that record. [RCW 42.56.070\(6\)](#). See also [WAC 44-14-03003](#).
- **Exemptions.** [Chapter 2](#) of this manual describes exemptions from disclosure.
- **Data Breaches.** [RCW 42.56.590](#) provides procedures for notice of security breaches of data with personal information.
- **Attorney General’s Office Assistance.** The Attorney General’s Office may provide Model Rules, as well as other information, technical assistance, and training. [RCW 42.56.155](#); [RCW 42.56.570](#).

Chapter 2 PUBLIC RECORDS ACT – EXEMPTIONS

Chapter last revised: October 1, 2015

2.1 Exemptions Permit Withholding or Redaction of Records

Records must be produced upon request unless a law “exempts or prohibits disclosure of specific information or records.” [RCW 42.56.070\(1\)](#). These laws are called “exemptions.” The PRA and other statutes provide hundreds of very specific exemptions. If an exemption applies to all or part of a record, the exempt content can be withheld or deleted (redacted). Many court cases interpret these exemptions, and new exemptions can be created or modified each year by the Legislature. For a list of these exemptions, see the [linked table](#) prepared by the Office of the Code Reviser (see the list under “Schedule of Review,” then select the most recent year). The Public Records Exemptions Accountability Committee (“[Sunshine Committee](#)”) is charged with reviewing exemptions in state

law and making recommendations for changes. RCW 42.56.140. A full treatment of all exemptions is beyond the scope of this Open Government Resource Manual. Instead, this chapter provides general guidance on exemptions and summarizes many of the ones most frequently encountered by requesters and agencies.

A. Application of Exemptions

The PRA requires exemptions to be narrowly construed to promote the public policy of disclosure. RCW 42.56.030. An agency can refuse inspection and copying of public records based on exemptions found either in the PRA or in an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). A record or portion of a record must fit squarely within a specific exemption in order to be withheld; otherwise, the withholding is invalid. An exemption will not be inferred or presumed. *Progressive Animal Welfare Soc'y. v. Univ. of Wash* (1994) ("PAWS II"). The "other statutes" provision does not allow a court "to imply exemptions but only allows specific exemptions to stand." *Brouillet v. Cowles Publishing Co* (1990) (cited in PAWS II).

An agency must redact and produce the remaining parts of the records if exempt information can be effectively deleted or if the exemption is found by a court to be "clearly unnecessary to protect any individual's right of privacy or any vital governmental function." RCW 42.56.210(1); Resident Action Council v. Seattle Housing Authority (2013). The existence of exempt records must be disclosed to the requester. *Sanders v. State* (2010) (citing to PAWS II).

An agency cannot define the scope of a statutory exemption through rule-making or policy. *Servais v. Port of Bellingham* (1995). An agency agreement or promise not to disclose a record cannot create an exemption that does not exist in the law. RCW 42.56.070(1); Spokane Police Guild v. Liquor Control Bd. (1989).

Exemptions have been classified by the Washington Supreme Court as being of two primary types: categorical, meaning that a particular type of information or record is exempt; and conditional, meaning that exempting a record depends on the effect on a privacy right or government interest. *Resident Action Council v. Seattle Housing Authority* (2013).

Exemptions within the PRA can be "permissive rather than mandatory." 1980 Att'y Gen. Op. No. 1. Therefore, an agency has the discretion to disclose an exempt record. However, there are instances when disclosure is prohibited and where an agency has no discretion to disclose the record, such as producing lists of individual in response to requests for commercial purposes. RCW 42.56.070(9).

Laws outside the PRA use a variety of terms such as "confidential," "privileged," or "shall not be disclosed," to create exemptions. "Other statutes" can be found in state laws, federal laws and regulations, and court rules. See, e.g., *Progressive Animal Welfare Soc'y v. University of Wash* (1994) ("PAWS II") (other state laws); *O'Connor v. DSHS* (2001) (court rules); *Ameriquest v. Office of the Attorney General* (2013) (federal laws and rules). If another statute does not conflict with the PRA and either exempts or prohibits disclosure of specific public records in their entirety; then the

records may be withheld despite the redaction requirements in [RCW 42.56.210\(1\)](#). *Progressive Animal Welfare Soc'y v. University of Wash* (1994) (“PAWS II”). Other statutes outside the PRA typically prohibit disclosure and may impose penalties if the prohibition is violated. See, for example, [Chapter 70.02 RCW](#) (Health Care Information Act), [Chapter 13.50 RCW](#) (Juvenile Records Act), and [RCW 74.04.060](#) (public assistance records). While some other statutes provide an “exclusive process” outside the PRA to produce records, it is not necessary to do so in order to qualify as an “other statute” under [RCW 42.56.070\(1\)](#). *Fisher Broadcasting Co. v. Seattle* (2014). Additionally, the Washington State Constitution grants the Governor a qualified gubernatorial privilege in response to a PRA request for policymaking communications with advisors. *Freedom Foundation v. Gregoire* (2013).

The descriptions of exemptions below address both exemptions found in the PRA as well as “other statute” exemptions related to the records addressed. This chapter does not address all exemptions in detail but instead focuses on those that are most frequently applied or have been interpreted by the courts.

B. No Stand-Alone "Privacy" Exemption

The PRA does not have a stand-alone “privacy” exemption. The PRA has a description of when privacy is invaded, described at [RCW 42.56.050](#), but that statute is not an exemption. [RCW 42.56.050](#) expressly states that it does not, by itself, “create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.” [RCW 42.56.050](#) also explains that, when an exemption within the PRA protects “privacy,” it allows withholding only if disclosure: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. This two-part test requires proof of both elements. *King County v. Sheehan* (2002).

An agency exempting information from a record must do so based upon some statute other than [RCW 42.56.050](#) (See [Chapter 2.1A](#) above). Some exemptions incorporate privacy as one of the elements that must be met for the exemption to apply, and when they do, an agency then looks to what constitutes an invasion of privacy under [RCW 42.56.050](#). [RCW 42.56.230\(3\)](#), [RCW 42.56.230\(4\)](#), and [RCW 42.56.240\(1\)](#). For example, personal information in agency employee files is exempt if disclosure would violate the employee's right to “privacy.” [RCW 42.56.230\(2\)](#). The Washington Supreme Court has found that privacy is a guiding principle for the creation and application of certain exemptions, observing that “PRA’s exemptions are provided solely to protect relevant privacy rights or vital government interest that sometimes outweigh the PRA’s broad policy in favor of disclosing records.” *Resident Action Council v. Seattle Housing Authority* (2013). When records are exempt in their entirety under a statute, the issue of whether an identified individual’s right to privacy would be violated need not be addressed. *Planned Parenthood v. Bloedow* (2015). In *Predisik v. Spokane School District No. 81* (2015), the Supreme Court further explained that a person has a right to privacy under the PRA only in matters concerning the “private life.”

2.2 There Are Several Types of Exemptions

A. Exemptions of General Applicability

1. Deliberative Process and Drafts: RCW 42.56.280

Preliminary drafts or recommendations, notes and intra-agency communications may be withheld by an agency if they pertain to the agency's deliberative process and show the exchange of opinions within an agency before it reaches a decision or takes an action. The purpose of this exemption limits its scope. *Progressive Animal Welfare Soc'y v. University of Wash.* (1994) ("PAWS II"); *Hearst Corp. v. Hoppe* (1978). Its purpose is to "protect the give and take of deliberations necessary to formulation of agency policy." *Hearst Corp. v. Hoppe* (1978); *Progressive Animal Welfare Soc'y v. University of Wash.* (1994) ("PAWS II"). It only protects records during a limited window of time while the action is "pending," and the withheld records are no longer exempt after final action is taken.

The test to determine whether a record is covered by this exemption has been summarized by the Washington Supreme Court as follows:

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not raw factual data on which a decision is based. *PAWS II*. It is not, however, required that documents be prepared by subordinates to be exempt.

ACLU v. City of Seattle (2004).

The exemption applies only to documents that are part of the deliberative or policy-making process; records about implementing policy are not covered. *Cowles Publishing v. City of Spokane* (1993). For this reason, inter-agency (as opposed to intra-agency) discussions probably are not covered by this exemption. *Columbian Publishing Co. v. City of Vancouver* (1983).

Matters that are factual, or that are assumed to be factual for discussion purposes, must be disclosed. *Brouillette v. Cowles Publishing Co* (1990); *Hearst Corp. v. Hoppe* (1978) (description of a taxpayer's home by a field assessor treated as fact by agency appraisers). Thus, unless disclosure of the records would reveal or expose the deliberative process, as distinct from the facts used to make a decision, the exemption does not apply. *Hearst Corp. v. Hoppe* (1978).

Additionally, under this statute, records are not exempt if "publicly cited in connection with an agency action." Therefore, an evaluation of a real property site requested by a city attorney was not

exempt from disclosure under the deliberative process exemption where it was cited as the basis for a final action. *Overlake Fund v. City of Bellevue*, (1991), (1994) (study ultimately withheld on other grounds). Subjective evaluations are not exempt under this exemption if they are treated as raw factual data and not subject to further deliberation and consideration. *Progressive Animal Welfare Soc'y v. University of Wash* (1994) ("PAWS II"); *Hearst Corp. v. Hoppe* (1978).

Importantly, once the policies or recommendations are implemented, those recommendations, drafts, and opinions cease to be protected under this exemption. *Progressive Animal Welfare Soc'y v. University of Wash.* (1994) ("PAWS II").

2. Litigation and Legal Information

a. "Controversy" Exemption: RCW 42.56.290

This provision exempts records related to a controversy involving the agency as a party in a lawsuit where records would not be available to other parties under the court rules. A "controversy" covered by this exemption includes threatened, actual, or completed litigation. *Dawson v. Daly* (1993).

If an agency is a party to a controversy, the agency may withhold records that normally would be privileged under litigation discovery rules (commonly called the "work product" doctrine). A document is work product if an attorney prepares it in confidence and in anticipation of litigation or it is prepared by another at the attorney's request. For example, a study of the economic viability of hotels of various sizes, commissioned by a city attorney's office to determine the city's potential liability for a constitutional takings claim, qualified as work product and was insulated from disclosure. *Overlake Fund v. City of Bellevue* (1994). Notes of interviews conducted by an investigator at the attorney's direction are protected if the records are relevant to and reasonably connected to an anticipated lawsuit even if the controversy is not identified in the records and the lawsuit has not yet been filed. See *Soter v. Cowles Publishing Co.* (2007) and see generally Public Records: The Attorney-Client Privilege and Work Product Doctrine – Guidance on Recurring Issues (Washington State Attorney General's Office) (Dec. 1, 2004).

b. Attorney/Client Privileged Records: RCW 5.60.060(2)

In addition to the PRA exemption for records related to a controversy, information in records may be exempt from production if it constitutes privileged attorney-client communications. The Washington Supreme Court in *Hanqartner v. City of Seattle* (2004) ruled that RCW 5.60.060(2), the statute codifying the common law attorney-client privilege, is an "other statute" exemption under RCW 42.56.070(1). Accordingly, records or portions of records covered by the attorney-client privilege are exempt from disclosure. See generally WAC 44-14-06002(3). This privilege protects communications and advice between attorneys and their clients but not records prepared for reasons other than communicating with an attorney. See *Morgan v. City of Federal Way* (2009) and *Sanders v. State* (2010).

c. Mediation Communications: RCW 42.56.600

Communications in the context of mediation that are privileged under chapter 7.07 RCW are exempt from production. RCW 7.07.070 states that mediation communications are confidential as agreed by the parties or as covered by other laws.

3. Security and Terrorism

RCW 42.56.420 provides exemptions from disclosure based on the impact the disclosure of the records may have on physical or information security. This statute exempts the following categories of records:

- (1) Records designed to respond to criminal terrorist acts, when release could significantly disrupt the conduct of government and are substantially likely to threaten public safety including vulnerability assessments and plans and records exempt under federal law
- (2) Vulnerability assessments and emergency or escape response plans at correctional facilities or secure treatment facilities for civilly committed sexually violent predators
- (3) Comprehensive safe school plans
- (4) Information about the infrastructure and security of computer and telecommunications networks that, if released, would increase risk to their confidentiality, integrity or availability
- (5) System security and emergency preparedness plans for transportation systems.

In *Northwest Gas Association v. Washington Utilities and Transportation Commission* (2007), the Court of Appeals interpreted subsection (1) of this statute to exempt pipeline shapefile data because the information was initially collected and then maintained to prevent, mitigate or respond to criminal terrorist acts.

B. Personal Information

"Personal information" is information that is "peculiar or proper to private concerns." *Lindeman v. Kelso School Dist. No. 458* (2007). Although the PRA is intended to enable citizens to retain sovereignty over government and to demand full access to information relating to our government's activities, the PRA was "not intended to make it easier for the public to obtain personal information about individuals who have become subject to government action due to personal factors.... Such personal information generally has no bearing on how our government operates." *Lindeman; DeLong v. Parmelee* (2010). "Personal information" has a different meaning than "privacy." *Lindeman*. Some exemptions list what is "personal information" and some exemptions also include invasion of "privacy" as a required element. The discussion of "invasion of privacy" is in Chapter 2.1B.

1. Student, Institutional Residents, and Public Assistance Records: RCW 42.56.230(1)

This exemption covers “personal information” held by agencies in files kept for public assistance or public health clients, students, and residents of public institutions. Although a record may include information about such persons, the information might not satisfy all the provisions of the exemption and thus that information would not be exempt from disclosure. For example, a surveillance video recorded on a school bus was not considered to be “personal information” maintained in a student file and was found to not be exempt under this provision. *Lindeman v. Kelso School Dist. No. 458* (2007). As an exception to this exemption, in *Oliver v. Harborview Med. Ctr.* (1980), a patient was allowed copies of her own medical records. (Note that since the decision in *Oliver*, disclosure of health care records is now addressed in specific statutes at RCW 42.56.360 and the statutes listed there include chapter 70.02 RCW. See more detailed discussion of health care records in [Chapter 2.2F](#)).

2. Child Information: RCW 42.56.230(2)

Personal information of children and their family members or guardians is exempt when held in licensed child care files of the Department of Early Learning and by any other public or nonprofit program serving or applying to children or students, including parks and recreation and after-school programs, except that emergency contact information can be produced in emergency situations.

3. Personal Information of Public Employees: RCW 42.56.230(3) (See [Chapter 2.2C](#) below)

The extent to which information about employees can be considered private and of no legitimate concern to the public has not been fully defined. Protection has been applied to intimate details of personal life that a person “does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or close personal friends.” *Bellevue John Does 1-11 v. Bellevue Sch. Dist.* (2008). Exemption of public employee information is discussed in more detail below.

4. Taxpayer Information: RCW 42.56.230(4)

This exemption applies to information about taxpayers and incorporates the prohibitions in RCW 84.08.210, RCW 82.32.330, 84.40.020, 84.40.340, or a city B&O tax ordinance authorized under RCW 35.102.145. The most common prohibition applied here is RCW 82.32.330, which provides that tax returns (filed with the Department of Revenue) and tax information about a specific or identifiable taxpayer are confidential, subject to specific exceptions.

In addition, information is exempt if it would violate the taxpayer’s right to privacy or cause unfair competitive disadvantage. See *Van Buren v. Miller* (1979) (information relied upon by the assessor to make valuation is not private); *Hearst Corp. v. Hoppe* (1978).

5. Financial Account Information: RCW 42.56.230(5)

This exemption for banking and financial account information is designed to limit the risk of identity theft and protects account numbers and information such as social security numbers, tax payer identification numbers, drivers' license numbers and other information listed in the definition of financial information in RCW 9.35.005. Disclosure can occur if required by other law.

6. Small Loan Information: RCW 42.56.230(6)

This exemption protects personal and financial information about borrowers held in the Department of Financial Institutions database that licensed lenders consult to determine if they are eligible to receive a small loan.

7. Vehicle Licensing Applications: RCW 42.56.230(7)

Records provided by applicants for driver's licenses or state identification cards to prove identity and other factors is protected from disclosure, as is information that shows a person failed to register with the selective service. Vehicle and boat registration or licensing records are exempt if they reveal that a person serves as an undercover law enforcement officer or conducts other types of confidential investigations.

8. Industrial Insurance Structured Settlements: RCW 42.56.230(8)

In 2014, a provision was added to exempt all information related to these agreements, except for final orders from the Board of Industrial Insurance Appeals.

C. Public Employee Records

1. Exemption of Personal Information: RCW 42.56.230(3)

Personal information of employees is exempt if it violates their right to privacy as defined in RCW 42.56.050. What is determined to be personal information of public employees has been evolving through case law. This exemption requires a showing that the information about an employee would be "highly offensive" if disclosed **and** is not of "legitimate" public concern. Therefore, the application of this exemption can vary depending on the circumstances involved. Predisik v. Spokane School District No. 81 (2015) (privacy right under PRA depends upon the types of facts disclosed and is not amenable to a bright-line rule). The exemption includes records in files for current and former employees, whether held by an employing agency or other agency, such as a retirement system. Seattle Fire Fighters Union, Local No. 27, v. Hollister (1987); Belenski v. Jefferson County (2015) (former employee records). Courts have analyzed what is "personal information" of public employees in the following areas:

- a. Employees' Public Conduct:** Disclosure of police officer's involvement at a bachelor party/strip show at a private club was not highly offensive because the conduct occurred in front of more than 40 people. Spokane Police Guild v. State Liquor Control Bd. (1989). Misconduct on the job and off-duty actions that "bear on ability to perform" public office are "not private, intimate, personal details" of a state patrol officer's life, but are of public concern. Cowles Publ'g Co. v. State Patrol (1988).
- b. Employees' Emails and Text Messages:** Emails and text messages involving public agency business clearly are public records subject to disclosure. However, the "personal information exemption" may apply to information within those emails that would be highly offensive and of no legitimate public interest if released. Even if the content of some employee emails is exempt because it is personal and unrelated to government operations and solely related to the employee's personal life, information about the number of personal emails sent and the time spent transmitting them is of public concern and should be disclosed. Tiberino v. Spokane County (2000). Text messages sent and received from a government employee's private cell phone are public records if they satisfy the definition of "public record" at RCW 42.56.010(3). Nissen v. Pierce County (2015).
- c. Employee Evaluations:** Courts have held disclosure of an employee's performance evaluations with no discussion of specific incidents of misconduct is presumed to be highly offensive and of no legitimate concern to the public. Dawson v. Daly (1993); Brown v. Seattle Public Schools (1993). Disclosure of this information between a public employee and supervisor normally serves no legitimate public interest and would impair the candidness of evaluations and employee morale if made public to anyone upon request. However, the performance evaluation of a city manager - the city's chief executive officer, its leader, and a public figure - was not exempt because it was of legitimate concern to the public. Spokane Research & Defense Fund v. City of Spokane (2000).
- d. Personnel Complaints and Investigations:** Multiple court opinions have addressed the disclosure of personnel investigations. If the misconduct is substantiated or disciplinary action has been taken, these records are to be disclosed because they are of legitimate interest to the public, even if embarrassing to the employee. See Brouillet v. Cowles Publishing Co (1990) (records of teacher certificate revocation records are of legitimate public interest); Morgan v. Federal Way (2009) (investigated and substantiated allegations of inappropriate behavior by a municipal court judge in dealing with others are of "substantial" public interest). In Bellevue John Does 1-11 v. Bellevue Sch. Dist. (2008), the Washington Supreme Court confirmed that teachers have no right to privacy in complaints of sexual misconduct that are substantiated or when disciplinary action is taken. The Bellevue John Does decision also held that disclosing "letters of direction" discussing alleged misconduct that was not substantiated is not "highly offensive" to the employee if identifying information is redacted. Unsubstantiated allegations are considered "personal information" that can be exempt from production if the standard of the "right to privacy" in RCW 42.56.050 is met.

The Washington Supreme Court further addressed the issue of the extent to which unsubstantiated allegations can be disclosed in *Bainbridge Island Police Guild v. City of Puyallup* (2011). In that case, the requester asked for the records regarding an investigation of sexual misconduct by a police officer by name. The court held that the unsubstantiated allegation of such misconduct was “personal information” and release would be “highly offensive” if released, but that the public’s legitimate concern in the investigation would be satisfied by redacting the identity of the officer. The Washington Supreme Court has also held that records showing employees on administrative leave while their employer investigates allegations of misconduct, but which do not describe the allegations, do not implicate the privacy rights of the employees and must be disclosed. *Predisik v. Spokane Sch. Dist. No. 81* (2015). In *West v. Port of Olympia* (2014), the court of appeals held that unsubstantiated allegations concerning accounting procedures, disposal of environmentally sensitive materials, and violation of port policies regarding working on holidays would not be highly offensive to the reasonable person and thus would be disclosed. Identities of high-ranking police officials was found to be of greater interest to the public and of legitimate public concern with fewer privacy rights attached even when misconduct was not established in *City of Fife v. Hicks* (2015).

- e. **Employee Whistleblowers:** The identity of state employees filing complaints with an ethics board or making a whistleblower complaint to the state auditor or other public official is protected from disclosure under RCW 42.56.240(11).

f. **Other Types of Employee Information:**

Settlement Agreements. Settlement agreements between employees and their employer are of legitimate public concern and must be disclosed, even if they were intended to be confidential. But information in a settlement agreement is exempt from disclosure based on the right to privacy, if it concerns intimate details of employee's personal and/or private life. *Yakima Newspapers, Inc. v. City of Yakima* (1995).

Salary and Benefit Information. Salary and benefit information of public employees is normally open to the public (*Tacoma Pub. Library v. Woessner* (1998)), except that salary survey information collected from private employers used for state ferry employees is exempt from disclosure under RCW 42.56.250(7).

Other Information. The extent to which information about employees can be considered to be private and of no legitimate concern to the public has not been fully defined but has been addressed as applying to intimate details of personal life that a person “does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or close personal friends.” *Bellevue John Does 1-11 v. Bellevue Sch. Dist.* (2008). The discussion of “invasion of privacy” is in Chapter 2.1B. Information that could be protected includes health information, marital status, disability, and reasonable accommodations. However, the ability to use a list of the names and ranks of law enforcement officers to locate other

publicly available information that could reveal private information about the officers was not accepted as a basis to exempt that list from disclosure. *King County v. Sheehan* (2002).

2. Test and Exam Questions: RCW 42.56.250(1)

“Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination” are exempt because disclosure would give an undue advantage to applicants for licenses or jobs.

3. Applicants for Public Employment: RCW 42.56.250(2)

Names of applicants and their job applications and accompanying materials are exempt from disclosure. See *Beltran v. Dep't Social & Health Services* (1999).

If an applicant is hired, some agencies do not consider this exemption to apply to that applicant's records. Instead, the agencies look to exemptions such as RCW 42.56.230(3) and RCW 42.56.250(3) to decide whether or not to disclose personal information from these records.

4. Public Employees' Home Information and Identification: RCW 42.56.250(3) and (8)

For public employees, volunteers, and individual home health care workers, this section exempts their home addresses and telephone numbers, personal cell phone numbers and email addresses, social security and driver's licenses or state identicard numbers, and emergency contact information. For their dependents, similar information is exempt except that dates of birth are added as exempt and driver's license and identicard numbers are not listed here. For employees of criminal justice agencies, their photographs and month and year of birth are also exempt, except if requested by the news media. This section is intended to protect these employees from the offender population, as shown by the exclusion from the definition of news media of persons held in custody of these agencies.

The statute provides that this exemption applies to information held in personnel and employment-related records. However, personal email addresses of city councilmembers used to conduct city business were found not to be exempt, because they were not part of personnel records or employment-related records. *Mechling v. City of Monroe* (2009).

5. Discrimination and Unfair Labor Practice Investigations: RCW 42.56.250(4) and RCW 42.56.250(5)

Identification of employees seeking advice to determine their rights about possible claims of discrimination against them is exempt when employees ask that their names be withheld; no showing of a risk of harm is required as is required for criminal investigations. RCW 42.56.250(5). Additionally, all records compiled during investigations by employers into unfair labor practices or

employment discrimination claims are exempt while those investigations are in process. RCW 42.56.250(5).

D. Several Exemptions Relate to Law Enforcement Information

1. Investigative Records: RCW 42.56.240(1)

The PRA exempts "intelligence information" and "specific investigative records" compiled by investigative, law enforcement, penology, and professional disciplinary agencies if the information is "essential to effective law enforcement" or needed to protect a person's privacy rights. "Specific . . . investigative records" are the result of an investigation focusing on a particular person, Laborers Int'l Union of North America, Local No. 374 v. City of Aberdeen (1982), or an investigation to ferret out criminal activity or to shed light on specific misconduct. Dawson v. Daly (1993); Columbian Publishing v. City of Vancouver (1983); City of Fife v. Hicks (2015). If a law enforcement agency maintains reports as part of a routine administrative procedure, and not as the result of a specific complaint or allegation of misconduct, the reports are not investigative records within the terms of this exemption. For example, "Use of Force Administrative Reports" prepared by police whenever there is contact between a K-9 unit dog and a person were held not within the investigative information exemption. Cowles Publishing v. City of Spokane (1993).

"Investigative, law enforcement, and penology agencies" are agencies having authority to investigate and penalize, such as the police, the police internal affairs investigation unit, the Public Disclosure Commission, medical disciplinary boards, or a local health department. An investigative agency may exempt only those records made in its investigative function. Columbian Publishing v. City of Vancouver (1983) (a general inquiry into agency personnel matters is not an "investigation" as contemplated by the PRA, even if it's performed by law enforcement officers). Case law under this section has focused more on criminal and law enforcement agencies and less on professional disciplinary agencies. A personnel investigation by a criminal justice agency that is not acting in its law enforcement capacity will be scrutinized to determine the impact on any law enforcement activities of the agency. For example, Department of Corrections' investigations of its medical staff's conduct were held not to be "essential to effective law enforcement" and could not be exempted under the narrow application of RCW 42.56.240(1). Prison Legal News, Inc. v. Dep't of Corrections (2005). See also Brouillet v. Cowles Publishing Co. (1990) (revocation of teacher certificates was not exempt).

The contents of an open, ongoing criminal investigation are generally exempt from disclosure because premature disclosure could jeopardize the investigation. Newman v. King County (1997); Ashley v. Washington State Public Disclosure Comm'n (1977). Once the investigation is completed, the records must be made available. Sargent v. Seattle Police Department (2013). Once the criminal case is referred to a prosecutor for a charging decision, the investigation is considered complete and the records of the investigation are no longer categorically exempt even if the matter is later referred back for additional investigation. Sargent v. Seattle Police Department (2013). Instead, the records are subject to disclosure unless the law enforcement agency can prove that nondisclosure of

the information is essential to effective law enforcement, or disclosure would violate a person's right to privacy. *Id.* Additionally, the exemption does not apply categorically to criminal investigation records that are part of a related internal investigation; the agency has the burden of proving any withheld parts of internal files are essential to effective law enforcement. *Id.*

An agency may withhold specific records of completed investigations if their disclosure would jeopardize witnesses or discourage potential sources of information from coming forward in the future. *Cowles Publ'g Co. v. State Patrol* (1988); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't* (1989). The names of complainants, witnesses, and officers contained in police internal investigation unit (IIU) files of sustained complaints are exempt from disclosure because the IIU process is vital to law enforcement, and officers would be reluctant to be candid if they thought their identities would be disclosed. The substance of the files is, however, not exempt. *Cowles Publ'g Co. v. State Patrol* (1988). When the identity of the officer who was the subject of the investigation is well known through other sources, exemption of the name is not essential to effective law enforcement. *Ames v. City of Fircrest* (1993). The *Cowles* court held that the redaction of officers' names in the IIU files was not necessary to protect their privacy. In *City of Fife v. Hicks* (2015), the court held that the identity of high-ranking police officials who were the subject of an investigation is inherently a matter of greater interest to the public.

2. Identity of Complainants, Witnesses, and Victims: RCW 42.56.240(2) and RCW 42.56.240(5)

The identity of victims and witnesses is protected in two places in this part of the PRA. *Sargent v. Seattle Police Department* (2013). Under RCW 42.56.240(1), addressed above, disclosure can be prevented due to the chilling effect on other witnesses if their identity will be disclosed. Under RCW 42.56.240(2), witness and victim identities can be protected if "disclosure would endanger any person's life, physical safety, or property." Also, if the witness or victim requests nondisclosure of his or her identity, the identity can presumptively be withheld but the courts have not clearly determined whether potential harm must also be demonstrated.

The agency has the burden of showing that the exemption requirements are met, and it cannot assert a categorical exemption for this information. An agency need not verify the accuracy of the alleged endangerment, but the desire for nondisclosure must be based upon risk of harm rather than mere embarrassment at the prospect of disclosure. Agencies should inquire about endangerment at an early stage of the complaint process. A general allegation of the chilling effect or endangerment is not sufficient, and the agency must produce evidence to support the exemption. *Sargent v. Seattle Police Department* (2013).

For child victims of sexual assault, RCW 42.56.240(5) lists specific items of identifying information that are to be redacted from records, including the relationship with the alleged perpetrator. In *Koenig v. City of Des Moines* (2006), the court held that this statute requires disclosure of victim information with redaction only of the specified identifiers, even if the requester knows the identity

of the child victim and requests the record by the victim's name. Personal details of the assault cannot be redacted on the basis of embarrassment or violation of right to privacy.

3. Sex Offender Records: RCW 42.56.240(3), RCW 42.56.240(8), RCW 71.09.080

Law enforcement investigative reports on sex offenders that are transferred to the Washington Association of Sheriffs and Police Chiefs are exempt under RCW 42.56.240(3), but some information reported about offenders that is relevant and necessary under community protection and notification statutes such as RCW 4.24.550 may be disclosed. The Association must refer requesters to local law enforcement agencies when it receives such a request but has no further obligation to respond. Information submitted to the statewide sex offender and notification program by persons asking to be notified about the release of a registered sex offender is exempt under RCW 42.56.240(8).

In *Koenig v. Thurston County* (2012), the Washington Supreme Court held that special sex offender sentencing alternative (SSOSA) evaluations and impact statements from victims of sex offenders were not exempt from disclosure as investigative records under RCW 42.56.240. Not all records held by a prosecutor are protected by this exemption. Victim impact statements and SSOSA evaluations are not designed or intended to uncover or investigate criminal activity but instead are used to determine an appropriate penalty for an offender and thus cannot be exempted under this statute.

The medical and treatment records of sexually violent predators who have been civilly confined to secure facilities at the end of criminal sentences are protected from disclosure except to the committed persons, their attorneys, and others involved in the system who have a need for the records. RCW 71.09.080(3). Additionally, these individuals are considered to be residents of state institutions whose personal information is subject to the exemption in RCW 42.56.230(1). However, agencies may release information relevant and necessary to protect the public about sex offenders under RCW 4.24.550.

4. Criminal Records Privacy Act (Chapter 10.97 RCW)

This act deals with disclosure of "criminal history record information," which is defined as information contained in records collected on individuals by criminal justice agencies, other than courts. RCW 10.97.030(1). These documents include identifiable descriptions and records of arrests, detentions, indictments, and criminal charges, and any dispositions, including sentences, correctional supervision, and release. An agency may freely disclose criminal history record information which pertains to an incident that occurred within the last twelve months for which a person is currently being processed by the criminal justice system. RCW 10.97.050(2). Also, "conviction data" may be disseminated freely at any time. RCW 10.97.050(1). "Nonconviction data" may not be copied by the public, but may be inspected without copying if it is not subject to any PRA disclosure exemption. *Bainbridge Island Police Guild v. City of Puyallup* (2011).

Additionally, the subject of the records can inspect and review the records and can obtain a copy of personal nonconviction data if the criminal justice agency has verified the person's identity. [RCW 10.97.080](#). This statute provides that the PRA must not be construed to allow any other copying of nonconviction data.

Investigative information does not fall within the definition of "criminal history record information." Release of police investigative information is covered by the PRA in [RCW 42.56.240](#), discussed in [Chapter 2.2D1](#) above.

5. Miscellaneous Law Enforcement-Related Exemptions

- a. Concealed pistol licenses: [RCW 42.56.240\(4\)](#)
- b. Statewide, local or regional gang database: [RCW 42.56.240\(6\)](#)
- c. Electronic sales tracking system for ephedrine and related products: [RCW 42.56.240\(7\)](#)
- d. Security alarm system and vacation crime watch program participants: [RCW 42.56.240\(9\)](#)
- e. Felony firearm conviction database: [RCW 42.56.240\(10\)](#)
- f. Security threat group information at DOC: [RCW 42.56.240\(12\)](#)
- g. Global positioning data of criminal justice agency employees and workers: [RCW 42.56.240\(13\)](#)
- h. Jail register: [RCW 70.48.100](#). The register containing the names of persons confined in jail, the reason for confinement, and dates of confinement, is open to the public, but other records of a person confined in jail are confidential and are to be made available only to criminal justice agencies, the courts, and the Washington Association of Sheriffs and Police Chiefs, and in jail certification proceedings, for research, or with the written permission of the confined individual. Booking photographs of an arrested person or person confined in jail, while confidential, may be used by law enforcement to assist in investigating crimes. [RCW 70.48.100\(3\)](#); *Cowles Publ'g Co. v. Spokane Police Dep't* (1999).
- i. Certain information contained in enhanced 911 emergency communications systems: [RCW 42.56.230\(9\)](#) and chapter 38.52 RCW ([Laws of 2015 c. 224](#)).

E. Certain Business-Related Information is Exempt

1. Real Estate Appraisals and Certain Other Real Estate Lease or Purchase Records: [RCW 42.56.260](#)

Real estate appraisals for or by an agency to buy or sell real property are exempt from disclosure for no more than three years. Also exempt are: documents prepared for considering the selection of a site when public knowledge would cause a likelihood of increased price, and documents prepared for considering the minimum price for sale or lease of real estate when public knowledge would cause a likelihood of decreased price, unless disclosure is mandated under another statute, or certain other actions with respect to the property have occurred.

2. Research, Intellectual Property, and Proprietary Information; RCW 42.56.270, Other Laws

a. Valuable Formula, Designs, Drawings, Research: RCW 42.56.270(1)

As a general provision applying to any agency, this statute protects “valuable formulae, designs, drawings, and research” data for five years after obtained by the agency. However, withholding the records is permitted only if disclosure would “produce private gain and public loss.” The purpose of this exemption is to prevent the taking of potentially valuable intellectual property held by an agency. *Progressive Animal Welfare Soc’y v. University of Wash.* (1994) (*PAWS II*). Valuable formula or research data may include, for example, material in an unfunded grant proposal, including raw data and guiding hypotheses that structure data (*id.*), and a cash flow analysis prepared by a consultant to assist an agency to negotiate lease rates for potential developers of agency properties. *Servais v. Port of Bellingham* (1995). In *Servais*, the court held the cash flow analysis to be exempt because private developers would benefit by insight into the port’s negotiating position to the detriment of the public if the record was disclosed. Research data, which is not limited to scientific or technical information, means facts and information collected for a specific purpose and derived from close study or from scholarly or scientific investigation or inquiry; this information is similarly exempt from disclosure, if the disclosure would result in private gain and public loss. *Id.*, see also *Evergreen Freedom Fdn. v. Locke* (2005) (holding that release of designs needed to facilitate Boeing’s 787 project would allow private parties to benefit and interfere with the agency’s agreement with Boeing).

b. Trade Secrets: Ch. 19.108 RCW

In addition, intellectual and proprietary information may be exempt under the Washington Trade Secrets Act, chapter 19.108 RCW. *Servais v. Port of Bellingham* (1995). Information submitted by a law firm in response to the request for qualifications and quotations was held not to be exempt from disclosure as a trade secret under RCW 19.108.010(4) or as financial and commercial information supplied to the Washington State Investment Board under RCW 42.56.270(6). *Robbins, Geller, Rudman & Dowd, LLP v. Office of Attorney General* (2014).

c. Copyrighted Materials: 17 U.S.C. § 106

In addition, agencies may need to consider federal copyright laws when providing copies of materials that are subject to copyright protection under 17 U.S.C. § 106. This issue may arise where private entities have copyrighted their work, such as building plans provided under contract. But there are exceptions for “fair use” of copyrighted material to allow it to be reproduced or inspected without consent of the copyright holder under 17 U.S.C. 106. An agency may notify the holder of the copyright of the request. RCW 42.56.540. See, for example, *Lindberg v. Kitsap Cy.* (1996) for a discussion of this issue.

3. Financial and Proprietary Information Supplied to Specific Agencies: RCW 42.56.270(2) – (23)

Other subsections within RCW 42.56.270 apply to financial and commercial information in records submitted to agencies for specific purposes. Each exemption is worded slightly differently, and little case law interprets these exemptions. The kinds of records or agencies affected are listed below by subsection. The language of the specific subsection should be consulted for the scope of the exemption.

- (2) Ferry and highway construction
- (3) Export services and projects
- (4) Economic development loans
- (5) Business and industrial development corporations
- (6) State Investment Board
- (7) Department of Labor and Industries medical aid contractors
- (8) Clean Washington Center programs
- (9) Public stadium authority
- (10) Applications for licenses for horse racing, gambling, liquor, lottery retail, or marijuana producer, processor, or retailer (See: *Dragonslayer, Inc. v. Washington State Gambling Commission* (2007)).
- (11) State purchased health care
- (12) Department of Commerce siting decisions
- (13) Department of Ecology electronic product recycling program
- (14) Life Sciences Discovery Fund Authority grants
- (15) Department of Licensing special fuel license applications
- (16) Department of Natural Resources mining permit applications
- (17) Conservation district farm plans
- (18) Health sciences and services authority grants
- (19) Identifiable small business impact statements

(20) University of Washington endowment funds

(21) Market share data on electronic product recycling

(22) Registration of small securities offerings

(23) Unaggregated or individual notices of a transfer of crude oil that is financial, proprietary, or commercial information submitted to the Department of Ecology

4. Public Utilities and Transportation Records: RCW 42.56.330; RCW 42.56.335

As summarized below, RCW 42.56.330 provides exemptions for:

(1) Commercial information filed with the Utilities and Transportation Commission or Attorney General – but these records may be disclosed after notice is provided to the subject and if they fail to obtain a court order to protect the records under RCW 80.04.095 or RCW 81.77.210;

(2) Addresses, telephone numbers, electronic contact information and billing information for less than a billing cycle held by a public utility;

(3) Individually identifiable records of members of a vanpool, carpool, or other ride-sharing program;

(4) Identifying information of participants or applicants in a paratransit or other transit service operated for persons with disabilities or the elderly;

(5) Identifying information of persons using transit passes or other fare payment media, except to an entity responsible for payment of any of the cost;

(6) Information collected by use of motor carrier intelligent transportation system or equipment;

(7) Identifying information of person using transponders to pay tolls; and

(8) Identifying information of users of driver's licenses or identicards including radio frequency identification chip or similar technology for border crossing ("enhanced" licenses).

In RCW 42.56.335, law enforcement is restricted from obtaining records of customers of public utility districts or city utilities unless a written statement is provided stating the customer is suspected of committing a crime and that the records would help determine whether the suspicion is true. This exemption only applies to a specific requester, namely, a law enforcement agency. It was passed in response to the decision in In re Rosier (1986), which limited the ability of law enforcement to engage in "fishing expeditions" through utility records while investigating marijuana growing operations. A telephone request is not sufficient. State v. Maxwell (1990). Voluntary production of

information about power consumption does not violate the statute. *State v. Maxfield* (1994). See also *State v. Cole* (1995).

5. Agriculture and Livestock Records: RCW 42.56.380; RCW 42.56.620

RCW 42.56.380 exempts from disclosure various kinds of commercial and proprietary information gathered by regulatory agencies for: (1) organic products; (2) fertilizers and minerals; (3) various agriculture products and livestock commissions and boards; (4) phytosanitary (plant disease) certificates; (5) – (7) marketing activities; (8) financial statements of public livestock markets; (9) herd inventory management; (10) testing for animal diseases; and (11) – (12) import information of livestock exempt under homeland security or other federal law.

In addition, RCW 42.56.610 provides that records obtained by state and local agencies from dairies, animal feeding operations, and concentrated animal feeding operations about discharge elimination system permits can be disclosed only to provide meaningful information to the public, while ensuring confidentiality of business information.

6. Insurance and Financial Institution Records: RCW 42.56.400

RCW 42.56.400 exempts from production include the following records:

- (1) Board of Industrial Insurance Appeals records related to appeals of crime victims' compensation claims;
- (2) Health Care Authority records under RCW 41.05.026 transferred to another state purchased health care program, to a technical review committee created to acquire state purchased health care;
- (3) Identification of all owners or insureds received by the Insurance Commissioner under chapter 48.102 RCW;
- (4), (5) and (23) Information provided to the Insurance Commissioner under various legal requirements;
- (6) Examination reports and information obtained from regulated institutions by the Department of Financial Institutions;
- (10) Claim data revealing the identity of claimants, providers, facilities, and insurers.

Various other exemptions exist in this section for records filed with the Insurance Commissioner under the various regulated programs. This section and the cited references in the subsections should be consulted for more detailed information on these exemptions.

7. **Marijuana Cooperative Registration Information: RCW 42.56 (Laws of 2015 c. 4)**

Registration information submitted to the state Liquor and Cannabis Board under chapter 69.51A RCW is exempt from disclosure under Section 1002, Laws of 2015 c. 4 (to be codified in a new section of chapter 42.56 RCW).

F. Health Information Exemptions

1. Public Health and Health Professional Records: RCW 42.56.350; RCW 42.56.360

RCW 42.56.350 exempts from disclosure the following records of health care providers licensed by the Department of Health:

- (1) The federal Social Security number; and,
- (2) The residential address and telephone number if the provider requests the information be withheld and provides a business address and business telephone number or if the provider requests the information be released or as provided in RCW 42.56.070(9).

RCW 42.56.360(1) contains numerous exemptions affecting health care providers and data collected by the Department of Health. Categories of exempt records include:

- (a) and (b) Information about drug samples, legend drugs, or nonresident pharmacies obtained by the pharmacy quality assurance commission.
- (c) Records created for or collected and maintained by a hospital quality improvement, or peer review or quality improvement committee and reports of adverse health events. See Cornu-Labat v. Hospital Dist. No. 2 Grant County (2013) and Lowy v. PeaceHealth (2012) for judicial interpretation of and limits on this exemption.
- (d) Proprietary financial and commercial information provided to the Department of Health with an application for an antitrust exemption sought by the entity. This subsection also contains procedures on notifying the affected entity and actions to compel disclosure.
- (e) Records of a provider obtained in an action under the impaired physician program.
- (f) Complaints filed under the Uniform Disciplinary Act for providers under chapter 18.130 RCW.
- Exemptions are also provided for records collected by the Department of Health under (g) prescription monitoring program, (h) Washington Death with Dignity Act, (i) cardiac and stroke system performance, and (k) state wide health care claims data reporting in chapter 43.371 RCW.
- For all public agencies, employee wellness program records except for statistics that do not identify individuals are exempted under RCW 42.56.360(1)(i).

Records of child mortality reviews by local health departments are exempted under [RCW 70.05.170\(3\)](#).

2. Health Care Records of Individuals: [RCW 42.56.360\(2\)](#); [Chapter 70.02 RCW](#); [Chapter 70.96A RCW](#); [Chapter 68.50 RCW](#); Federal Laws and Rules

In [RCW 42.56.360\(2\)](#), the PRA provides that [chapter 70.02 RCW](#) applies to the inspection and copying of health care information of individuals, incorporating that law as an “other statute” exemption to the PRA. [Chapter 70.02 RCW](#) is the state Health Care Information Act (HCIA), adopted in 1991. That law provides standards for when entities and individuals can access medical records of patients when held by providers or facilities and establishes that health care information is “personal and sensitive information” that can harm individuals if improperly disclosed. [Planned Parenthood v. Bloedow](#) (2015).

The HCIA mirrors in many aspects the federal HIPAA Privacy Rule, [45 CFR 160 – 164](#), adopted by authority of the [Health Insurance Portability and Accountability Act \(HIPAA\)](#), [42 USC §1320d](#), which applies in all states. That law applies to government agencies that provide or pay for health care and those entities that obtain health information when doing business with covered agencies.

The HCIA establishes standards and obligations for government entities that serve as health care providers, facilities or payors to protect records and to disclose as authorized. In addition, it requires that all agencies that are not health care facilities or providers but obtain health care information under the exceptions to confidentiality in that chapter must have rules and policies for the acquisition, retention, destruction, and security of health care records, consistent with the HCIA. [RCW 70.02.290](#). Entities which receive records to provide services must not disclose records in violation of the HCIA. [RCW 70.02.270](#).

As an exception to the confidentiality of these records, [RCW 70.02.060](#) creates a process to allow disclosure of health care information, without authorization, in court proceedings. The attorney seeking access to individual health care information must give the health care provider and the patient or his or her attorney at least 14 days’ notice before service of a discovery request or compulsory process. The patient can seek a protective order to prohibit or restrict the provider from producing these records. However, the HCIA does not restrict providers, payors or insurers from complying with obligations imposed by federal or state health care payment programs or federal or state law. [RCW 70.02.900\(1\)](#). In addition, the HCIA does not modify disclosure under worker’s compensation, juvenile records law, and chemical dependency provisions. [RCW 70.02.900\(2\)](#).

Special standards are provided in the HCIA for records of mental health treatment and services for adults and minors. [RCW 70.02.230-.260](#). Restrictions on the disclosure of records of sexually transmitted diseases are also contained in the HCIA in [RCW 70.02.220](#) and [70.02.300](#). Records of persons treated for chemical dependence issues are strictly protected by [RCW 70.96A.150](#) and by federal regulations contained at [42 C.F.R. Part 2](#).

Information in the medical marijuana authorization database containing names and other personally identifiable information of patients and providers is exempt from disclosure under Sections 21-23 of Chapter 70, 2015 Laws (to be codified in chapters 69.51A and 42.56 RCW).

Reports from autopsies or postmortems are confidential except to personal representatives, family members, attending physicians, and others involved in investigations. RCW 68.50.105. However, a coroner or medical examiner is not prohibited from publicly discussing findings on deaths caused by a law enforcement or corrections officers. RCW 68.50.105(2). Records of child mortality reviews by local health departments are exempted from disclosure under RCW 70.05.170(3).

G. Government Services and Benefits

1. Juvenile Offender and Child Welfare Records: Chapter 13.50 RCW

Records relating to the offenses committed by juveniles are governed by RCW 13.50.050, 13.50.260, and 13.50.270. The official juvenile court file is open to the public unless sealed under RCW 13.50.260. Procedures were adopted in 2014 and 2015 to require juvenile judges to hold sealing hearings to address whether the records should be sealed from public inspection. Records are presumed to be sealed unless they relate to the commission of a more serious offense, a later offense is committed, or an objection is filed. If the court records are sealed, those records, along with the social file and other related records, are to be exempted from disclosure wherever held. If an agency holds these records, it can only respond that the records are confidential and the agency can not reveal the existence of any records. RCW 13.50.260(6). Agencies holding such sealed records can communicate with the juvenile respondent. RCW 13.50.260(11).

Child welfare records are made confidential and exempted from the PRA under RCW 13.50.100. The records can only be disclosed to the individuals authorized under that statute, which include the child and his or her parents, and their attorneys. In a line of cases arising under chapter 13.50 RCW, appellate courts have held that, although these records meet the definition of public records under the PRA, these are “other statute” exemptions that exempt or prohibit disclosure. The courts have found that these statutes supplement the PRA unless they conflict, and that the process set by these statutes is the “exclusive means” of obtaining these records and for challenging any denial of records. See Deer v. Dep’t of Social & Health Servs. (2004), and Wright v. State (2013).

As an exception to confidentiality of child welfare records, the Department of Social and Health Services must, under RCW 74.13.500, disclose information about the abuse or neglect of a child, investigations of abuse or neglect, and services provided with regard to the abuse or neglect, if there is a child death or near fatality as a result of the abuse or neglect or if the child was receiving services within 12 months before the death. Identifying information can be redacted from these records if determined not to be in the best interest of the child or is medical information of others under the standards in RCW 74.13.515 and .520.

2. Adoption Records: Chapter 26.33 RCW

Adoption records are confidential. Information that does not identify the parties can be provided to others involved in the process. RCW 26.33.340. A confidential intermediary may be appointed by the court to determine if the identity can be revealed if requested by birth parents or adopted children to find each other. RCW 26.33.343. Adults adopted after October 1, 1993 can receive noncertified copies of their original birth certificates unless the birth parents have filed an affidavit of nondisclosure or a contact preference form.

3. Public Assistance Records: RCW 74.04.060

In addition to the PRA exemption in RCW 42.56.230(1), the contents of records and communications regarding public assistance programs under Title 74 RCW are exempt from disclosure under RCW 74.04.060 and are deemed privileged and confidential. RCW 74.04.060(1)(a). Information may be disclosed for purposes related to the administration of these programs. As a general exception to confidentiality, any person can ask whether someone is a current recipient of public assistance and receive a “yes or no” answer. Other entities receiving public assistance information to administer, regulate, or investigate the public assistance program must maintain the same degree of confidentiality. RCW 74.04.060(3). It is a gross misdemeanor to use a list of names for commercial or political purposes. RCW 74.04.060(4).

4. Child Support Records: RCW 26.23.120

Child support enforcement records are confidential and may only be released with authorization of the parties, except that information can be disclosed to the parents about each other as needed to conduct the support enforcement action. A request for address information of the other parent is subject to limitations designed to protect the safety of that parent.

5. Domestic Violence and Rape Crisis Center Records: RCW 42.56.370; RCW 26.04.175

Client records held by agency domestic violence or sexual assault programs are exempt from production under the PRA. In addition, chapter 40.24 RCW establishes an address confidentiality program at the office of the Secretary of State to protect the residential information of victims of domestic violence, sexual assault, and stalking, with this program’s records exempted from production under RCW 40.24.070. Victim address information is also protected in applications for marriage licenses under RCW 26.04.175.

6. Employment Security Department Records: RCW 42.56.410 and Chapter 50.13 RCW

Under the PRA, records of the Department of Employment Security that are confidential under [chapter 50.13 RCW](#) remain exempt from disclosure when provided to another individual or organization for operational, research, or evaluation purposes. [RCW 42.56.410](#).

Under [RCW 50.13.020](#), information or records concerning an individual or employing unit obtained by the Department of Employment Security pursuant to the administration of its unemployment compensation program are private and confidential. [Chapter 50.13 RCW](#) contains exceptions to that confidentiality for various purposes. Individuals and employers have access to their own information and those related to the awarding of benefits. [RCW 50.13.040](#). Decisions entered by the commissioner appeal process are public. [RCW 50.13.050](#). Other government agencies that obtain records due to their need for official purposes must maintain the confidentiality of the records received. [RCW 50.13.060](#).

7. Workers' Compensation Records: [Title 51 RCW](#)

Several laws make various records in the industrial insurance program exempt. Records about individual claims resolution structural settlement agreements provided to the Board of Industrial Insurance Appeals are exempt under [RCW 51.04.063](#) and in the PRA under [RCW 42.56.230\(8\)](#). Information obtained from employers records by the Department of Labor and Industries is exempt under [RCW 51.16.070\(2\)](#). Claim files of workers are exempt by [RCW 51.28.070](#). For health care providers involved in workers compensation cases, records of audits are exempt under [RCW 51.36.110](#) and their proprietary information is exempt under [RCW 51.36.120](#). Records of crime victims' compensation claimants held by the Department of Labor and Industries are also confidential under [RCW 7.68.140](#).

8. Educational Information Records: [RCW 42.56.230](#); Other Laws and Rules

In addition to the student information exemption in [RCW 42.56.230\(1\)](#), the child program exemption in [RCW 42.56.230\(2\)](#), and the [Federal Education Rights and Privacy Act \(FERPA, 20 U.S.C. § 1232g\)](#), exempt other information regarding students. [RCW 42.56.320](#) exempts from disclosure: (1) financial disclosures by private vocational schools; (2) financial and commercial information relating to purchase and sale of tuition units; (3) identifiable information received for research or evaluation by the workforce training and education coordinating board; (4) nonpublic records received relating to gifts and grants; and (5) annual declarations of intent by parents who home-school children. Student education records may also be addressed in other laws, for example, records of students in common schools are also addressed in Title 28A RCW. See, for example, [RCW 28A.605.030](#) (parental or guardian access to records).

9. Library Records: [RCW 42.56.310](#)

The PRA in [RCW 42.56.310](#) protects from disclosure library records kept to track use of libraries and their resources and that identify or could be used to identify a library user.

H. Miscellaneous Exemptions

- 1. Emergency or Transitional Housing: RCW 42.56.390**
- 2. Traffic Accident Reports: RCW 46.52.080**
- 3. Communications Made to a Public Officer in Official Confidence, When the Public Interest Would Suffer by Disclosure: RCW 5.60.060(5)**
- 4. Timeshare and Condominium Owners Lists: RCW 42.56.340**
- 5. Archaeological Sites: RCW 42.56.300**
- 6. Fish and Wildlife: RCW 42.56.430**
- 7. Veterans' Discharge Papers: RCW 42.56.440**
- 8. Check Cashers and Sellers Licensing Applications: RCW 42.56.450**
- 9. Fireworks: RCW 42.56.460**
- 10. Enumeration Data used by the Office of Financial Management for Population Estimates: RCW 42.56.615**
- 11. Correctional Industry Workers: RCW 42.56.470**

Chapter 3 OPEN PUBLIC MEETINGS ACT

Chapter last revised: October 1, 2015

3.1 Introduction

The Open Public Meetings Act ("OPMA"), chapter 42.30 RCW, was passed by the Legislature in 1971 as a 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. The OPMA and the Public Records Act (PRA), chapter 42.56 RCW, create important and powerful tools enabling the people to inform themselves about their government, both state and local.

3.2 The Courts Will Interpret the OPMA to Accomplish Its Stated Intent

As with all laws, the courts will interpret the OPMA to accomplish the Legislature's intent. RCW [42.30.010](#) declares the OPMA's purpose in a strongly worded statement.

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The OPMA also provides that, "The purposes of this chapter are hereby declared remedial and shall be liberally construed." [RCW 42.30.910](#). As such, exceptions to the openness requirements of the OPMA (such as the grounds for executive sessions) are narrowly construed. *Miller v. City of Tacoma* (1999).

3.3 What Entities are Subject to the OPMA?

A. "Public Agency"

The OPMA requires that meetings of the "governing body" of a "public agency" be open to the public. [RCW 42.30.030](#). A "public agency" is defined for purposes of the OPMA in [RCW 42.30.020\(1\)](#) to include:

- Any state board, commission, committee, department, educational institution, or other state agency that is created by statute;
- Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state;
- Any "subagency" of a public agency that is created by statute, ordinance, or other legislative act, such as planning commissions and library or park boards.

A "public agency" for purposes of the OPMA does *not* include:

- Any court;
- The Legislature.

[RCW 42.30.020\(1\)\(a\)](#).

B. “Subagencies”

In addition to applying to the governing bodies of state and local government agencies as identified in [RCW 42.30.020](#) above, the OPMA applies also to the governing bodies of any “subagency” of such state and local government agencies. Although a “subagency” is not defined in the OPMA, a subagency must be “created by a statute, ordinance, or other legislative act.” [RCW 42.30.020\(1\)\(c\)](#). Case law and attorney general opinions suggest that, to be a subagency, the entity established by legislative act must have some policy or rule making authority. See [Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now](#) (2004); [1983 Att’y Gen. Op. No. 1](#); [1971 Att’y Gen. Op. No. 33](#).

C. Other Entities

The courts have interpreted the OPMA to apply to “an association or organization created by or pursuant to statute which serves a statewide public function.” [West v. Wash. Ass’n of Cnty. Officials](#) (2011).

The OPMA may also apply to the “functional equivalent” of a public agency, though the courts have yet to address that issue squarely. In a 1991 opinion, the Attorney General suggested a four-part test to be used in determining whether an entity is a “public agency” and subject to the OPMA: “(1) whether the organization performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the organization was created by the government.” [1991 Att’y Gen. Op. No. 5](#). The courts have applied these factors to determine whether an entity is the “functional equivalent” of a public agency for purposes of the Public Records Act. [Telford v. Thurston County Board of Commissioners](#) (1999); [Clarke v. Tri-Cities Animal Care & Control Shelter](#) (2008). However, the courts have yet to apply this test to that question for purposes of the OPMA.

3.4 What is a “Governing Body”?

A. Definition

A “governing body” is defined in the OPMA as “the multi member board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.” [RCW 42.30.020\(2\)](#). Because the OPMA is directed to meetings of governing bodies, it does not apply to the activity of an agency that is governed by an individual. In [Salmon for All v. Department of Fisheries](#) (1992), the court held that the Department of Fisheries was not subject to the OPMA because it was governed by an individual, the director. Many state agencies, such as the Department of Labor and Industries, the Department of Licensing, the Department of Social and Health Services, the Department of Employment Security, and the Washington State Patrol, similarly lack governing bodies and so are not subject to the OPMA. All local public agencies have governing bodies within the agency. With subagencies, the governing body of the subagency is often the subagency itself, as in the example of a city or county planning commission.

B. Committees of a Governing Body

In 1983, the legislature amended the definition of governing body to include “any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.” [RCW 42.30.020\(2\)](#). The Attorney General has interpreted “committee thereof” to include all committees established by a governing body, regardless of the identity of their members, such that a committee need not include members of the governing body, though nonmembers must be appointed by the governing body. [1986 Att’y Gen. Op. No. 16](#). As a consequence, there may exist little practical difference, in some instances, between a subagency that consists only of a governing body and a committee of a governing body that is established by legislative act.

Although it may be clear when a committee is conducting hearings or taking public testimony or comment, it may not be clear when a committee “acts on behalf” of the governing body. However, in [Citizens Alliance v. San Juan County](#) (2015), the State Supreme Court adopted the reasoning of the Attorney General in [1986 Att’y Gen. Op. No. 16](#) and concluded that a committee acts on behalf of the governing body “when it exercises actual or de facto decision-making authority for the governing body.” A committee is not exercising such authority when it is simply providing advice or information to the governing body. See [Clark v. City of Lakewood](#) (2001).

While, clearly, all meetings of the governing body of a subagency are subject to the notice requirements of the OPMA, there is some dispute as to whether a committee of a governing body is similarly required to give notice for all of its meetings when it is only at some of its meetings that it is acting so as to come within the definition of “governing body.” Nevertheless, it would be pragmatic for such committees that sometimes engage in such activities - acting on behalf of the governing body, conducting hearings, or taking testimony or public comment - to conduct all their business in open meetings.

Case example: *The seven-member city council is considering the purchase of public art. The council agrees that public input would assist the selection process. Some councilmembers believe that the creation of an arts commission that would adopt policies for the city’s acquisition of public art would “get politics out of the world of art.” Other councilmembers express concern that an arts commission will control too much of the process without significant council input. Three resolutions are drafted for council consideration:*

The first establishes a city arts commission and details the method of selecting the members, including three city councilmembers and two citizen members, who would serve specific terms. The commission is directed to establish policies for the selection and placement of public art in the city. Its recommended policies will be subject to city council approval. It is directed to obtain public input before the adoption of the recommended policies. As funding becomes available, it will make recommendations to the city council regarding the purchase of works of public art and their location in the city.

The second resolution establishes a public arts committee of the city council consisting of three members of the council. Five interested citizens will be asked to participate in its determination of worthy projects. The citizens would serve at the pleasure of the council. The public arts committee is directed to develop a list of citizens who have expressed interest in public art and to hold hearings seeking public comment regarding any recommendations that the committee might make to the full city council.

The third resolution recognizes the existence of a citizen's committee known as "Public Art Now!" that was formed by a councilmember. The committee would be authorized to use city's meeting rooms. The council would welcome the committee's advice regarding the selection and placement of public art and its recommendations would be considered at any public hearing when the council decided to purchase works of art.

What would be the consequences under the OPMA of the adoption of each resolution?

Answer: *The city arts commission is probably a "subagency" under the OPMA. It has been created by legislative act and its governing body is directed to develop policy for the city. As such, all of its meetings would be subject to the OPMA's requirements.*

The public arts committee is probably a "committee" of the governing body, the city council. It is not a separate entity (subagency). Since it will be obtaining public input, at least some of its meetings would be subject to the OPMA. However, it is advisable that it hold all its meetings in open session.

"Public Art Now!" is not subject to the OPMA. The city council did not establish it or grant it any authority.

3.5 What Procedures Apply to Meetings Under the OPMA?

A. "Meeting"

In its definition section, the OPMA first defines "action" before defining a "meeting" as a meeting "at which action is taken." [RCW 42.30.020\(4\)](#). "Action" is defined to mean "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." [RCW 42.30.020\(3\)](#). "Final action" is defined as "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." *Id.* It is not necessary for a governing body to take "final action" for there to be a "meeting" that is subject to the requirements of the OPMA; mere "action," such as a discussion of agency business, is sufficient. However, it is not "action" for members of a governing body to individually review material in advance of a meeting at which a public contract was awarded. [Equitable Shipyards, Inc. v. State](#) (1980).

Ordinarily, a quorum (majority) of the members of a governing body must be present at a meeting for the governing body to be able to transact agency business. As such, a meeting that would be subject to the OPMA occurs if a majority of the members of a governing body were to discuss or consider agency business, no matter where that discussion or consideration might occur. "Action" by less than a quorum is generally not subject to the OPMA. See, e.g., *Euqster v. City of Spokane* (2005). However, as discussed above, a committee of a governing body that includes less than a quorum of the body may be subject to the OPMA in certain circumstances.

Physical presence by the members of a governing body is not necessary for there to be a "meeting." For example, an email exchange among a quorum of a governing body in which "action" takes place is a "meeting" under the OPMA. *Wood v. Battle Ground School Dist.* (2001). Since an email exchange among members of a governing body is not open to the public, such an exchange in which "action" takes place would violate the OPMA.

It is generally agreed that an agency may authorize one or more of its members to attend a meeting by telephone or video-conferencing, using technologies such as Skype or WebEx, when a speaker phone or video screen is available at the official location of the meeting so the governing body and the public can hear the member's input and the member can hear what is said at the meeting.

A quorum of members of a governing body may attend a meeting of another organization's provided that the body takes no "action." 2006 Att'y Gen. Op. No. 6. For example, a majority of a city council could attend a meeting of a regional chamber of commerce or a county commission meeting provided that the council members did not discuss city business or do anything else that constitutes an "action."

The OPMA expressly permits the members of the governing body to travel together or engage in other activity, such as attending social functions, so long as they do not take "action." RCW 42.30.070.

Case example: *The five-member school board attends the annual convention of the State School Association. Over dinner, three members discuss some of the ideas presented during the convention, but refrain from any conversation about how they might apply them to the school district. All five travel together to and from the convention and the only discussion is over whether they are lost.*

Answer: *No violation occurred but the board members must be careful. The example is offered to highlight the level of awareness members of a governing body must have. It is not unusual for such situations to arise. For instance, the dinner discussion was among a majority of the members so a discussion about school district business would have been "action" and, without the required notice, would be in violation of the OPMA.*

B. Types of Meetings Not Covered by the OPMA

The OPMA does not apply to certain types of meetings. [RCW 42.30.140](#) provides that the OPMA does not apply to:

- Meetings involved with the issuing, denying, suspending, or revoking business, professional, and certain other licenses, including disciplinary proceedings
- Quasi-judicial proceedings
- Meetings involving matters subject to the Administrative Procedure Act, [chapter 34.05 RCW](#)
- Collective bargaining negotiations and related discussions, and meetings involved with planning for such negotiations and for grievance and mediation proceedings

The exact wording of [RCW 42.30.140](#) should be consulted to determine whether an exemption applies.

When a governing body engages in any of these exempt activities, it is not required to comply with the OPMA, although other public notice requirements may apply. Some exempt activities, such as quasi-judicial matters or hearings governed by the Administrative Procedure Act ([chapter 34.05 RCW](#)), have their own notice requirements. Quasi-judicial matters are those where the governing body is required to determine the rights of individuals based on legal principles. Common examples of quasi-judicial proceedings are certain local land use decisions, such as site-specific rezones, conditional use permits, and variances.

Case example: *During a break in the regular meeting, the city council gets together in the chambers to decide what they should do with regard to the union's latest offer. They authorize the negotiator to accept the offer on wages if the union will accept the seniority amendments. When they return to the meeting, nothing is said about the discussion or decision.*

Answer: *The OPMA specifically exempts the discussion and decisions about the collective bargaining strategy or position from its requirements. Since it was exempt, the discussion was not required to be open.*

The OPMA does not provide grounds for exempting public records from disclosure. See [Am. Civil Liberties Union v. City of Seattle](#) (2004). An independent exemption under the Public Records Act or other statute must exist to exempt records from disclosure. See [Chapter 1](#) and [Chapter 2](#). Therefore, even though collective bargaining matters can be discussed in a closed session, this is not a basis for withholding public records reviewed in the executive session relating to that topic.

C. Public Notice of Meetings

Under the OPMA, public agencies must give notice of regular and special meetings. See [Chapter 3.6](#) for details.

D. Secret Votes Prohibited

"Secret" votes - where individual votes are not divulged - are prohibited, and any votes taken in violation of the OPMA are null and void. RCW 42.30.060(2). The votes of the members of a governing body should be publicly announced at the time the vote is taken.

E. Attendance at Meetings

The OPMA provides that any member of the public may attend the meetings of the governing body of a public agency. The agency may not require people to sign in, complete questionnaires, or establish other conditions to attendance. RCW 42.30.040. For instance, an agency could not limit attendance to those persons subject to its jurisdiction. The OPMA does not address whether an agency is required to hold its meeting at a location that would permit every person to attend. However, it seems clear that the courts would discourage any attempt to deliberately schedule a meeting at a location that was too small to permit full attendance or that was locked. RCW 42.30.050.

A person may record (audio or video) a meeting provided that it does not disrupt the meeting. 1998 Att'y Gen. Op. No.15. A stationary audio or video recording device would not normally disrupt a meeting.

If those in attendance are disruptive and make further conduct of the meeting unfeasible, those creating the disruption may be removed. RCW 42.30.050; In re Recall of Kast (2001). If order cannot be restored to the meeting by the removal of persons disrupting the meeting, the meeting room may be cleared and the meeting continued, or the meeting may be reconvened in another location. However, members of the media are entitled to attend the adjourned meeting and the governing body is limited to act only on those matters on the agenda. The governing body may also authorize readmitting persons not responsible for disrupting the meeting. *Id.*

Case example: *The school board schedules a special meeting to discuss a controversial policy question. It becomes obvious that the regular meeting room is too small for all of those trying to attend the meeting. The board announces that the meeting will be adjourned to an auditorium in the same building. The chair announces that those who wish to speak should sign in on the sheet on the table. She states that given the available time, speakers will be limited to three minutes each. At one point, the meeting is adjourned to remove an apparently intoxicated person who had been interrupting the comments of speakers.*

Resolution: *While the OPMA allows the public to attend all meetings, it does not allow for the possibility of insufficient space. Presumably, if a nearby location is available, the governing body should move there to allow attendance. The chair can require those who wish to speak (but not all attendees) to sign in. The sign-in requirement for speaking does not restrict attendance, only participation. Since the OPMA does not require the governing body to allow public participation, the*

time for each speaker can also be limited. The governing body can maintain order by removing those who are disruptive.

F. Right to Speak at Meetings

The OPMA does not require a governing body to allow public comment at a public meeting. If a governing body does allow public comment, it has authority to limit the time of speakers to a uniform amount (such as three minutes) and the topics speakers may address.

3.6 The OPMA Requires Notice of Meetings

A “meeting” under the OPMA is either a “regular” meeting or a “special” meeting, with different notice requirements for each. So, for example, a meeting designated as a “retreat,” “study session,” or “workshop” is, for OPMA purposes, either a regular or a special meeting, depending on how it is held.

A. Regular Meetings

The OPMA requires agencies to identify the time and place their governing bodies will hold regular meetings, which are defined as “recurring meetings held in accordance with a periodic schedule declared by statute or rule.” [RCW 42.30.075](#). State agencies subject to the OPMA must publish their schedule in the [Washington State Register](#), while local agencies (such as cities and counties) must adopt the schedule “by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.” [RCW 42.30.075](#); [RCW 42.30.070](#). Although the OPMA does not require local agency governing bodies to meet inside the boundaries of their jurisdiction, there is general agreement that agencies should not schedule meetings at locations that effectively exclude the public. Other statutes may require certain entities to hold their meetings at particular locations, such as [RCW 36.32.080](#), which requires a board of county commissioners to hold regular meetings at the county seat, or at the alternate locations specified in that statute.

If a scheduled regular meeting falls on a holiday, it must be held on the next business day. [RCW 42.30.070](#).

A 2014 amendment to the OPMA requires agencies with governing bodies to make the agenda of regular meetings available online at least 24 hours in advance of the meeting. [RCW 42.30.077](#). This requirement does not apply if the agency does not have a website or if it employs fewer than 10 full-time equivalent employees. Also, this requirement does not mean that an agency cannot modify the agenda after it is posted online. A failure to comply with this requirement with respect to a meeting will not invalidate an otherwise legal action taken at the meeting.

Other laws and local governing body rules may require additional regular meeting notice and publication and/or posting of a preliminary agenda. See, e.g., [RCW 35.23.221](#), [RCW 35A.12.160](#).

B. Special Meetings

Whenever an agency has a meeting at a time other than a scheduled regular meeting, it is conducting a "special meeting." [RCW 42.30.080](#). For each special meeting, the OPMA requires at least 24 hours' written notice to:

- the members of the governing body, delivered personally, or by mail, fax, or email;
- media representatives (newspaper, radio, and television) who have filed a written request for notices of a particular special meeting or of all special meetings, delivered personally, or by mail, fax, or email; and
- the public, by posting on the agency website and by prominently posting it at the main entrance of the agency's principal location and at the meeting site if the meeting will not be held at the agency's principal location.

An agency is not required to post the public notice on its website if it does not have one, if it has less than 10 full-time equivalent employees, or if doesn't employ personnel whose job it is to maintain the website.

The OPMA does not provide any guidance as to whether the media's written request for notice must be renewed; it is advisable, however, to periodically renew such requests to ensure that they contain the proper contact information for the notice and have not been misplaced or inadvertently overlooked due to changes in agency personnel.

The notice of a special meeting must specify the time and place of the meeting and "the business to be transacted," which would normally be an agenda. At a special meeting, final disposition by the agency is limited to the matters identified as the business to be conducted in the notice. The statutory language suggests that the governing body could discuss, but not finally dispose of, matters not included in the notice of the special meeting.

A member of the governing body may waive the required notice by filing a written waiver or by simply appearing at the special meeting. [Estey v. Dempsey](#) (1985). The failure to provide notice to a member of the governing body can only be asserted by the person who should have received the notice, not by any person affected by action at the meeting. [Kirk v. Pierce County Fire Protection Dist. No. 21](#) (1981).

C. Emergency Meetings

The OPMA provides that, in the event of an emergency such as a fire, flood, or earthquake, meetings may be held at a site other than the regular meeting site, and the notice requirements of the OPMA are suspended during the emergency. [RCW 42.30.070](#). An agency should, however, provide special-meeting notice of an emergency meeting, if practicable. [RCW 42.30.080\(4\)](#).

The courts have found that an agency must be confronted with a true emergency that requires immediate action, such as a natural disaster, for its governing body to hold an emergency meeting that does not comply with the OPMA. It has been held that a strike by teachers did not justify an "emergency" meeting by the school board. Mead School Dist. No. 354 v. Mead Education Ass'n (1975).

D. Adjournments and Continuances

The OPMA establishes procedures for a governing body to adjourn a regular or special meeting and continue that meeting to a time and place identified in an order of adjournment. RCW 42.30.090. Less than a quorum of a governing body may adjourn and continue a meeting under these procedures, or the clerk or secretary of the body may do so if no members are present. Notice of the meeting adjournment must be the same that is required for special meetings in RCW 42.30.080, and a copy of the order or notice of adjournment must be posted on or near the door of the place where the meeting was held.

Public hearings held by a governing body may be continued to a subsequent meeting of the governing body following the procedures for adjournment in RCW 42.30.090. RCW 42.30.100.

3.7 Executive Sessions Are Allowed for Specific Topics, Following OPMA Procedures

"Executive session" is not expressly defined in the OPMA, but the term is commonly understood to mean that part of a regular or special meeting of a governing body that is closed to the public. A governing body may hold an executive session only for specified purposes, which are identified in RCW 42.30.110(1)(a)-(m), and only during a regular or special meeting. Nothing, however, prevents a governing body from holding a meeting, which complies with the OPMA's procedural requirements, for the sole purpose of having an executive session.

Attendance at an executive session need not be limited to the members of the governing body. Persons other than the members of the governing body may attend the executive session at the invitation of that body. Those invited should have some relationship to the matter being addressed in the closed session, or they should be in attendance to otherwise provide assistance to the governing body. For example, staff of the governing body or of the governmental entity may be needed to present information or to take notes or minutes. However, minutes are not required to be taken at an executive session. See RCW 42.32.030.

Because an executive session is an exception to the OPMA's overall provisions requiring open meetings, a court will narrowly construe the grounds for an executive session in favor of requiring an open meeting. Miller v. City of Tacoma (1999).

A. Procedures for Holding an Executive Session

To convene an executive session, the governing body's presiding officer must announce: (1) the purpose of the executive session, and (2) the time when the executive session will end. The announcement is to be given to those in attendance at the meeting. [RCW 42.30.110\(2\)](#).

The announced purpose of the executive session must be one of the statutorily identified purposes for which an executive session may be held. The announcement therefore must contain enough information to identify the purpose as falling within one of those identified in [RCW 42.30.110\(1\)](#). It would not be sufficient, for example, for a mayor to declare simply that the council will now meet in executive session to discuss "personnel matters." Discussion of personnel matters, in general, is not an authorized purpose for holding an executive session; only certain specific issues relating to personnel may be addressed in executive session. See [RCW 42.30.110\(1\)\(f\), \(g\)](#).

Another issue that may arise concerning these procedural requirements for holding an executive session involves the estimated length of the session. If the governing body concludes the executive session *before* the time that was stated it would conclude, it should not reconvene in open session until the time stated. Otherwise, the public may, in effect, be excluded from that part of the open meeting that occurs between the close of the executive session and the time when the presiding officer announced the executive session would conclude.

If the executive session is not over at the stated time, it may be extended only if the presiding officer announces to the public at the meeting place that it will be extended to a stated time.

Case Example: *Three members of a five-member school board meet privately, without calling a meeting, to exchange opinions of candidates for the school superintendent position. They justify this private meeting on the ground that the board may meet in executive session to discuss the qualifications of applicants for the superintendent position, under [RCW 42.30.110\(1\)\(g\)](#). Have these school board members complied with [RCW 42.30.110](#)?*

Answer: *Clearly, they have not. Although a governing body may discuss certain matters in closed session under this statute, that closed session must occur during an open regular or special meeting and it may be commenced only by following the procedures in [RCW 42.30.110\(2\)](#). The public must know the board is meeting in executive session and why. Although, as discussed above, some matters are not subject to the Open Public Meetings Act under [RCW 42.30.140](#); however, the above example is not one of them.*

B. Grounds for Holding an Executive Session

An executive session may be held only for one of the purposes identified in [RCW 42.30.110\(1\)](#), as follows:

(a) Matters Affecting National Security

After September 11, 2001, state and local agencies have an increased role in national security. Therefore, discussions by agency governing bodies of security matters relating to possible terrorist activity should come within the scope of this executive session provision.

(b) Acquisition of Real Estate by Lease or Purchase

This provision has two elements: (1) the governing body must be considering either selecting real property for purchase or lease or it must be considering purchasing or leasing specific property; and (2) public knowledge of the governing body's consideration would likely cause an increase in the price of the real property.

For the purposes of this provision, the consideration of the purchase of real property can involve condemnation of the property, including the amount of compensation to be offered for the property. *Port of Seattle v. Rio* (1977).

However, it remains unclear exactly what the scope is of “considering” the acquisition of real property. Since this subsection recognizes that the process of purchasing or leasing real property or selecting real property to purchase or lease may, in some circumstances, justify an executive session, it implies that the governing body may need to reach some consensus in closed session as to the price to be offered or the particular property to be selected. See *Port of Seattle* (1977). However, the Washington Supreme Court in *Miller v. City of Tacoma* (1999) emphasized that “only the action explicitly specified by the exemption [“consider”] may take place in executive session.” See also *Feature Realty, Inc. v. City of Spokane* (2003). Taken literally, this limitation would preclude a governing body in executive session from actually selecting a piece of property to acquire or setting a price at which the body would be willing to purchase property, because such action would be beyond the power to merely “consider.” Yet, the purpose of an executive session under this subsection would be defeated if the governing body would be required to vote in open session to select the property or to decide how much it would be willing to pay for the property, where public knowledge of these matters would likely increase its price.

(c) Sale or Lease of Agency Property

This subsection, the reverse of the previous one, also has two elements: (1) the governing body must be considering the minimum price at which real property belonging to the agency will be offered for sale or lease; and (2) public knowledge of the governing body's consideration will likely cause a decrease in the price of the property.

This provision also states that final action selling or leasing public property must be taken in an open meeting. That statement may seem unnecessary, since all final actions must be taken in a meeting open to the public. However, its possible purpose may be to indicate that, although the decision to sell or lease the property must be in open session, the governing body may decide in executive

session the minimum price at which it will do so. A contrary interpretation would seemingly defeat the purpose of this subsection. But see *Miller v. City of Tacoma* (1999) and discussion in [Chapter 3.9B\(b\)](#) above.

Governing bodies should exercise caution when meeting in closed session under this and the preceding provision so that they are not doing so when there would be no likelihood of increased price if the matter were considered in open session.

(d) Performance of Publicly Bid Contracts

This subsection indicates that when a public agency and a contractor performing a publicly bid contract are negotiating concerning how the contract is being performed, the governing body may "review" those negotiations in executive session *if* public knowledge of the review would likely cause an increase in contract costs. Presumably, difficulties or disputes concerning contract performance have arisen in some contexts that require confidentiality to avoid increased costs where the nature of the difficulties or disputes would become public knowledge.

(e) Consideration of Certain Information by an Export Trading Company

This provision, which authorizes consideration in executive session of financial and commercial information supplied by private persons to an export trading company, applies to export trading companies that can be created by port districts under [chapter 53.31 RCW](#). Under [RCW 53.31.050](#), financial and commercial information supplied by private persons to an export trading company must be kept confidential.

(f) Complaints or Charges Against Public Officer or Employee

This provision authorizes executive sessions to receive and evaluate complaints or charges brought against a public officer or employee. It should be distinguished from subsection (g), discussed below, concerning reviewing the performance of a public employee in executive session. For purposes of meeting in executive session under this provision, a charge or complaint must have been brought against a public officer or employee. The complaint or charge could come from within the agency or from the public. Bringing the complaint or charge triggers the opportunity for the officer or employee to request that a public hearing or open meeting be held regarding the complaint or charge.

(g) Evaluating Qualifications or Performance of a Public Employee/Official

There are two different purposes under this provision for which a governing body may meet in executive session. For both purposes, the references to "public employment" and to "public

employee" include within their scope public offices and public officials, so that a governing body may evaluate in executive sessions persons who apply for appointive office positions, such as state university president or city manager, as well as for employee positions.

The first purpose involves evaluating the qualifications of applicants for public employment. This could include personal interviews with an applicant, discussions concerning an applicant's qualifications for a position, and discussions concerning salaries, wages, and other conditions of employment personal to the applicant. The authority to "evaluate" applicants in closed session allows a governing body to discuss the qualifications of applicants, not to choose which one to hire. Although this subsection expressly mandates that "final action hiring" an applicant for employment be taken in open session, this does not mean that the governing body may take preliminary votes that eliminate candidates from consideration. *Miller v. City of Tacoma* (1999).

The second part of this provision concerns reviewing the performance of a public employee. This provision would be used typically either where the governing body is considering a promotion or a salary or wage increase for an individual employee or where it may be considering disciplinary action based on an employee's performance. It should be distinguished from subsection (f), which concerns specific complaints or charges brought against an employee and which, at the request of the employee, must be discussed in open session.

The result of a governing body's closed session review of the performance of an employee may be that the body will take some action either beneficial or adverse to the officer or employee. That action, whether raising a salary of or disciplining an officer or employee, must be made in open session.

When a discussion involves salaries, wages, or conditions of employment to be "generally applied" in the agency, it must take place in open session. However, if that discussion involves collective bargaining negotiations or strategies, it is not subject to the OPMA and may be held in closed session without being subject to the procedural requirements for an executive session in [RCW 42.30.110\(2\)](#). See [RCW 42.30.140\(4\)](#).

Case Example: *A city council meets in executive session to consider two applicants for the city manager position. During the discussion of the applicants' qualifications, particularly regarding their past city manager experience, it becomes clear that a majority of the council members are not happy with the qualifications of either candidate. The discussion then turns to the search process and whether it was broad enough or sufficiently advertised to attract all interested and qualified candidates. A number of council members express dissatisfaction with the process and express a desire to begin the search for a city manager anew, with a more comprehensive search process. The council then closes the executive session and reconvenes the open session. A motion is made and a vote is taken to reject both of the candidates for the city manager position the council had evaluated in closed session. Then a second motion is made and approved to authorize city staff to develop a new search procedure that is broader and more extensively advertised than the original search. Did the council meet improperly in executive session?*

Resolution: *Yes and no. The council satisfied subsection (g) by discussing the merits of the two applicants. It did not vote on either of the applicants. The fact that it became clear from the individual council members' expressions of opinion that neither applicant was sufficiently qualified from the council's point of view does not allow any final action in closed session. The vote taken to reject both applicants took place in open session.*

However, the discussion concerning the search process should have taken place in open session, because it did not involve evaluating the qualifications of any applicant for the city manager position.

(h) Evaluating Candidates for Elective Office

This provision applies when an elected governing body is filling a vacant position on that body. Examples of such bodies include a board of county commissioners, a city council, a school board, and the boards of special purpose districts, such as fire protection and water-sewer districts. Under this provision, an elected governing body may evaluate the qualifications for an applicant for a vacant position on that body in executive session. However, unlike when it is filling other positions, the governing body may interview an applicant for a vacancy in an elective office only in open session. As with all other appointments, the vote to fill the position must also be in open session.

(i) Litigation, Potential Litigation, or Enforcement Actions

An agency must meet three basic requirements before it can invoke this provision to meet in closed session. First, "legal counsel representing the agency" must attend the executive session to discuss the enforcement action, or the litigation or potential litigation. This is the only executive session provision that requires the attendance of someone other than the members of the governing body. The legal counsel may be the "regular" legal counsel for the agency, such as a city attorney or the county prosecutor, or it may be legal counsel hired specifically to represent the agency in particular litigation.

Second, the discussion with the legal counsel either must concern an agency enforcement action or it must concern litigation or "potential litigation" to which the agency, the governing body, or one of its members acting in an official capacity is or is likely to become a party. Discussions concerning enforcement actions or existing litigation could, for example, involve matters such as strategy or settlement.

This provision for an executive session defines "potential litigation" as matters that are protected by attorney-client privilege concerning:

- Litigation that has been specifically threatened to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party;
- Litigation that the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or

- Litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency.

This definition permits discussions by an agency governing body of actions that involve a genuine legal risk to the agency. This allows a governing body to freely consider the legal implications of a proposed decision without the concern that it might be jeopardizing some future litigation position.

The third requirement for meeting in closed session under this subsection is that public knowledge of the discussion would likely result in adverse legal or financial consequence to the agency. It is probable that public knowledge of most discussions of existing litigation to which the agency, the governing body, or one of its members in an official capacity is a party would result in adverse legal or financial consequence to the agency. Knowledge by one party in a lawsuit of the communications between the opposing party and its attorney concerning that lawsuit will almost certainly give the former an advantage over the latter. The same probably can be said of most discussions that qualify as involving potential litigation. The Washington Supreme Court, in *Recall of Lakewood City Council* (2001), held that a governing body is not required to determine beforehand whether disclosure of the discussion with legal counsel would likely have adverse consequences; it is sufficient if the agency, from an objective standard, should know that the discussion is not benign and will likely result in adverse consequences.

Since the purpose of this executive session provision is only to allow the governing body to discuss litigation or enforcement matters with legal counsel, the governing body is not authorized to take final action regarding such matters in an executive session. Recent case law suggests that a governing body may do no more than discuss litigation or enforcement matters and may therefore be precluded from decisions in the context of such a discussion in order to advance the litigation or enforcement action. In *Feature Realty, Inc. v. City of Spokane* (2003), the federal Ninth Circuit Court of Appeals invalidated a “collective positive decision” of a governing body in executive session to approve a settlement agreement. The *Feature Realty* court relied on the Washington Supreme Court’s holding in *Miller v. City of Tacoma* (1999) that a governing body can only take an action in executive session “explicitly specified” in an exemption to the OPMA.

This provision is, in practice, often used as a justification for executive sessions, particularly because “potential litigation” is susceptible to a broad reading. Indeed, many things a public agency does will subject it to the possibility of a lawsuit. However, a court will construe “potential litigation” or any other grounds for an executive session narrowly and in favor of requiring open meetings. *Miller v. City of Tacoma* (1999). To avoid a reading of this subsection that may be broader than that intended by the legislature — and to avoid a suit alleging a violation of the OPMA — it is important for a governing body to look at the facts of each situation in the context of all the requirements of this subsection.

Case Example: *A board of county commissioners is considering adopting a stringent adult entertainment ordinance, and a company that had announced its intention to locate a nude dancing*

establishment in the county states that it will sue the county if it passes this ordinance. The commissioners call an executive session to discuss with the prosecuting attorney this "potential litigation." Specifically, they intend to discuss with the prosecuting attorney his opinion as to the proposed ordinance's constitutionality. May the commissioners meet in executive session to discuss this?

Answer: *The county commissioners may discuss with their legal counsel in executive session the constitutionality of the proposed ordinance, particularly in light of the threatened legal challenge. They want to have a strong position coming into the litigation. The company's knowledge of their discussion would give it an unfair advantage in framing the constitutional theories in support of its threatened suit against the county. Also, the prosecuting attorney may not feel he can be totally candid with the commissioners in open session.*

The company, on the other hand, may argue that the commissioners are not discussing the potential litigation, but rather are only discussing the ordinance. The commissioners should always be aware of the constitutionality of the actions they take. But, that does not mean the commissioners have the authority to meet in executive session any time they are proposing legislation that may implicate constitutional issues. However, given the circumstances here, the commissioners' position should prevail. Consistent with the definition of "potential litigation" added by the legislature in 2001, the county commissioners may discuss the "legal risks of a proposed action," in this case, the legal risks of adopting a stringent adult entertainment ordinance, particularly when the company has threatened litigation if the county adopts the ordinance.

(j) Western Library Network Prices, Products, Equipment, and Services

This provision for executive session no longer has any applicability, as the State Library Commission has been abolished and the Western Library Network statutes have been repealed. See [RCW 27.04.090](#) and former chapter 27.26 RCW.

(k) State Investment Board Consideration of Financial and Commercial information

This provision clearly is designed to protect the integrity of public trust or retirement funds. It allows the State Investment Board, established and governed by [chapter 43.33A RCW](#), to consider commercial and financial information relating to the investment of such funds in closed session, if discussion in open session would result in loss to those funds or to the private providers of the information.

(l) Information Related to State Purchased Health Care Services

This provision allows executive sessions to consider proprietary or confidential nonpublished information related to the development, acquisition, or implementation of state purchased health care services as provided in RCW [41.05.026](#).

(m) Life Sciences Discovery Fund Authority Grant Applications and Grant Awards

(n) Health Sciences and Services Authority Grant Applications and Grant Awards

The above two provisions for executive sessions, added in 2005 and 2010 respectively, are clearly intended to protect applicants for grants awarded by these agencies from disclosure of certain confidential or proprietary information that the agency governing bodies consider in discussions concerning the award of these grants. To convene an executive session for such discussions, there must be a reasonable expectation that public knowledge of these discussions would cause harm to the applicants who provide this information.

3.8 The OPMA Provides Remedies/Penalties for Violations

Any person may challenge an action based on a violation of the OPMA through a suit in superior court as provided in [RCW 42.30.120](#) and [RCW 42.30.130](#). Four distinct remedies are available to persons under the OPMA:

- Nullification of actions taken in illegal meetings ([RCW 42.30.060\(1\)](#))
- Civil penalties of \$100 per member of the governing body for knowing violations of the OPMA ([RCW 42.30.120\(1\)](#))
- An award of costs and reasonable attorney fees for any person prevailing in an action alleging an OPMA violation ([RCW 42.30.120\(2\)](#))
- Mandamus or injunction to stop OPMA violations or prevent threatened violations ([RCW 42.30.130](#))

If the court determines that a public agency has taken action in violation of the OPMA, that action is null and void. [RCW 42.30.060\(1\)](#). If an agency's action is null and void as a result of an OPMA violation, the agency must re-trace its steps by taking the action in accordance with the OPMA in order to make that action valid. See *Henry v. Town of Oakville* (1981); *Feature Realty v. City of Spokane* (2003) (agency re-tracing of steps must be done in public). But if the OPMA violation occurs early in the governing body's consideration of a matter, subsequent actions taken in compliance with the OPMA, including the final action, are valid. *OPAL v. Adams County* (1996); see also [33 Op. Att'y Gen. at 40](#) (1971).

If a court determines that a governing body violated the OPMA, each member of the governing body who attended the meeting with knowledge that the meeting was in violation of the OPMA is subject to a \$100 civil penalty. [RCW 42.30.120](#). A violation of the OPMA is not a criminal offense.

A court must award all costs, including attorney fees, to a party who is successful in asserting an OPMA violation against an agency. [RCW 42.30.120\(2\)](#). If the court finds that the lawsuit against the agency is frivolous, the agency may recover its attorney fees and expenses. The only statutory remedy is an action filed in superior court. [RCW 42.30.120\(2\)](#).

Also, an OPMA violation may provide a sufficient legal basis for a recall effort against a local elected official. See, e.g., *In re Recall of Lakewood City Council Members* (2001); *In re Recall of Kast* (2001).

Case example: *Prior to a regular meeting, two members of a three-member board of county commissioners communicate by email about an ordinance to be considered at the upcoming regular meeting. At that meeting, the board discusses and then adopts the ordinance the two commissioners had discussed by email. After making a PRA request for the commissioners' emails, a county resident challenges the validity of the ordinance based on an alleged violation of the OPMA when the two commissioners discussed the ordinance by email.*

Answer: *The email discussion by the two commissioners was "action" under the OPMA, and, since it did not occur in a meeting open to the public, it was a violation of the OPMA. The two commissioners are personally liable for the \$100 penalty if they knew the email discussion was in violation of the OPMA. It seems unlikely that the commissioners would not have known that their email discussion was in violation of the OPMA, and so they will likely be subject to that penalty.*

The ordinance adopted by the commissioners after discussion in an open meeting should not be invalidated based on the improper email discussion. The board discussed the ordinance and voted on it in open session, in compliance with the OPMA. So, despite the earlier OPMA violation, the board subsequently complied with the OPMA in adopting the ordinance.

3.9 The OPMA Requires Training

Legislation enacted in 2014 requires that all members of state and local governing bodies receive training on the requirements of the OPMA. [RCW 42.30.205](#). The training must be completed within 90 days after a governing body member takes the oath of office or otherwise assumes the duties of the position. The training must be repeated at intervals of no longer than four years, as long as an individual is a member of the governing body. This legislation does not specify the training that must be received, other than to state that it may be taken online. For information on this new training requirement, see the Attorney General's [Open Government Training Web page](#).