



Wenatchee School District Open Public Meetings ACT Training Minutes June 16th, 2014 District Office

Board Members Present

6:00 p.m.

Staff Present

Laura Jaecks, President
Walter Newman, VP
Jesús Hernández
Jennifer Talbot
Robert Sealby

Lindee Akers, Public Records Officer

Opening of Meeting

Laura Jaecks, Board President, opened the Open Public Meeting Act Training at 6:10 p.m..

Danelle Marchant, Legal Counsel from Johnson, Gaukroger, Smith & Marchant PS Facilitated the training.
Ms. Marchant provided the following power-point while conducting a question and answer open forum format.

**OPEN GOVERNMENT TRAINING
DANIELLE R. MARCHANT
JOHNSON, GAUKROGER, SMITH & MARCHANT, P.S.
JUNE 16, 2014**

OPEN GOVERNMENT TRAININGS ACT: BACKGROUND

- .j 2012 Auditor’s Office Report noted more than **250 “open government-related issues”** among local governments
- .j Recent years, courts have imposed significant **monetary penalties** against public agencies due to non-compliance with Public Records Act (“PRA”)
- .j Attorney General’s Office advisory Model Rules on the PRA have recognized that the **PRA training is best practice**
- .j Legislature passed ESB 5964 in March 2014 which is designed to **foster open government** and to **reduce liability** by educating officials and staff on “open government requirements”

OPEN GOVERNMENT TRAININGS ACT:

- Requires training of public records officers and certain local/state officials
- .j Required training covers three areas
- .j Public Records
- .j Records Retention
- .j Open Public Meetings
- .j Requires “refresher” training at least every four years

OPEN GOVERNMENT TRAINING: VIOLATIONS

- .j Does not provide for penalties
- .j Court considers whether training was taken when it is determining penalties for violations of PRA and OPMA

LESSON 1: PUBLIC RECORDS

PUBLIC RECORDS ACT: PURPOSE

- People do not yield their sovereignty to the agencies that serve them.
- .j People do not give their public servants the right to decide what is good for people to know and what is not good for them to know.
- .j People insist on remaining informed so that they may maintain control over the instruments that they have created. RCW 42.56.030

GENERAL PROCEDURES

- .j Appoint Public Records Officer
- .j Adopt and Publish Rules/Procedures
- .j Publish Fee Schedule
- .j Maintain List of Laws that Exempt or Prohibit Disclosure
- .j Maintain Index of Information
- .j See RCW Ch. 42.56

RULES AND PROCEDURES

- .j Provide full access to public records
- .j Protect Records from damage/disorganization
- .j Provide the fullest assistance to requestors
- .j Provide most timely possible action on requests
- .j Describe central and field office organization
- .j Describe location where public may obtain information, make requests, and obtain copies of agency decisions

INDEX OF INFORMATION

- .j Policy Statements
- .j Policy Interpretations
- .j Staff Manuals
- .j Planning policies/decisions
- .j Staff/Consultant reports and studies
- .j Local agencies may “opt-out” from index requirement
- .j Unduly Burdensome
- .j Issue and publish formal order

WHAT IS A PUBLIC RECORD?

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.

WHAT IS A WRITING?

Any handwriting, typewriting, printing, photo-stating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

CAUTION!!!

- .j **Home Computers**
- .j **Non-Agency Email Accounts**
- .j **Metadata**

THE REQUEST

- .j No statutorily required format
- .j Can be made by email, fax or verbally
- .j If done verbally the person receiving the request should reduce it to writing and then confirm the request with the requestor
- .j May have a form request
- .j May not require the form to be completed
- .j Encouraged to make form available on website
- .j Inspection of records v. Copies of records

THE REQUESTOR

- .j Cannot require the disclosure of the purpose of the request
- .j Shall not distinguish among persons requesting records
- .j Exceptions
- .j If request is for a list of individuals, may ask if requestor intends to use the records for a commercial purpose
- .j May seek information sufficient to allow agency to determine if another statute prohibits disclosure
- .j Prisoner Injunction: Harass or Intimidate Agency

REQUESTOR OBLIGATIONS

- .j Reasonable Notice that Request is for Public Records
- .j “public records,” “public disclosure,” “FOIA,” or “Freedom of Information Act”
- .j Request an Identifiable Record
- .j A record that the agency can reasonably locate
- .j Not required to identify exact record
- .j Request for Information Distinguished
- .j No obligation to respond
- .j PRA does not require agencies to research or explain public records, but only make those records accessible to the public

AGENCY OBLIGATIONS

- .j Comply with General Procedures
- .j Timely Respond
- .j Timely Disclose
- .j Retain Records
- .j No Duty to Create Records

AGENCY RESPONSE

- .j Five Business Days to Respond
- .j Response must acknowledge receipt of the request and:
 - .j Provide Records
 - .j Deny the Request
 - .j Seek Clarification
 - .j Request a reasonable time for a further response

PROVIDING THE RECORDS: PRESUMPTION

- .j Public records are presumed open to the public
- .j PRA is to be liberally construed
- .j Public records may only be withheld when there is a statutory exemption
- .j Narrowly construed
- .j Redact exempt information and provide remainder of the public record

SEEKING CLARIFICATION

- .j Agency can seek clarification if the request is not reasonably clear or does not request identifiable records
- .j Should explain why need clarification

- .j If Requestor fails to clarify then agency need not respond any further
- .j How long to wait for the clarification?
- .j Should send a closing letter

ESTIMATE OF TIME FOR FURTHER RESPONSE

- .j Estimate must be reasonable
- .j Agency's burden to show why an estimate of time is reasonable
- .j Factors to consider:
 - .j Clarification is necessary
 - .j Search for records
 - .j Assemble and review records
 - .j Provide notice to affected third parties/agencies
 - .j Prepare an exemption log
 - .j Perform other essential agency functions
 - .j May have multiple extensions
 - .j Good practice to explain why additional time is needed
 - .j Installments

SEARCHING FOR RECORDS

- .j Search Terms
- .j May ask the Requestor to suggest search terms
- .j Must conduct an "adequate search" for responsive records
- .j Type of Format (paper, electronic, etc.)
- .j Records of current and former staff/officials
- .j Possible locations (file cabinets, website, audio, home computers, smartphones, etc.)
- .j Search should be reasonably calculated to uncover responsive records
- .j Search should follow obvious leads to possible locations where records are likely to be found
- .j Document Search Efforts
- .j Agency bears the burden of proof to show the adequacy of the search

INSTALLMENTS

Agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.56.080.

- .j Can charge for each installment
- .j If installment is not claimed or reviewed, agency does need to fulfill remainder of request
- .j Cannot use installments to delay access

DENYING THE REQUEST OR REDACTING RECORDS

- .j Remember the presumption!
- .j If a public record is withheld from disclosure in its entirety or partially, then the agency must cite to a statutory "exemption."

EXEMPTIONS

- .j Exemptions are narrowly construed
- .j Only withhold exempt information in the record and release remaining portion of the record
- .j Agency bears the burden of proof that an exemption applies
- .j Should Provide an Exemption Log
- .j Hundreds of different exemptions listed in various statutes
- .j FERPA and Juvenile Justice Care Agency statutes

EXEMPTION LOG

- .j Also known as a Withholding Index
- .j Contents
 - .j Type of Record
 - .j Date of Record
 - .j Number of Pages of Record
 - .j Author/Recipient of Record
 - .j Statute that is the Basis of the Exemption (**Mandatory**)
 - .j Explanation on How the Exemption Applies (**Mandatory**)
- .j Does not need to be elaborate, but should allow requestor to make a threshold determination if the exemption was properly invoked

FEES

- .j No fees for searching, reviewing, or redacting records
- .j No fees for inspection of records
- .j Fees for copying records
- .j 15¢ per page or actual costs (can include staff salaries, benefits, general overhead or administrative costs)
- .j Charges must be reasonable and documented
- .j Fees for mailing records
- .j Deposit of up to 10%
- .j Payment prior to disclosure of records

ENFORCEMENT AND PENALTIES

- .j May have internal administrative review process
- .j Court Review
 - .j Civil Penalties within PRA
 - .j Per Day Penalty (Max \$100/day)
 - .j Attorney Fees/Costs
 - .j King County previously penalized over \$370,000 in per day penalties + over \$80,000 in attorney fees
 - .j Other Penalties Outside of PRA

PENALTY FACTORS:

§§ Factors that can reduce a penalty:

§§ A lack of clarity in the PRA request.

§§ The agency's prompt response or legitimate follow-up inquiry for clarification.

§§ The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.

§§ **Proper training & supervision of the agency's personnel.**

§§ The reasonableness of any explanation for noncompliance by the agency.

§§ The helpfulness of the agency to the requester.

§§ The existence of agency systems to track and retrieve public records.

PENALTY FACTORS: AGGRAVATING

§§ Aggravating factors (factors that can increase a penalty):

§§ A delayed response by the agency, especially in circumstances making time of the essence.

§§ Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions.

§§ Lack of proper training & supervision of the agency's personnel.

§§ Unreasonableness of any explanation for noncompliance by the agency.

§§ Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.

§§ Agency dishonesty.

§§ The public importance of the issue to which the request is related, where the importance was foreseeable to the agency.

§§ Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency.

§§ A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

§§ The inadequacy of an agency's search for records.

GOOD FAITH

If attempted to comply in good faith with the PRA but:

.; **Failed to disclose** a public record then public agency is liable to the requestor for the civil penalties.

.; **Disclosed** a public record then public agency is not liable.

.; There are exceptions

LESSON 2: RECORDS RETENTION

LAWS FOR RECORDS MANAGEMENT

.; 40.10 Essential Records

.; 40.14 Preservation and Destruction of Public Records

.; 40.16 Penal Provisions for the Intentional Destruction of Public Records

.; 40.20 Reproduced Records

.; 42.56 Public Records Act

REGULATIONS FOR RECORDS MANAGEMENT

.; 434-600 Promulgation

.; 434-610 Definitions

.; 434-615 Custody of Public Records

.; 434-620 Powers and Duties (State Archivist)

.; 434.624 Powers and Duties (State Records Committee)

.; 434-626 Powers and Duties (State Agency Records Officers)

.; 434-630 Powers and Duties (Local Records Committee)

.; 434-635 Local Records Disposition Authority

.; 434-640 Methods of Records Disposal

.; 434-660 Standards for Public Records

.; 434-662 Preservation of Electronic Records

.; 434-663 Imaging Systems (Standards)

.; 434-670 Local Records Grants Program

.; 434-677 Security Microfilm (Standards)

.; 434-690 Archives (Public Records Access)

WHAT IS A PUBLIC RECORD?

Any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO specifications, or other document, regardless of physical form or characteristics, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business, and legislative records as described in RCW 40.14.100.
RCW 40.14.010

RECORDS RETENTION SCHEDULES

Public records must be retained in accordance with records retention schedules approved by the Local Records Committee

.; See also FERPA Requirements

.; Once timeframe has been met, agency can destroy or transfer records to the Washington State Archives as outlined in the records retention schedule

PRIMARY V. SECONDARY COPIES

.; Primary Copy

.; Generally is the original record sent or received

.; Serves as the official record

.; Must be retained in accordance with the retention schedules

.; Secondary Copy

- .j Copies/duplicates of primary records which may be discarded when no longer needed for agency business

RETENTION VALUE

- .j Record with Retention Value
- .j Must be retained for specified retention period
- .j Public records requests – retain for 2 years after fulfilled
- .j Work Orders – retain for 3 years
- .j Record with minimal Retention Value
- .j Retain until no longer needed for agency business then destroy
- .j Convenience copies
- .j Transitory Records
- .j Short term value, not needed as evidence of a business transaction, not covered by a specific record schedule
- .j Preliminary drafts (in many cases)
- .j Cookies in the kitchen notices

RETENTION SCHEDULES

- .j Audit Findings
- .j Lawsuits
- .j Criminal Sanctions

CASE STUDY

- .j Former county auditor accused of shredding public documents
- .j Charged initially with two felony counts of injury to public records
- .j Admitted to asking staff to shred documents, which included vouchers related to unauthorized personal expenses
- .j Pled guilty to attempted injury of public records and sentenced to 168 hours of community service and ordered to pay county \$62,000 in restitution

RECORDS RETENTION OVERVIEW

- .j Which public records to retain
- .j How long to retain the public records
- .j Once retained for required period, determine if public record must be destroyed or transferred

LESSON 3: OPEN PUBLIC

OPEN PUBLIC MEETINGS ACT: PURPOSE

- .j Public entities are agencies of the public that exist to aid in the conduct of the people’s business. Their actions are to be taken openly and deliberations conducted openly.
- .j Allows public view of the “decision-making process”
- .j Act is to be “liberally construed”

OMPA APPLIES TO PUBLIC AGENCIES AND GOVERNING BODIES

- .j School Boards are Public Agencies
- .j Applies to Sub-Agencies
- .j Created by or pursuant to statute, ordinance or other legislative act
- .j Possesses some aspect of policy or rule-making authority
- .j Applies to Governing Bodies
- .j A 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
- .j Unclear when a committee acts on “behalf of” the governing body
- .j AGO Opinion: exercises actual or de facto decision-making authority for the governing body, rather than providing advice or information to the governing body

MEETINGS DECLARED OPEN AND PUBLIC

All **meetings** of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency.
RCW 42.30.030. (There are exceptions.)

WHAT IS A MEETING?

“Meeting” means meetings at which action is taken.

WHAT IS ACTION?

“Action” means the transaction of the official business of a public agency by a governing body.

- .j Public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.

WHAT IS FINAL ACTION?

“Final action” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

- .j Must be taken in public even if deliberations were in closed session
- .j Secret ballots are not allowed

MEETINGS WHERE ACTION IS TAKEN

- .j Physical presence is not required
- .j Email or phone
- .j Gathering may not be titled “meeting”
- .j Retreats, workshops, study sessions
- .j No meeting occurs if there is no quorum
- .j A majority of the members of a governing body may travel together or gather for purposes other than a regular meeting or a special meeting; PROVIDED, that they take no action

- .j Exceptions
- .j Quasi-judicial matters, matters governed by APA, collective bargaining, disciplinary proceedings

TYPES OF MEETINGS

- .j Regular
- .j Special
- .j Emergency

REGULAR MEETINGS

“Regular” meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule.

- .j District’s regular meetings are held at 6:00 p.m. on the 4th Tuesdays of each month in the board office
- .j Agenda to made available online no later than 24 hours in advance of the published start time of meeting
- .j SHB 2105 Effective June 12, 2014

SPECIAL MEETINGS

“Special” meeting is any meeting that is not a regular meeting.

- .j Called by presiding officer or a majority of the members

SPECIAL MEETINGS: NOTICE

- .j Written notice to **each member** of the governing body
- .j Waived if a member submits a written waiver of notice or member is present at the time the meeting convenes
- .j Notice delivered to each **local newspaper** of general circulation and **local radio or television station** that has on file with the governing body a written request to be notified of such special meeting or of all special meetings
- .j Notice **posted** on the agency's web site
- .j Notice **prominently displayed** at the main entrance of the agency's principal location and the meeting site
- .j Such notice must be delivered and posted and at least **twenty-four hours** before the time meeting unless there is an emergency
- .j Notice must specify the **time and place** of the special meeting and the **business to be transacted**

EMERGENCY MEETINGS

No Notice Required

- .j **Injury or damage to persons or property** or the likelihood of such injury or damage, when time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage.
- .j **Reason of fire, flood, earthquake**, or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency.

MEETING MINUTES

- .j Minutes of public meetings must be promptly recorded and open to public inspection
- .j No required format of minutes
- .j RCW 42.32.030 (Statute not within OPMA)

ATTENDANCE AT MEETINGS

A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his or her name and other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

RCW 42.30.040.

- .j May set reasonable rules of conduct
- .j No public comment period required by OPMA
- .j Not limited to members of public within the governing body’s jurisdiction
- .j Cameras and tape recorders are permitted unless disruptive

INTERRUPTIONS AND DISRUPTIONS

- .j Render the orderly conduct of such meeting unfeasible
- .j Order those creating disruption to be removed
- .j Order the meeting room cleared and continue in session or may adjourn the meeting and reconvene at another location selected by majority vote of the members
- .j Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session

EXECUTIVE SESSION

- .j Part of a regular meeting or special meeting that is closed to the public
- .j Limited to specific purposes set forth in OPMA
- .j Announce purpose of executive session and time it will end (may be extended)
- .j No minutes required
- .j See handout

EXECUTIVE SESSION: LITIGATION OR POTENTIAL LITIGATION

- .j Legal counsel representing agency must be present
- .j Discussion must concern litigation or potential litigation that the agency, governing body, or one of its members is or is likely to become a party
- .j Public knowledge of the discussion would likely result in adverse legal or financial legal consequence to the agency.

PENALTIES FOR VIOLATING OPMA

- .j \$100 civil penalty against each member (personal liability)
- .j Costs and attorney fees
- .j Agency may obtain also if action was frivolous and advanced without reasonable case

- .; Action taken at meeting can be declared null and void
- .; Must retrace steps

Ms. Marchant conducted a question and answer period at the end of the training. Most questions pertained to personal devices use, community approaching the board members individually in public and determination of what is considered a “meeting”. Ms. Marchant answered everyone’s questions.

V. Training Adjournment

TRAINING ADJOURNED: The meeting adjourned at 7:40 p.m.

President

Superintendent

Date