



Bellevue City Council Training: Open Meetings, Public Records, and More

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What laws apply to the City Council?

General Governance

- As a public body, Washington state law applies to Council actions, including but not limited to:
 - The Open Public Meetings Act, chapter 42.30 RCW; and
 - The Public Records Act, chapter 42.56 RCW, and associated regulations
- If Council Rules or procedures conflict with municipal or state law, municipal and state law controls. See generally chapter 35A.13 RCW (powers of city council subject to state law).

General Governance, cont.

- Which other laws & procedures apply to meetings?
 - The Council is governed by Council Rules adopted in Resolution No. 8928.
 - For all other contested issues arising from points of order, the Council is governed by *Robert's Rules of Order*. See Resolution No. 8928, § 2.
 - *Robert's Rules* provide rules and procedures for deliberation and debate designed to place the entire membership on equal footing.

Open Public Meetings Act

Open Public Meetings Act



The Open Public Meetings Act (“OPMA”), ch. 42.30 RCW, applies to all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of the state and its subdivisions. RCW 42.30.010.

OPMA Training

In 2014, the Legislature imposed a training requirement for the OPMA:

- Every Member of a governing body must complete training on OPMA requirements no later than 90 days after either the Member takes the oath of office or assumes his or her duties.
- Additionally, every Member must complete OPMA training at intervals of no more than four years so long as he or she remains a Member.

RCW 42.30.205

Basic Provisions of OPMA

- All meetings must be open to the public, except authorized executive sessions. RCW 42.30.030; RCW 42.30.110.
- The following are required: notice of meeting, agenda, and published meeting materials and minutes. RCW 42.30.070; RCW 42.30.060; RCW 42.030.075; RCW 42.030.077.
- Meetings where City business is received, discussed, and/or acted upon must include a quorum of Members.
 - Quorum requires a majority of members. See RCW 42.30.020(3).

The OPMA and “Action”

- Action at meetings:
 - “Action” is defined as the transaction of official business including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. RCW 42.30.020(3).
 - No legal action may be taken by a council, board, commission, committee, or task force except in a public meeting. RCW 42.30.060.

The OPMA and Quorum

- No meeting takes place, and the OPMA does not apply, if the public body lacks a quorum. See *Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty.*, 326 P.3d 730 (Wash. Ct. App. 2014).
- But, “action” taken by a quorum of the Members outside of a public meeting violates the OPMA.
 - Members should be careful not to take action, whether intentionally or unintentionally, outside of a regularly scheduled public meeting or properly constituted special meeting.
 - Remember the broad definition of “action.”

More on Quorum

- The Council Rules are consistent with the OPMA and define a quorum as a majority of members. See Resolution No. 8928, § 3(C); RCW 42.30.020(3).
- The Council Rules also provide that “a lesser number may recess or adjourn from time to time and may compel the attendance of absent members in such manner and subject to such penalties as may be prescribed by ordinance.” Resolution No. 8928, § 3(C).
 - Thus, the decision to recess, to adjourn, or to take steps to ensure a quorum does not, in and of itself, require a quorum. But any “action” does require a quorum. See RCW 42.30.020(3).

The OPMA and Agendas

- In 2014, the Legislature mandated the posting of agenda online. See RCW 42.30.077 (2014) (agenda for each regular meeting of a governing body must be available online no later than 24 hours before the published start time).
 - Does not invalidate subsequent modifications to agenda and does not invalidate otherwise legal action taken at a meeting where the agenda was not posted.
- At a special meeting, only action that appears on the posted agenda may be taken. RCW 42.30.080(3).

More on Agendas

- For a regular meeting, any Member may move to amend the proposed agenda by adding an item or by proposing any other change.
- No legislative item shall be voted on that was not on the Council agenda approved by the Council at a meeting or as amended during the meeting by at least four members.

Resolution No. 8928, §7(B).



Executive Sessions

A governing body may hold an executive session only:

- To select or consider acquisition of real estate and to consider the minimum price at which real estate will be offered for sale;
- To review negotiations on the performance of publicly bid contracts;
- To receive and evaluate complaints or charges brought against a public officer or employee (but the officer or employee can request that the hearing be public);
- To evaluate qualifications of an applicant for public employment or to review the performance of a public employee (but discussion of salary, conditions of employment, and final hiring or discipline decisions must be public);

Executive Sessions, cont.

- To evaluate the qualifications of a candidate for appointment to elective office (but final appointment decision must be public);
- To discuss with legal counsel representing the agency matters relating to enforcement actions, pending litigation, and potential litigation (but not just because a lawyer is present);
- And for other specific statutory purposes as set forth in RCW 42.30.110(1).
- As of 2017, executive sessions also can be convened to discuss any data security breaches. (SHB 1417).

Before convening an executive session, the presiding officer must publicly announce the purpose for excluding the public and the time the session will be concluded. The executive session may be extended by announcement of the presiding officer. RCW 42.30.110(2).

Executive Sessions, cont.

In 2017, the Washington Supreme Court issued a rare OPMA decision signaling that it will interpret executive sessions provisions narrowly:

- The Court considered the executive session provision in RCW 42.30.110(1)(c) regarding “the minimum price at which real estate will be offered for sale or lease”;
- The Court held that the plain language “limits discussion in executive session to consideration of the lowest acceptable value to sell or lease property”;
- The Court unanimously held that executive sessions may not be used to discuss the contextual factors such as impacts on jobs, environmental risks, quantity of land, and property improvements.

Columbia Riverkeeper v. Port of Vancouver, Case No. 92455-4, 2017 WL 2483271 (Wash. Sup. Ct. June 8, 2017).

Serial Meetings

- Serial conversations between smaller groups may be treated as a “meeting.”
 - *Wood v. Battle Ground School Dist.*, 107 Wn. App 550, 564, 27 P.3d 1208 (2001) (exchange of e-mails among board members was a meeting under the OPMA).

Serial Meetings, cont.

- The mere use or passive receipt of e-mail or other social media communication does not automatically constitute a meeting.
Citizens Alliance for Prop. Rights Legal Fund v. San Juan Cnty., 184 Wn.2d 428, 359 P.3d 753 (2015).
 - The Members must intend to meet to transact official business.
 - The Members must communicate about issues that may or will come before the Council for a vote; in other words, they must take “action” under the OPMA.
 - No meeting occurred in this case where only three of six council members participated.

Social Media & the OPMA

- Use of social media implicates the OPMA.
 - Members should be cautious as to the prospect of creating a “serial meeting” through the use of social media technology, e.g., via three Members discussing official business in a room and then one of the three texting a fourth and reporting back.

Citizens All. for Prop. Rights Legal Fund v. San Juan Cnty., 184 Wn.2d 428, 448 n.5, 359 P.3d 753 (2015) (left open whether such communications constitute a meeting).

Violations of the OPMA



Violations may result in civil penalties against Members, and fees and penalties assessed against the City.

RCW 42.30.130;
RCW 42.30.120.

Individual Penalties

In 2016, the Legislature amended to OPMA to specify individual penalties as follows:

- Each Member who attends a meeting where action is taken in violation of the OPMA, with knowledge of that the meeting is in violation of the OPMA, shall be subject to personal liability in the amount of \$500 for the first violation (increase from \$100);
- Each Member who was previously assessed a penalty under the above provision in a final court judgment, shall be subject to personal liability in the amount of \$1,000 for any subsequent violation.

Public Records Act

Public Records Act

- The Public Records Act (“PRA”) is codified primarily at chapter 42.56 RCW.
- It is a “strongly worded mandate for broad disclosure of public records.” *West v. Thurston County*, 168 Wn. App. 162, 182, 275 P.3d 1200 (2012).
- It requires disclosure of all public records unless they fall within a specific exemption. RCW 42.56.070(1).
 - Courts liberally construe the disclosure provisions and narrowly construe the exemptions.
 - See also *Public Records Act Rules*, Records and Information Management Program at 1 (“The Act and these rules will be interpreted in favor of disclosure.”).

PRA Training

As with the OPMA, the PRA requires that each local elected official must complete a training course regarding the PRA and ch. 40.14 RCW regarding records retention:

- Either before assuming office or within 90 days of taking the oath of office or assuming duties; and
- At least every 4 years thereafter so long as he or she holds office.

RCW 42.56.150

Scope of the PRA

- A “record” is any “writing” containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. RCW 42.56.010(3).
- A “writing” means handwriting, typewriting, printing, photostating, photographing, and *every other means of recording* any form of communication or representation. . . . RCW 42.56.010(4).
- A requester is entitled to all non-exempt records, and may request that electronic records be produced in electronic format. See WAC 44-14-050(2).

Scope of the PRA, cont.

“‘[P]ublic record’ is broadly defined and includes ‘existing data compilations from which information may be obtained’ ‘regardless of physical form or characteristics.’ RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. *Id.*; see also WAC 44–14–04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.”

Fisher Broad.-Seattle TV LLC v. City of Seattle, 180 Wn.2d 515, 524, 326 P.3d 688 (2014).

E-mails as Public Records

- Personal e-mails of a county employee were public records where the employee was terminated for excessive use of personal e-mail. *Tiberino v. Spokane County*, 103 Wn. App. 680, 688, 13 P.3d 1104 (2000).
 - In other words, these e-mails were public records even though their substance did not pertain to government business.
- “[P]urely personal” emails on the home computers of city officials were not public records where they did not relate to a “government function.” *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 868, 288 P.3d 384 (2012).

E-mails as Public Records

“Appellants argue that the superior court erred in ordering Vermillion “to produce e[-]mails from his personal e[-]mail account and swear under [penalty of] perjury that he had complied.” Specifically, Vermillion argues that the PRA does not “authorize an agency to require an elected official to search a personal e[-]mail account. We reject Vermillion's argument.”

West v. Vermillion, 196 Wn. App. 627, 636, 384 P.3d 634 (2016) (emphasis added), *review denied*, 187 Wn. 2d 1024, 390 P.3d 339 (2017)

Petition for Cert filed with United States Supreme Court

Use of Personal Devices

“Whether or not [the PRA] violates the elected official or public official's constitutional rights, be either state or federal, I find that they still have those rights; that just because you run for public office does not make you exempt in your maintaining of your right against search and seizure, either under the state constitution or the federal constitution, and that's my ruling.”

Nissen v. Pierce Cnty., 183 Wn. App. 581, 588, 333 P.3d 577, 581 (2014), *aff'd in part, rev'd in part*, 183 Wn. 2d 863, 357 P.3d 45 (2015) (citing superior court oral ruling).

Use of Personal Devices, cont.

Text messages of Pierce County Prosecutor sent on personal device may be public records if they relate to the conduct of government.

Call logs from personal cell phone may be public records if they relate to the conduct of government and are retained or used in his prosecutor's official capacity. Such logs are not public records though if they play no role in County business and County never uses them.

Nissen, 183 Wn. App. at 588.

Use of Home Computers

- Other electronic records on personal or home computers also may be public records:
 - *Hangartner v. City of Seattle*, 151 Wn.2d 439, 446, 90 P.3d 26 (2004).
 - The King County Superior Court ordered production of electronic records contained on personal computers of Seattle Monorail Project staff in response to a public records request.
 - Although the ruling was reversed on appeal on other grounds, another court could enter a similar order in another case. See *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 869 n.20, 288 P.3d 384 (2012) (“Because all of the officials consented to a search of their personal computers, we do not address whether such a search would violate article I, section 7 of the State Constitution.”).

Metadata

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Metadata

- A requestor also may obtain metadata:
 - “Data about data”: Metadata is electronically stored information associated with electronic files such as e-mail, Microsoft Word or Excel documents, or other electronic records.
 - Can include information regarding the time or date a record is created, recipients of an e-mail, the author of an e-mail or other electronic document, and revisions made to a document.

Metadata, cont.

- *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010).
 - Washington Supreme Court held that metadata can be a public record that must be disclosed, if specifically requested, under the PRA.
 - The Court held that the City of Shoreline could search a Deputy Mayor's home computer in the effort to recover requested metadata.

Segregate Public & Personal Records

All Members should observe best practices with respect to electronic public records, including:

- Segregate e-mail and other communications used for Council business from those used relating to personal business;
- Ensure Council documents are segregated from personal documents on personal devices or home computers;
- Ensure e-mails and other electronic documents that are public records are transferred to an organized, secure, and accessible filing system for retention, in such a manner that preserves metadata;
- Comply with retention time periods, both in terms of saving and deleting records; and
- Be prepared to produce public records in response to a records request.

Social Media & the PRA

- Use of social media implicates the PRA.
 - Electronic public records include text messages, online communications, blog postings, Facebook posts, and “tweets.”
 - Electronic public records must be retained pursuant to the applicable retention schedules. WAC 434-662-030.
 - All web content also must be retained in accord with the applicable retention schedule. WAC 434-662-140.
 - Public entities must employ security procedures to prevent additions, modifications, or deletion of a record by an unauthorized party. WAC 434-662-060.
 - If posts to blogs, Twitter, Facebook, and other similar sites are connected with the Member’s public business, they may be public records and must be retained for the retention period.

Policy on Social Media

City of Bellevue, Website Policies and Procedures provide as follows:

Approval Process

The City Manager's Office shall approve what social media outlets may be suitable for use by the city and its departments. The city manager will review department requests to use social media sites and may delegate this review function to the New Media Group and the Director of Communications. The City Manager's Office will monitor the city's social media sites to ensure appropriate use, message and branding consistent with Bellevue's goals. Violation of these standards may result in the removal of social media pages or the imposition of oversight before content is posted. The Communications director retains the authority to remove pages and manage the posting of content.

Retention Under the PRA

- Official Public Records: six years unless state records committee determines retention is unnecessary and uneconomical. RCW 40.14.060.
- Office Files and Memoranda: according to retention schedule determined by state records committee.
- Refer to City Fact Sheet on Ch. 40.14 RCW.

Retention of E-mails

- State Archivist guidance regarding the types of e-mails that typically are considered public records (even if on home computer or personal device):
 - Policies and directives;
 - Correspondence or memoranda related to official business;
 - Agendas and minutes of meetings;
 - Documents related to business transactions;
 - Drafts of documents circulated for comment or approval; and
 - Final reports or recommendations.

Retention of E-mails, cont.

- E-mails must be retained in accord with the applicable retention schedule.
WAC 434-662-150.
- Agreement with the State Archives to have City staff review Council emails and transfer any with archival value to the Digital Archives to meet the requirement for “executive correspondence” with permanent retention value

How Requests Are Handled

- In the event of a public records request to the Council, the Public Records Officer coordinates the collection of some Council materials and may also contact Council directly to ask them to search for records
- Although Staff coordinates and oversees compliance with the PRA, all Council Members should be aware of and comply with PRA procedures and records requests.

How Requests Are Handled: Rufin v. City of Seattle (June 26, 2017)

RCW 42.56.520. The trial court found, and substantial evidence supports, that the City did not comply with this provision because it did not provide records, deny the request, or acknowledge the request with a time estimate within five days. Given this finding of fact, the trial court's conclusion of no PRA violation does not flow. The City's failure to provide a response under RCW 42.56.520 violates the PRA.

How Requests Are Handled: Rufin v. City of Seattle (June 26, 2017)

[T]he focus of the inquiry is not whether responsive documents do in fact exist, but whether the search itself was adequate. The adequacy of a search is judged by a standard of reasonableness, that is, **the search must be reasonably calculated to uncover all relevant documents**. What will be considered reasonable will depend on the facts of each case. When examining the circumstances of a case, then, **the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found**.

PRA Fees & Penalties

- *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 470, 229 P.3d 735 (2010) (imposing a penalty of \$45 per day [a total of \$371,340], plus reasonable attorney fees and costs, for failure to fully and timely comply with a public records request). Penalties are no longer mandatory, but fees are.
- *O'Neill v. City of Shoreline*, No. 70657-8-I, 2014 WL 4066219, at *5 (Wash. Ct. App. Aug. 18, 2014) (holding that the RCW 42.56.550(4) provides for “a more liberal recovery of costs than does RCW 4.84.010, the statute that governs recovery of costs generally” and that “the liberal allowance for cost recovery furthers the policy of the public's right to access public records”).

PRA Fees & Penalties, cont.

- *Wades Eastside Gun Shop, Inc. v. Dep't of Labor and Indus.*, 185 Wn. 2d 270, 279-280, 372 P.3d 97 (2016)(affirming a \$502, 827.40 penalty based on the number of pages L&I withheld, emphasizing the “considerable” and “ample” discretion of trial courts to determine PRA penalties).
- *Adams v. Washington State Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015)(upholding a \$35 per day penalty where DOC acted in “bad faith” by failing to engage in serious independent analysis of the exempt status of withheld documents. The court also considered the size of the DOC and the inadequacy of the records denial sheet).
- *Kitsap County v. Smith*, 143 Wn. App. 893, 918, 180 P.3d 834 (2008) (allowing a county to pursue claims against an employee for improperly removing public records).

Legislative Changes to the PRA in 2017

In May 2017, the PRA was amended by two pieces of legislation: Engrossed Substitute House Bill (ESHB) 1594 and Engrossed House Bill (EHB) 1595.

ESHB 1594

- amends several sections of the PRA related to providing initial responses to PRA requests, the definition of public records and required training for public records officers;
- establishes a competitive grant fund for local agencies to improve technology information systems for handling PRA requests;
- requires agencies to maintain an extensive and detailed log of all PRA requests and report information annually to the legislature if the agency spends at least \$100,000 a year in staff and legal costs fulfilling public records requests.

2017 Legislative Changes, cont.

EHB 1595

- addresses an agency's ability to charge for producing and transmitting electronic records;
- allows agencies to recoup these costs as well as charge a "customized service charge" for requests that require use of "information technology expertise" if the agency provides notice to the requester in advance;
- clarifies the scope of an agency's responsibility to respond to certain types of requests, including automated "bot requests."

City Resources & Electoral Politics

Members may not use City computers, e-mail, websites, or social media to assist a campaign for or against a candidate or ballot proposition:

No elective official nor any employee of his or her office nor any person appointed to or employed by any public office or agency may use or authorize *the use of any of the facilities of a public office or agency, directly or indirectly*, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency.

RCW 42.17A.555 (emphasis added).

Guidelines for Election Related Use

Washington Public Disclosure Commission guidelines regarding local government use of resources for campaigns:

“An agency may develop an objective and fair presentation of the facts and post that information on its website, including information regarding agency needs and the anticipated impacts of a ballot measure.”

PDC Guidelines, cont.

But:

“Agency computers, e-mail systems, telephones, and other information technology systems shall not be used to aid a campaign for or against a candidate or ballot measure.”

“Electronic communication systems shall not be used to generate or forward information that supports or opposes a candidate or ballot measure.”

“Agency websites shall not be used for the purposes of supporting or opposing a candidate or ballot measure.”

Questions?

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