PRA – AGENCY OBLIGATIONS: A STARTING POINT

CHECKLIST

For Local Government Success

MRSC

The Public Records Act (PRA) establishes basic procedural requirements that each agency must adopt. Use this checklist as a start for PRA compliance.* *For more information and resources visit www.mrsc.org/opmapra.*

- [ ] **Assign a Public Records Officer (PRO)**
  Post the PRO's contact information at the agency's place of business, on the agency's website (if any), and in any relevant publications. RCW 42.56.580.

- [ ] **Adopt a Local Public Records Act Policy**
  The local PRA policy should outline reasonable regulations for the agency's handling of public records requests, such as the agency's response process when it receives a records request. The policy must be prominently displayed. RCW 42.56.040.

- [ ] **Publish a List of Exemptions and Prohibitions Found Outside the PRA**
  Publish a list of exemptions and prohibitions to disclosure other than those listed in the PRA. RCW 42.56.070. Examples of these other types of exemptions and prohibitions can be found in Appendix C of MRSC's *Public Records Act* publication.

- [ ] **Maintain an Index of Public Records**
  Maintain a current index of many types of agency records unless to do so would be unduly burdensome for the agency. If it's unduly burdensome, the agency must adopt a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations. RCW 42.56.070.

- [ ] **Adopt a PRA Fee Schedule**
  Establish fees for PRA costs, including costs for hard copies, electronic copies, and mailing costs. RCW 42.56.070 and RCW 42.56.120.

- [ ] **Provide for a Review Procedure for any Denial of Records**
  An agency must provide for review of a denial to inspect records. The review can be conducted by the PRO's supervisor, the agency's attorney, or any individual designated by the agency. Review is deemed complete two business days after the initial denial. RCW 42.56.520.

- [ ] **PRA Training Requirements, Effective July 1, 2014 (see Office of the Attorney General: *Open Government Training Act Q & A*):**
  - Every local elected official and every local government PRO must receive records training (PRA training concerning chapter 42.56 RCW and records retention training concerning chapter 40.14 RCW).
  - This training must be completed no later than 90 days after these elected officials and PROs take their oath of office or assume their duties. They must also receive "refresher" training at intervals of no more than four years.

*DISCLAIMER: This checklist is meant to provide summary information on basic procedural requirements of the PRA; the checklist is not intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

PRA – HOW TO PERFORM AN ADEQUATE SEARCH FOR RECORDS

PRACTICE TIPS

For Local Government Success

MRSC

The Public Records Act (PRA), chapter 42.56 RCW, requires that agencies perform an adequate search to locate records responsive to a public records request. The PRA itself doesn't provide detailed provisions on how to conduct an adequate search. Rather, such requirements can be found in court decisions interpreting the PRA, including *Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702 (2011). These practice tips are based on such case law. Use these tips to guide your agency's search for responsive records.* *For more information and resources visit* **www.mrsc.org/opmapra.**

Adopt a Standard Methodology to Search for Records

(This methodology will apply to each search.)

1	**Records organization.** Understand how each department within your agency organizes and retains its records.
2	**Implement an effective system for locating and collecting responsive records.** With an effective system in place, an agency can more efficiently find records responsive to a PRA request and more easily defend itself against a challenge that its search for records was inadequate, especially in situations in which the agency finds no records responsive to a PRA request. a. How does the agency inform applicable staff and officials about a PRA request? **TIP:** Consider having the Public Records Officer (PRO) email the records request to applicable staff and officials and require them to actively respond regarding whether they have responsive records via the "voting" function in Microsoft Outlook (or equivalent). b. Who searches for the records? **TIP**: If the PRO searches for records, consider developing a "tip sheet" identifying locations to search for commonly-requested records, listing commonly-used search terms, and providing other key information (see below).

Specific Search Tips For Processing PRA Requests

(These tips are generally applicable to all requests and some are particularly useful for non-routine requests.)

1	**Be clear on what the requester is seeking.** • In determining the scope of the search, take care not to interpret the request too narrowly. • If the request is unclear, seek clarification from the requester. • Document any communication the agency has with the requester.

*DISCLAIMER: These practice tips are meant to provide tips on how to perform an adequate search; the tips aren't intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

2	**Inform staff and officials of PRA requests in a timely manner.** • As soon as possible after receiving a PRA request, alert all agency staff and officials who may possess or know about any records responsive to the request. • Consider providing a PRA "hold memo" to applicable staff and officials regarding all responsive records, including those records scheduled for destruction under the agency's records management protocol. • The PRO should work closely with the agency's legal counsel, as needed, early and throughout the process so the legal counsel can provide guidance on any issues as they arise.
3	**Ask the right staff the right questions.** • Create a list of individual staff, officials, and departments that may have responsive records; meet with those staff and officials to discuss the PRA request. • Brainstorm and list potential record types and locations. • Develop search terms to use in locating responsive records.
4	**Search every place a record is reasonably likely to be located.** • Think through whether records may be located in multiple records systems (e.g., agency and personal computers, hard copy files, voicemails) and search those locations if responsive records may exist there. • If the requester provides the agency with suggested search terms, don't limit your agency's search only to those terms. Instead, conduct the search based on all search terms that are reasonably likely to uncover all responsive records. • Reasonableness and adequacy of search are key: the agency must show that it made good faith search efforts that were ***reasonably calculated to uncover all responsive records***.
5	**Follow any obvious leads as they are uncovered.**
6	**Document, document, document your search. (Show your work.)** • Document which search terms were used and which locations were searched. • If challenged, the agency can include such search details in declarations defending the agency's search. • Documenting search efforts at the time of the search avoids having to reconstruct the search at a later date, maintains accurate search information, and reduces the time and effort required by staff to show the search was adequate. • Effectively track PRA requests, searches, and responses through electronic means (e.g., software) and/or on a combined records request/search/tracking form.
7	**Consider informing the requester of the locations searched and the search terms used.**

Take Away Points

1. A search is measured by the standard of reasonableness.
2. An adequate search is a prerequisite to an adequate response.

Key Questions for Your Agency

1. Was the search reasonably calculated to uncover all responsive records?
2. Can my agency effectively show that an adequate search was conducted?

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ELECTRONIC RECORDS – PRA AND RECORDS RETENTION

PRACTICE TIPS

For Local Government Success

MRSC

These practice tips are intended to provide practical information to local government officials and staff about electronic records and requirements under the Public Records Act (PRA) (chapter 42.56 RCW) and records retention law (chapter 40.14 RCW). The tips are based on real-world experiences, as played out in our courts and otherwise.*

For more information and resources visit **www.mrsc.org/opmapra.**

Key Initial Point

In the context of these practice tips, it's important to keep in mind that the vast majority of records – including electronic records – that agencies deal with are public records. That said, it's also important to recognize that: (1) not all records prepared, owned, used, or retained by an agency are public records; and (2) not all public records have retention value.

Key Terms as Used in These Practice Tips

Electronic record: An electronic record (e-record) is a record you can access through an electronic device. E-records include documents, emails, voice messages, texts, tweets, instant messages, photos, and videos.

Electronic device: An electronic device (e-device) is any device you can use to access e-records. E-devices include desktop computers, laptops, smart phones, other cell phones, and tablets.

Remember These General Principles for Electronic Records

1. **Think *before* you "POUR."** Regardless of the e-device you use to create or access an e-record, if that e-record, no matter its form, is prepared, owned, used, or retained by the agency, and its content relates to the conduct of government or the performance of any governmental or proprietary function, it's a public record.

2. **Establish agency policies/procedures.** Agencies should adopt effective policies and/or procedures related to e-communications and e-devices, including appropriate use and retention requirements.

3. **Failure to comply can be costly.** Knowledge of, and compliance with, the rules that apply to production and retention of e-records and use of e-devices is essential, because even inadvertent mistakes can result in serious consequences for your agency.

   What kind of consequences? If a PRA requester wins in court, an agency will be subject to daily penalties ranging from $0-$100 per day (the trial court decides the amount), and the court will award attorney fees and costs to the requester. In the context of records retention requirements, it's a

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felony to willfully and unlawfully destroy public records. Also, lack of compliance commonly leads to lost productivity because agency resources are diverted from other tasks to defend the agency's actions, as well as to a loss of public trust in the agency's commitment to open government. See, e.g., RCW 42.56.550 (PRA penalties), chapter 40.16 RCW (injury to and misappropriation of a public record).

4. **Be aware of metadata.** Metadata is data about data, or hidden information, about e-records that's automatically created by software programs, and which describes the history, tracking, and/or management of an e-record. Metadata is subject to the PRA, but a requester must specifically ask for metadata for an agency to be required to produce it. See, e.g., *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147-52 (2010).

E-DEVICE

Should I Use My Agency E-Device or My Personal E-Device for Agency Business?
It's best to use only agency-issued e-devices to conduct agency business. By doing so, you allow your agency to properly retain its public records and locate those records in response to a PRA request. Also, you eliminate the basis for a search of your personal e-devices in response to a PRA request (see below).

But What If I Happen to Use a Non-Agency E-Device to Conduct Agency Business?
Preferred option: If agency staff and officials will be using e-devices to conduct agency business off-site and/or remotely, we recommend that your agency set-up a remote system that allows agency personnel to securely access the agency's network via non-agency devices.

Alternative option if your agency doesn't have such a remote access system: If you don't have the option of accessing your agency's system remotely as above described, it's critical to ensure that agency and non-agency e-records are easily distinguishable and not mixed together on your non-agency e-device. This can be done, for example, by keeping all of your agency related e-files in a separate folder.

But keep in mind ... If you use a non-agency e-device to conduct agency business, that device could be subject to a search in response to a PRA request.

Don't I Have Privacy Rights Related to My Personal E-Devices?
Yes, but those rights are conditional when public records are involved. For example, there have been PRA lawsuits in which courts have ordered searches of the personal computers of agency officials for public records that may have been improperly withheld.

TEXT MESSAGE

Can I Send Agency-Related Text Messages from a Cell Phone or Smartphone?
Yes, but keep in mind that texting creates unique challenges. If you use texting (or instant messaging) to conduct agency business, key considerations for you and your agency relate to who has custody and control of the record, and how to access and retain such records. Commonly, the service provider (e.g., phone company) will retain texts only for a limited time (e.g., 5-10 days).

Recommendation: If texting is used to conduct agency business, consider adopting and enforcing an agency policy that limits texting to those for whom it's truly necessary (e.g., for specified law enforcement and emergency management functions). Also, use capture tools (i.e., software) to capture all texts and retain those that have retention value.

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EMAIL

Should I Use My Agency Email Account or My Personal Email Account for Agency Business?

It's best to use only an agency-issued email account for agency business. Just like use of agency e-devices, use of agency email accounts allows your agency to properly retain its emails and locate them in response to a PRA request. This principle applies as well for other e-communications related to agency business (e.g., texts, instant messages, tweets).

But What If I Receive an Email on My Personal Email Account That Relates to Agency Business?

If this occurs, forward that email to your agency email account and advise the sender that you don't use your personal email address to conduct agency business, and to send any future agency-related emails to your agency email address.

But What If My Agency Doesn't Have Agency-Issued Email Accounts?

Urge your agency to establish an email system that allows the agency to assign individual addresses to each official and staff member. If the agency doesn't set up an agency email system, you should create a separate email account that's used solely for agency business (e.g., commissioner-jones@gmail.com, councilmember-robertson@msn.com).

And keep in mind ... If you use a non-agency email address/account, consult with your agency's public records officer and legal counsel to address issues such as determining how those records will be retained in compliance with records retention law, and how the records will be located and made available in response to a PRA request.

VOICE MAIL

Do I Have to Keep Voice Mail Messages?

If a voice mail message relates to agency business and it has retention value, that message needs to be captured electronically and, if that's not possible, the content of the message needs to be saved in some other manner.

Recommendation: The agency should have a voice message system that allows it to capture voice mail messages electronically, such as through an integrated voice mail and email system, so all voice messages are created also as e-files that become part of the email system. If that's not possible, it's recommended that the agency save voice mail messages through some other means.

SOCIAL MEDIA

What Are Some Public Records Considerations Related to Social Media?

Facebook and Twitter, for example, can be effective tools to connect with the public. But, if your agency is going to create social media accounts, public records considerations need to be thought through and addressed. Unless the agency is posting only secondary copies of agency records to, for example, the agency's Facebook page or Twitter feed, it's advisable to presume that all posts, comments, and tweets are public records and to consider how to manage posts and tweets, retain such records, and use software tools to capture those records.

Recommendation: Don't use your personal Facebook page, Twitter feed, or blog for agency business. It's advisable for agencies to have clear and enforceable policies regarding such activities. Also, if you're an incumbent elected official who is a candidate, don't mix your election activities with agency business.

*DISCLAIMER: These practice tips are meant to provide practical information to local government officials and staff about electronic records and requirements under the PRA and records retention law. The tips aren't intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

August 2014

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ELECTRONIC RECORDS – PRA AND RECORDS RETENTION

DO'S AND DON'TS

For Local Government Success

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These Do's and Don'ts are intended to provide summary guidance related to use of electronic records and electronic devices in compliance with the Public Records Act (PRA) (chapter 42.56 RCW) and records retention law (chapter 40.14 RCW). For a more thorough analysis of these issues, please review our related guide: *Electronic Records – PRA and Records Retention Practice Tips.** *For more information and resources also visit* **www.mrsc.org/opmapra**.

	Do	Don't
Agency Computer	Do use your agency computer to conduct agency business. This allows your agency to retain records appropriately and locate such records in response to a PRA request.	Don't delete records from your agency computer (or any computer) unless you're certain the records aren't public records, or the records are past their required record retention period. (If you have any doubt about deleting records, check with your agency's legal counsel.)
Personal Computers	Do use your personal computer to remotely access your agency's file server and email server (if your agency allows for such remote access).	Don't use your personal computer to conduct agency business unless you do so by accessing your agency's server(s) remotely. If that's not possible and you use your personal computer to conduct agency business, make sure that you: • Retain all public records with retention value; and • Provide those records to your agency so the agency can retain the records appropriately and make them available if a PRA request is made for such records.
Agency Email Account	Do use your agency email account to conduct agency business. This allows your agency to retain its records appropriately and to locate such records in response to a PRA request.	Don't delete emails sent or received from your agency email account unless you're certain the emails aren't public records, or the emails are past their required record retention period. (If you have any doubt about deleting emails, check with your agency's legal counsel.)

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Personal Email Account	Do forward any agency-related emails received on your personal email account to your agency email account. Do instruct the sender that you don't conduct agency business via your personal email account(s), and to send all emails related to agency business to your agency email address.	Don't use your personal email account for agency business, unless your agency doesn't provide agency email accounts. If you must use a personal email account for agency business, set-up a unique email account solely for agency business, clearly segregate agency-related emails from personal emails, and provide all agency-related emails to your agency so those records can be retained appropriately and made available if a PRA request is made for such records.
Texting on Agency Devices and Personal Devices	Do follow your agency policy related to texting. If your agency doesn't have a policy, make sure you're retaining all agency-related text messages for their full retention period. If you send or receive agency-related text messages via a non-agency device, provide those messages to your agency so they can be retained appropriately and made available if a PRA request is made for such records.	Don't text in violation of your agency's policy. Don't use texting for agency-related business without a clear understanding of how those messages are being retained by the provider (e.g., phone company) and by your agency. Text messages, like emails, can be public records that must be retained by your agency, and such records may need to be provided in response to a PRA request.
Voice Mail Messages on Agency Phones and Personal Phones	Do, if possible, capture all agency-related voice mail messages through an integrated voice mail and email system. If that's not possible, save voice mails with retention value through other means.	Don't delete all agency-related voice mails once you have listened to them. Like email and text messages, voice mails can be public records that must be retained by your agency, and such records may need to be provided in response to a PRA request.
Agency Social Media	Do try to post only secondary copies of content on agency social media sites. That way, the agency won't have to separately retain all of the content of the social media sites. If that's not possible, your agency should consider purchasing software that captures and archives social media sites.	Don't set up and use an agency social media site, and don't edit and delete content on your agency's social media site(s), without complying with records retention and PRA requirements.
Personal Social Media	Do abstain from discussing agency business via your personal social media accounts. If you post or exchange agency-related communications via your personal site, make sure you comply with records retention and PRA requirements.	Don't conduct agency business via your personal social media site. Agency-related records can be public records, subject to retention requirements and the PRA, even if the records are located on your personal social media site. If you're an incumbent elected official who is a candidate, don't mix your election activities with agency business via use of social media.

*DISCLAIMER: These Do's and Don'ts are meant to provide summary tips related to use of electronic records and electronic devices in compliance with the PRA and the records retention law. The tips aren't intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

August 2014

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OPMA – AGENCY OBLIGATIONS: A STARTING POINT

PRACTICE TIPS

For Local Government Success

MRSC

The basic requirement of the Open Public Meetings Act (OPMA) is that meetings of governing bodies be open and public. Use these practice tips to guide your agency's OPMA compliance.* For more information and resources visit www.mrsc.org/opmapra.

Basic Requirements

- **All meetings open and public.** All meetings of governing bodies of public agencies must be open to the public, except for certain exceptions outlined in the OPMA. RCW 42.30.030.
- **Quorum.** Generally, a meeting occurs when a quorum (majority) of the governing body is in attendance and action is taken, which includes discussion or deliberation as well as voting. RCW 42.30.020(2) & (3).
- **Attendees.** All persons must be permitted to attend and attendees cannot be required to register their names or other information as a condition of attendance. Disruptive and disorderly attendees may be removed. RCW 42.30.040 & .050.
- **No secret ballots.** Votes may not be taken by secret ballot. RCW 42.30.060(2).
- **Adoption of ordinances.** Ordinances, resolutions, rules, regulations, and orders must be adopted at a public meeting or they are invalid. RCW 42.30.060(1).

Position in Agency	Required to Comply
Member of a governing body City or Town Councilmember or Mayor County Commissioner or County Councilmember Special Purpose District Commissioner/Board Member	Yes
Member of a subagency created by ordinance or legislative act, e.g.: Planning Commission Library Board Parks Board Civil Service Commission	Yes
Member of a committee Committees that act on behalf of the governing body, conduct hearings, or take testimony or public comment	Yes
Agency staff	No

Penalties for Noncompliance

- **Actions null and void.** Any action taken at a meeting which fails to comply with the provisions of the OPMA is null and void. RCW 42.30.060(1).
- **Personal liability.** Potential personal liability of $100 for any member of a governing body who attends a meeting knowing that it violates the OPMA. RCW 42.30.120(1).
- **Agency liability.** Any person who prevails against an agency in any action in the courts for a violation of the OPMA will be awarded all costs, including attorney fees, incurred in connection with such legal action. RCW 42.30.120(2).

OPMA Training Requirements, Effective July 1, 2014

- Every member of a governing body of a public agency must complete training requirements on the OPMA within 90 days of assuming office or taking the oath of office.
- In addition, every member of a governing body must complete training at intervals of no more than four years as long as they remain in office.

*DISCLAIMER: These practice tips are meant to provide summary information on basic agency obligations of the OPMA; the practice tips are not intended to be regarded as specific legal advice. Consult with your agency's legal [illegible]

OPMA – EXECUTIVE SESSIONS

CHECKLIST

For Local Government Success

MRSC

The Open Public Meetings Act (OPMA) requires specific steps be taken in order to hold an executive session. Use this checklist to guide your agency's compliance with the OPMA related to executive sessions.* *For more information and resources visit www.mrsc.org/opmapro.*

	Requirement	Completed/ Applicable
Meeting	An executive session can only be held as part of a regular or special meeting.	☐
Purpose	The presiding officer announces in open session the purpose of the executive session.	☐
End Time	The presiding officer announces in open session the time the executive session will end.	☐
Legal Counsel	Legal counsel is present during the executive session, if required. (See topics below and on the next page for discussions that require the presence of legal counsel.)	☐
Confidentiality	At the start of the executive session, participants are reminded that discussions are confidential.	☐
Topics	Related to local governments, the following topics set forth in RCW 42.30.110(1) can be discussed in executive session:	
	• Matters affecting national security. RCW 42.30.110(1)(a).	☐
	• Lease or purchase of real estate if there's a likelihood that disclosure would increase the price. RCW 42.30.110(1)(b).	☐
	• Consideration of the minimum offering price for sale or lease of real estate if there's a likelihood that disclosure would decrease the price. RCW 42.30.110(1)(c). ☐ **Note:** Final action selling or leasing public property must be taken in open session.	☐
	• Negotiations on the performance of a publicly bid contract. RCW 42.30.110(1)(d). See back of page.	☐
	• Complaints or charges brought against a public officer or employee. RCW 42.30.110(1)(f). ☐ **Note:** At accused's request, discussion must be in open session.	☐
	• Qualifications of an applicant for public employment. RCW 42.30.110(1)(g). See back of page.	☐
	• Performance of a public employee. RCW 42.30.110(1)(g). See back of page.	☐
	• Qualifications of an applicant/candidate for appointment to elective office. RCW 42.30.110(1)(h). See back of page.	☐
	• Agency enforcement actions. RCW 42.30.110(1)(i). See back of page. ☐ **Note:** Requires presence of legal counsel.	☐
	• Current or potential litigation. RCW 42.30.110(1)(i). See back of page. ☐ **Note:** Requires presence of legal counsel.	☐
	• Legal risks of current or proposed action. RCW 42.30.110(1)(i). See back of page. ☐ **Note:** Requires presence of legal counsel.	☐
Extended End Time	If the executive session is not completed by the originally announced end time, the presiding officer announces the extended end time in open session before returning to executive session.	☐
Resumption	Open session is not resumed until after the announced end time.	☐

eeting Date _____ Form Completed By _____

Attendees _____

*DISCLAIMER: This checklist is meant to provide summary information on executive sessions; the checklist is not intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

May 2014

OPMA – EXECUTIVE SESSION PROCEDURES

PRACTICE TIPS*

For Local Government Success

MRSC

An executive session must begin after a regular or special meeting is convened and adjourn before the meeting ends. While an executive session will therefore always be a part of a regular or special meeting, it is possible to hold a special meeting for the sole purpose of holding an executive session.

To start, the chair must announce the executive session to those in attendance at the meeting, including: (1) the purpose of the executive session; and (2) the time when the executive session will end.

Announced Purpose and Topics of Discussion: 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 must contain enough detail to identify the purpose as falling within the limits of the law.

It would not be sufficient, for example, for a meeting chair to declare simply that the governing body 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.

Attendance of legal counsel – Legal counsel must be present at an executive session, either in person or remotely via a device that allows two-way communication, to discuss enforcement actions, current or potential litigation, or the legal risks of current or proposed action. "Potential litigation" means 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; or the agency reasonably believes may be commenced by or against the agency, the governing body, or a member acting in an official capacity. Discussion of the "legal risks" of a current or proposed action can only occur in executive session if public discussion of those legal risks is likely to result in an adverse legal or financial consequence to the agency.

Notes for Specific Discussion Topics

- Contract Performance – Review of contract performance of publicly bid contracts may only be discussed in executive session when public knowledge of such consideration would likely cause increased costs.
- Qualifications of an applicant for public employment or review of performance of a public employee – If the governing body elects to take final action regarding hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action must be taken in open session.
- Qualifications of candidate for appointment to elective office – Candidate interviews and final action appointing a candidate to elective office must be in an open public meeting.
- Collective bargaining sessions – Collective bargaining sessions with employee organizations are not subject to the requirements of the OPMA. This means that discussions of these topics may occur in closed session, and it's not necessary for the governing body to follow the OPMA procedures before such discussions. This exemption applies to contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement or to that portion of a meeting during which the governing body is planning or adopting the strategy to be taken by the governing body during the course of any collective bargaining, professional negotiations, grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress.

Length of Session: 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 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 chair announced the executive session would conclude. If the executive session is not over at the stated time, it may be extended only if the chair announces to the public at the meeting place that it will be extended to a stated time.

Attendance: Attendance at an executive session need not be limited to the members of the governing body. Persons other than elected members may attend the executive session at the invitation of the governing body. Those invited should have some relationship to the matter being addressed in the executive session, or they should be in attendance to otherwise provide assistance to the governing body. Note that if the stated purpose for the executive session is to discuss litigation or potential litigation with the governing body's attorney, the presence of persons at the session who are not governing body members or agency staff may waive the attorney-client privilege.

Minutes: Minutes are not required to be taken at an executive session. If minutes or notes are taken during an executive sessior they may be subject to the disclosure requirements of the Public Records Act.

*DISCLAIMER: These practice tips are meant to provide summary information on executive sessions; these tips are not intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

May 2014

CITY COUNCIL

Speaker Sign-Up Sheet

January 14, 2016

NAME (PLEASE PRINT)	ADDRESS	TOPIC	PHONE/E-MAIL ADDRESS
✓ Tom Roush	2000 Alaskan Way #255 Sea. 98121	Pac. Ridge Zoning	206-229-6051

OPMA – ELECTRONIC COMMUNICATIONS

PRACTICE TIPS

For Local Government Success

MRSC

These practice tips are intended to provide practical information to local government officials and staff about electronic communications and requirements under the Open Public Meetings Act (OPMA), chapter 42.30 RCW. Electronic communications between members of an agency's governing body can implicate the OPMA, and these practice tips will help guide you in identifying and addressing key issues in this regard.* *For more information and resources visit* www.mrsc.org/opmapra

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An Email Exchange Can Constitute a Meeting

If you, as a member of the governing body (e.g., city council, board of commissioners, planning commission), communicate with other members of the governing body by email, keep in mind that email exchanges involving a majority of members of the governing body can constitute a "meeting" under the OPMA. This principle also applies to text messaging and instant messaging.

What types of email exchanges can constitute a meeting? If a majority of the members of the governing body takes "action" on behalf of the agency through an email exchange, that would constitute a meeting under the OPMA. Note that taking "action" under the OPMA can occur through mere discussion of agency business, and that any "action" may be taken only in a meeting open to the public. The participants in the email exchange don't have to be participating in that exchange at the same time, as a "serial" or "rolling" meeting can occur in violation of the OPMA.

Recommendations: As a member of the governing body, consider the following tips to avoid potential OPMA violations:

- Passive receipt of information via email is permissible, but discussion of issues via email by the governing body can constitute a meeting.
- An email message to a majority or more of your colleagues on the governing body is allowable when the message is to provide only documents or factual information, such as emailing a document to all members for their review prior to the next meeting.
- If you want to provide information or documents via email to other members of the governing body, especially regarding a matter that may come before the body for a vote, have the first line of the email clearly state: "For informational purposes only. Do not reply."
- Unless for informational purposes only, don't send an email to all or a majority of the governing body, and don't use "reply all" when the recipients are all or a majority of the members of the governing body.
- Alternatively, rather than emailing materials to your colleagues on the governing body in preparation for a meeting, have a designated staff member email the documents or provide hard copies to each member. It's permissible, for example, for a staff member to communicate via email with members of the governing body in preparation for a meeting, but the staff member needs to take care not to share any email replies with the other members of the governing body as part of that email exchange.

2

Phone Calls and Voice Messages Can Constitute a Meeting

As with email exchanges, if a majority of the members of the governing body is taking "action" (see above) on behalf of the agency through phone calls or a voice mail exchange, that would constitute a meeting. Such a "telephone tree" occurs, for example, when members call each other to form a majority decision. As above, the calls and messages can constitute a serial or rolling meeting.

3

Key Consideration Related to Conferring to Call a Special Meeting

Under RCW 42.30.080, a special meeting (in contrast to a regular meeting) may be called at any time by the presiding officer of the governing body or by a majority of the members of the governing body. In order to give effect to this authority granted under RCW 42.30.080, we believe it's permissible for a majority of the members of the governing body to confer outside of a public meeting for the sole purpose of discussing whether to call a special meeting. This includes conferring for that purpose via electronic communications (e.g., email).

4

Use of Social Media Can Implicate the OPMA

Question: If members of the governing body use social media (e.g., through a Facebook page or Twitter feed) to host a discussion about issues related to the agency, and the discussion includes comments from members of the governing body, could that violate the OPMA?

Answer: If the discussion includes comments from a majority of the members of the governing body, that discussion could constitute a public meeting under the OPMA. There's no authority under the OPMA regarding what would constitute adequate public notice – if that's even possible – for this kind of virtual meeting, so it's best to avoid this type of discussion on social media.

Recommendation: Social media can be an effective tool to solicit comments from the public, but social media shouldn't be used by your agency's governing body to collectively formulate policy.

5

Failure to Comply with the OPMA Can Be Costly

Violation of the OPMA can result in personal liability for officials who knowingly violate the OPMA and in invalidation of agency actions taken at a meeting at which an OPMA violation occurred. Attorney fees and court costs are awarded to successful OPMA plaintiffs. OPMA violations can also lead to a loss of public trust in the agency's commitment to open government.

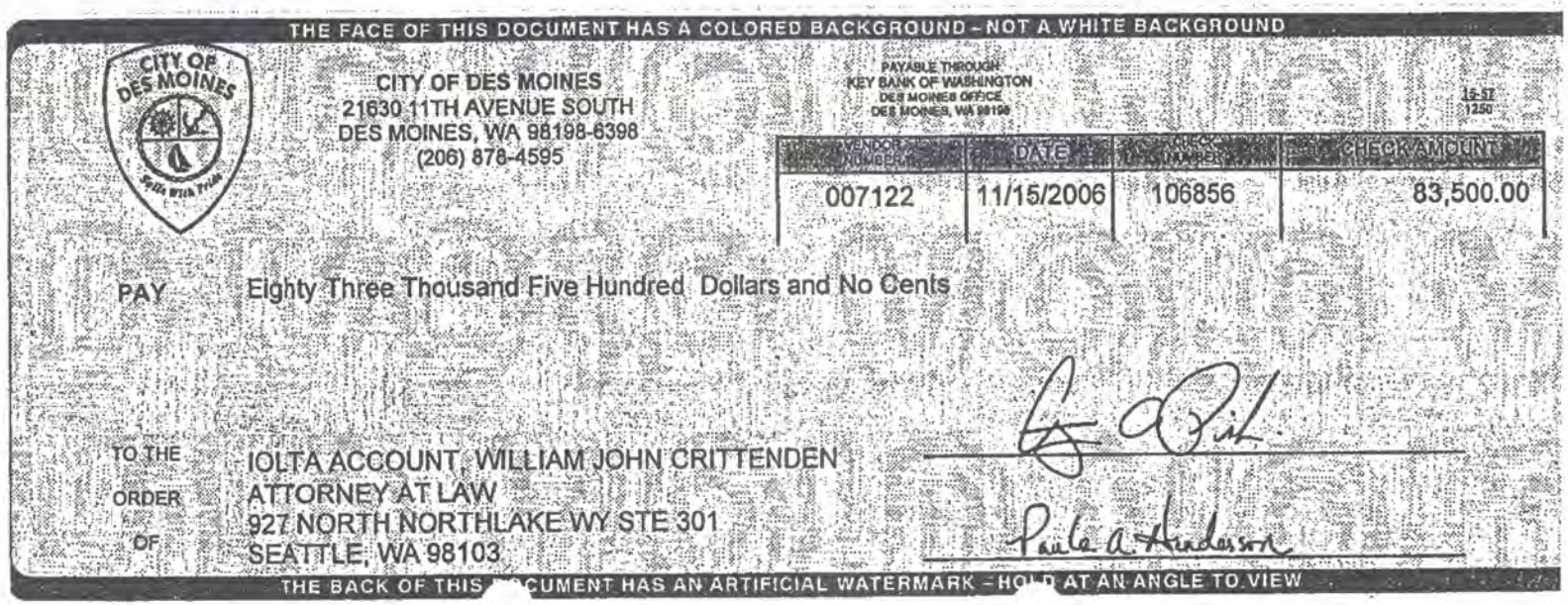
*DISCLAIMER: These practice tips are meant to provide practical information to local government officials and staff about electronic records and requirements under the OPMA. The tips aren't intended to be regarded as specific legal advice. Consult with your agency's attorney about this topic as well.

August 2014

E-Mail as a Public Record

Prepared by Pat Bosmans with help from MRSC for the City of Des Moines

Cost of Non-Compliance



THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND - NOT A WHITE BACKGROUND

CITY OF DES MOINES
21630 11TH AVENUE SOUTH
DES MOINES, WA 98198-6398
(206) 878-4595

PAYABLE THROUGH
KEY BANK OF WASHINGTON
DES MOINES OFFICE
DES MOINES, WA 98198

15-51
1250

VENDOR NUMBER	DATE	CHECK NUMBER	CHECK AMOUNT
007122	11/15/2006	106856	83,500.00

PAY Eighty Three Thousand Five Hundred Dollars and No Cents

TO THE ORDER OF
IOLTA ACCOUNT WILLIAM JOHN CRITTENDEN
ATTORNEY AT LAW
927 NORTH NORTHLAKE WY STE 301
SEATTLE, WA 98103

Paula A. Henderson

THE BACK OF THIS DOCUMENT HAS AN ARTIFICIAL WATERMARK - HOLD AT AN ANGLE TO VIEW

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Public Records Overview

- What is the Public Records Law
- E-Mail as part of public records

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The Law

- All e-mail messages that are sent or received that contain info about business activities, and that can function as evidence of business transactions are, regardless of recorded medium, part of the records of the City and must be managed in accordance with the General Records Act Chapter 40.14 RCW, the Public Disclosure Law, Chapter 42.56 RCW, Essential Records, Chapter 40.10 RCW and Penal provisions Chapter 40.16 RCW

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What Is a Public Record?

- Any "writing" that contains information relating to the conduct of government or the performance of any governmental or proprietary function.

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Property of the State of WA

- All public records are the property of the State of Washington (RCW 40.14.020) and may not be destroyed except according to a records retention schedule adopted pursuant to RCW 40.14.070)

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What Is a "Writing"?

- All forms of communication: written, audio, visual
- Includes: papers, audio recordings, photos, film, maps, charts, electronic databases, budgets, blueprints, etc.
- Includes e-mails
- Content, not medium, controls

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REMEMBER

- CONSIDER THE CONTENT OF THE EMAIL AND NOT THE FORM IT'S IN

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E-Mail May Be a Public Record

- Just a different form of writing – not a separate analysis
- Treat as any other written document
- Whether it is a public record is based on content of e-mail not fact it is an e-mail

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EMAIL THAT ARE RECORDS

- Policies and directives
- Correspondence or memos related to official business
- Work schedules and assignment
- Agendas and minutes of meetings
- Drafts of documents that are circulated for comment or approval

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Email as Records continued

- Any document that initiates, authorizes, or completes a business transaction
- Final reports or recommendations

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Retention of E-Mail

- If a public record, should be kept for retention period in General Retention Schedule based on content
- Remember, e-mails on home computers must be retained if public records

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Emails with no retention value

- Personal messages and announcements not related to official business
- Info – only copies or extracts of documents distributed for convenience or reference
- Published reference materials
- Copies of inter- or intra-agency memos, bulletins
- Announcements of social events, such as retirement parties or holiday celebrations

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Release of E-mails

- May be accessed and monitored in the normal course of business by system administrators, supervisors and support staff
- May be releaseable to the public
- May require special measures for privacy protection
- Are subject to discovery proceedings in legal acions

HINTS

- Generally speaking, the individual who sends an e-mail should maintain the record copy of the message.
- Put subject lines in e-mail so that you can file messages.
- E-mail should be filed in folders in your Outlook

FAQ: Can I print a message, and then delete them?

- Yes, but include the name of the sender, name of recipient, date and time of transmission and/or receipt. After the e-mail is printed retain it as you would if the document had come to you in a printed format.

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FAQ: What about 'drafts'?

- Draft documents or working papers that are circulated via e-mail, that propose or evaluate high-level policies or decisions and provide unique info that contributes to the understanding of major decisions of the agency should be preserved according to the retention schedule.

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FAQ: What about attachments?

- File them with other electronic documents on your PC or network and apply the appropriate retention schedule.

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FAQ: What about multiple copies of the same documents

- If you do not have the primary responsibility for the document and if you have no business need to retain it, the document is an informational copy and subject to deletion/destruction at will.

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FAQ: Do I need to keep the distribution lists?

- If you send to a distribution list, you must also keep a copy of the members of that list for as long as you are required to keep the message itself.

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