



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

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Open Public Meetings Act

Open Public Meetings Act



The Open Public Meetings Act (“OPMA”), chapter 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

The Washington Legislature requires OPMA training every 4 years:

- 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

Governing Body or “Committee Thereof”

- “Governing body” is not just limited to the City Council.
- "Governing body" means the multimember 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).

OPMA Basics

- 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 minutes. RCW 42.30.060; RCW 42.30.070; 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 Agendas

- Agendas must be posted 24 hours before the meeting. RCW 42.30.077.
- At a regular meeting, any member may move to amend the proposed agenda by adding an item or by proposing any other change.
- At a special meeting, only action that appears on the posted agenda may be taken. RCW 42.30.080(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 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 Cty.*, 184 Wn.2d 428, 446, 359 P.3d 753 (2015).
- 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.”

Serial Meetings

Serial conversations between smaller groups may be treated as a “meeting.”

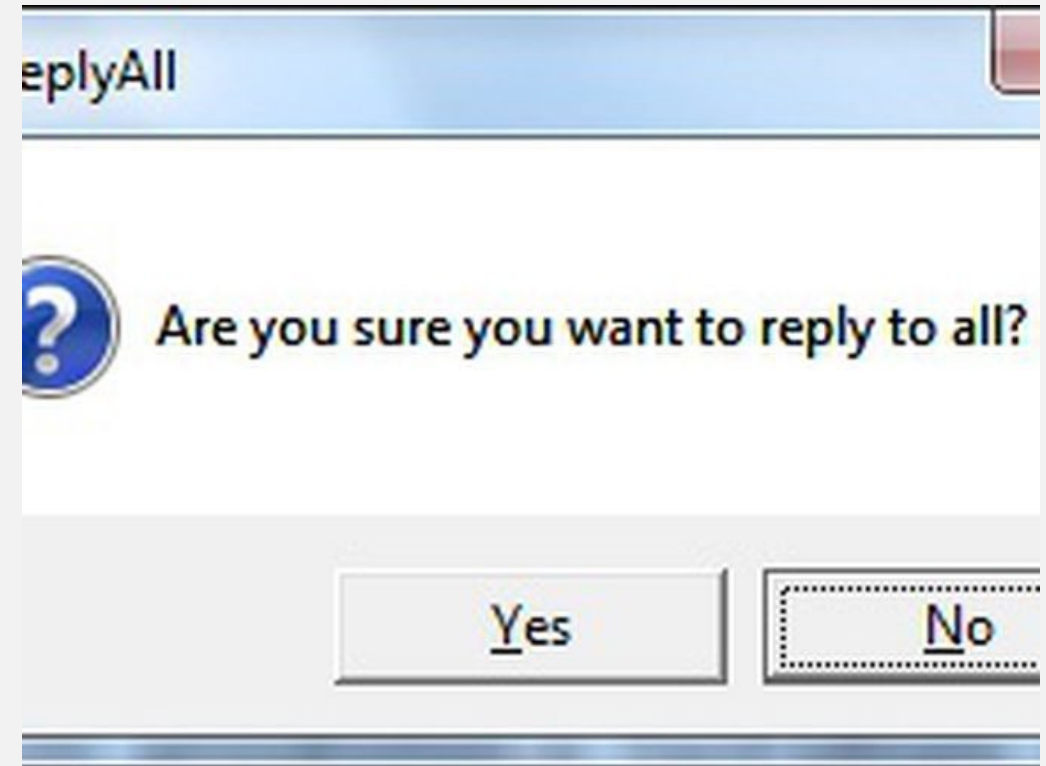
- *Wood v. Battle Ground School Dist.*, 107 Wn. App 550, 564, 27 P.3d 1208 (2001) (exchange of e-mails among board members was a meeting under the OPMA).

OMPA restrictions apply regardless of the form of communication: texts, online comments, e-mails, phone calls, and in-person conversations all count.

Serial Meetings, cont.

The mere receipt of e-mail or social media is not automatically a meeting. *Citizens Alliance*, 184 Wn.2d at 443-44.

Must intend to meet to transact official business & must communicate about issues that may or will come before the Council for a vote. *Id.*; *Zink v. City of Mesa*, No. 36994-3-III, 2021 WL 2197995, at *3 (Wash. Ct. App. June 1, 2021)



Taking Polls & Other Things to Avoid

Seattle Head Tax case, *Egan v. City of Seattle*, 14 Wn. App. 2d 594, 616, 471 P.3d 899 (2020):

- Four Council members participated in a call with a consultant and discussed the fate of the tax.
- Most of the Council members then engaged in a series of small group discussions (in meetings, phone calls, and electronic communications) regarding a potential repeal of the tax.
- Although the OPMA claim was initially dismissed, the Court of Appeals reversed.
- Avoid any scenario where you take action in groups such that a quorum may be present.

Cody Reiter

Vote Counts

Date:

Issue/Bill:

	Approve	Decline	Other
Bagshaw	<input checked="" type="checkbox"/> Assuming Yes	<input type="checkbox"/>	<input type="checkbox"/>
González	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Harrell	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Herbold	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Johnson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Juarez	<input checked="" type="checkbox"/> Assuming Yes	<input type="checkbox"/>	<input type="checkbox"/>
Mosqueda	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/> -?
O'Brien	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sawant	<input type="checkbox"/>	<input checked="" type="checkbox"/> Assuming	<input type="checkbox"/>

11:18 AM

Re: statement

11:19 AM

Meeting Outside of Meetings



Beware meeting outside of a public meeting: site visits, dinners, social gatherings, etc.

- Avoid attending in groups of more than three members.
- If more than three members attend, do not take “action,” including discussing any issue that may come before the City.
- When in doubt, check with City staff.

Executive Session Purposes

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 Session Purposes, 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).

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 Are Construed Narrowly

The Washington Supreme Court has confirmed that it will interpret executive session 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, 188 Wn.2d 421, 432-33, 395 P.3d 1031 (2017).

Executive Sessions vs. Closed Sessions

Closed sessions arise only in very limited circumstances

- Confirmed by the Court of Appeals in a recent decision, *Tateuchi v. City of Bellevue*, 15 Wn. App. 2d 888, 905, 478 P.3d 142 (2020).
- “That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group” is exempt from OPMA. RCW 42.30.140(2).
 - Must be quasi-judicial, i.e., a decision akin to a court
 - Adjudicating a dispute between specific parties
- A session cannot be “closed” if a body is acting in a legislative capacity with a quorum.
 - Also distinct from executive sessions



What's the Risk?

- Fees and costs against the City
 - Court of Appeals decision issued June 1, 2021, clarified that fees/costs are mandatory and can significantly exceed the limited penalties provided for under the Act.
Zink v. City of Mesa, No. 36994-3-III, 2021 WL 2197995, *6 (Wash. Ct. App., June 1, 2021).
- Civil penalties against violating members
 - \$500 for first violation
 - \$1000 for subsequent violation
- Also potential basis for recall action, *In re Recall of Pepper*, 189 Wn.2d 546, 558, 403 P.3d 839 (2017)
- Invalidation of City's action
- Loss of public trust and confidence

Public Records Act

Public Records Act

- The Public Records Act (“PRA”) is codified primarily at chapter 42.56 RCW.
- The PRA is a “strongly worded mandate for broad disclosure of public records. *Green v. Pierce Cty.*, No. 98768-8, 2021 WL 2149389, at *3 (Wash. May 27, 2021).
- 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

Similar to the OPMA, the PRA requires that each local elected official must complete a training course regarding the PRA and chapter 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.

“Record requestors are not required to supply the exact name of the record, but requests must be for identifiable records or a class of records.”

Zabala v. Okanogan Cty., 5 Wn. App. 2d 517, 528, 428 P.3d 124 (2018).

“‘[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.”

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).

Social Media & the PRA

- It's the content, not the form:
 - Electronic public records may include text messages, online communications, Facebook & Instagram posts, “tweets”, and likely whatever other app you can download.
 - Electronic public records must be retained pursuant to applicable retention schedules. WAC 434-662-030; see *also* WAC 434-662-140 (web content also must be retained).
 - “Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period. Printing and retaining a hard copy is not a substitute for the electronic version unless approved by the applicable records committee.” WAC 434-662-040.

Nissen: Personal Phones

- 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 the prosecutor's official capacity.
 - Logs are not public records if they play no role in County business and County never uses them.

Nissen v. Pierce Cty., 183 Wn.2d 863, 357 P.3d 45 (2015).

Extending *Nissen*: *West v. Vermillion*

“[A]n agency's employees or agents must search their own ‘files, devices, and accounts,’ and produce any public records, including ‘e-mails,’... that are responsive to the PRA request...

[A]ffidavits by the agency employees, submitted in good faith, are sufficient to satisfy the agency's burden to show it conducted an adequate search for records.”

West v. Vermillion, 196 Wn. App. 627, 636–37, 384 P.3d 634, 638 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 339 (2017), and *cert. denied*, 138 S. Ct. 202, 199 L. Ed. 2d 115 (2017).

Extending *Nissen*: *West v. City of Puyallup*

Two Key Points:

“[A] public official's posts on a personal Facebook page can constitute an agency's public records subject to disclosure under the PRA if the posts relate to the conduct of government and are prepared within a public official's scope of employment or official capacity.”

“However,... [the] particular Facebook posts at issue in this case were not public records as a matter of law because [the Council member] did not prepare them within the scope of her official capacity....”

West v. Puyallup, 2 Wn. App. 2d 586, 588, 410 P.3d 1197 (2018).

West Employs *Nissen* Test

To determine whether [the Council member] was acting within the scope of her employment or official capacity... when she prepared the Facebook posts, the Court looked at whether:

- (1) her position required the posts,
- (2) the City directed the posts, or
- (3) the posts furthered the City's interests

West, 2 Wn. App. 2d, at 599-600.



The *West* Court's Conclusions

- Door's position as a City Council member clearly did not require that she post on Facebook.
- The Facebook page was not associated with the City and was not characterized as an official City Council member page. It was characterized as the “Friends of Julie Door.”
- Door was not “conducting public business” on the Facebook page.
 - Any “tangential benefit” to the City was insufficient to establish that Door was acting within the scope of employment or her official capacity.

West, 2 Wn. App. 2d, at 598-99 (emphasis added).

Applying the *West* Test

Another recent example regarding Facebook Posts by a Council member:

West v. Clark Cty., 16 Wn. App. 2d 1013 (2021) (“The posts did not contain specific details regarding Clark County Council discussions, decisions, or other actions. If anything, as Clark County states, the posts furthered Madore's own interests by establishing his views on particular policies and inviting discussion among his constituents.”)

The Ongoing Reach of *Nissen*



Conducting an Adequate Search

Search all potential records locations (even if you think it will yield duplicates), produce duplicates if they come from different locations and requester has not requested removal of duplicates, and talk to potential custodians about their saving and deletion practices:

“An agency cannot limit its search to only one record system if responsive documents are likely to be found in other systems. Also, as Russell stated in her declaration, it is a best practice to disclose all copies of a responsive record even if they are duplicates of the same record found elsewhere.” *Benitez v. Skagit Cty.*, 13 Wn. App. 2d 1019, 2020 WL 1917453, at *10 (Wash. Ct. App. April 20, 2020)(unpublished) (emphasis added).

“DOC's search should have extended to locations where incident reports that are not part of an infraction packet are likely to repose—and computers used by the persons who created the reports are obvious places to look. DOC's argument that it did not need to contact Mr. Burnette because he was not the person responsible for retaining the record ignores the relevant standard.” *Thurura v. Washington State Dep't of Corr.*, 15 Wn. App. 2d 1047, 2020 WL 7231100, at *5 (Wash. Ct. App. Dec. 8, 2020) (unpublished).

Segregate Public & Personal Records

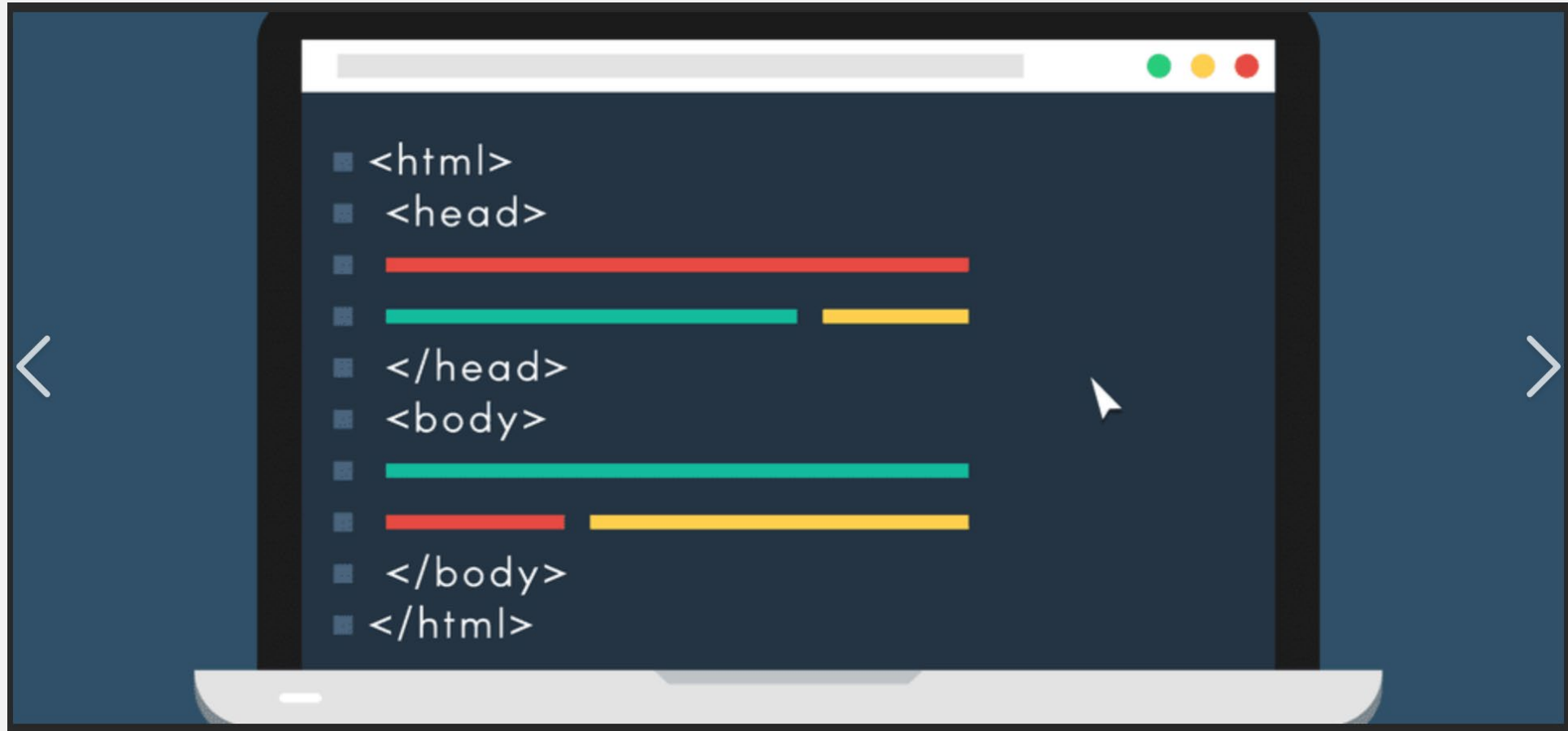
All members should observe best practices with respect to electronic public records, including:

- Segregate e-mail and other communications used for City business from those used relating to personal business;
- Ensure City 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.

Retention Under the PRA

- State statutes govern retention of official public records. RCW 40.14.060.
- State statutes also govern retention of other files and communications, including e-mails and social media.
- Retention requirements are also subject to City-specific retention schedule.
- Work with City staff if you have questions.

Metadata



Metadata

Metadata can be submitted in different formats, but agencies should be prepared to speak to their technological capabilities and limitations: “...the City's conduct did not violate the Public Records Act by presenting metadata in a written format for records subject to redaction.” *Berg v. City of Kent*, 81253-0-I, 2021 WL 164846, at *7 (Wash. Ct. App. Jan. 19, 2021).

“Critically, however, the Bergs did not present any evidence to rebut the City's assertion that it was impossible to produce the metadata digitally and maintain necessary redactions. If the Bergs had done so, **the burden would have returned to the City to either produce those records or overcome the Bergs’ evidence.**” *Berg v. City of Kent*, 81253-0-I, 2021 WL 164846, at *7 (Wash. Ct. App. Jan. 19, 2021) (emphasis added).

How Requests Are Handled

- Although Staff coordinates and oversees compliance with the PRA, all members should be aware of and comply with PRA procedures and records requests.
- A request directed to an individual member, or staff, is still a valid request.

PRA Fees & Penalties

Penalties are no longer mandatory, but fees are.

- Fees can be significant. See, e.g., *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).
- The PRA affords trial courts considerable discretion to fashion appropriate penalties for violations of the act. Taking into account the facts and circumstances of the case, the trial court here did not abuse that discretion in determining what constitutes a relevant “record” and imposing penalties on a per page basis. *Wade's Eastside Gun Shop, Inc. v. Dep't of Lab. & Indus.*, 185 Wn.2d 270, 297, 372 P.3d 97 (2016).

Thank You

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