

**MINUTES OF THE MEETING OF THE COMMISSION**

**May 27, 2014**

The regular meeting of the Board of Commissioners of Public Utility District No. 1 of Whatcom County was called to order at 8:00 a.m. by Commissioner Jeff McClure. Said meeting was open to the public and notice thereof had been given as required by law. Those present included Commissioner Mike Murphy, Commissioner Paul Kenner and Legal Counsel Jon Sitkin. Staff: Steve Jilk, General Manager; Ann Grimm, Administrative Assistant; Brian Walters, Director of Utility Operations; Annette Smith, Director of Finance; Duane Holden, Manager of Construction and Facilities; Rebecca Schlotterback, Manager – Contracts and Regulatory Compliance; Alec Strand, Project Manager; Lew Gaskill, Accountant 1; Paul Siegmund, Manager of Automation and Technology Services; Fred Disch, Water Systems Supervisor. Public attending: Greg and Karen Brown, citizens and Rick Maricle, Phillips 66.

◆ **Public Comment**

None made.

◆ **Approval of the Meeting Minutes and Claims**

The Commissioners were presented with the Minutes of the regular meeting held May 13, 2014 and the following Claims of May 27, 2014.

<b>VENDOR NAME</b>	<b>AMOUNT</b>
BANK OF NEW YORK	- 706,945.75
BAY CITY SUPPLY	- 201.25
BONNEVILLE POWER ADMINISTRATION	- 811,399.00
BROWN, LARRY CONSTRUCTION	- 4,882.50
COMCAST	- 86.01
EDGE ANALYTICAL LABORATORIES	- 19.00
FEDERAL EXPRESS	- 4.76
FERNDALE ACE HARDWARE	- 87.76
FERNDALE LUBE	- 88.97
GASKILL, LOIS E	- 15.12
HARDWARE SALES, INC.	- 138.96
HARRIS GROUP, INC.	- 9,604.55
HD FOWLER CO, INC	- 109.15
INTERNAL REVENUE SERVICE	- 11,394.65
KCDA PURCHASING COOPERATIVE	- 45.35
LAPLAUNT, DAVID	- 108.70
NEOPOST, INC	- 748.65
NORTH COAST ELECTRIC COMPANY	- 730.46
PAYROLL	- 148,949.70
PLATT ELECTRIC SUPPLY CO	- 517.30
PROBUILD - OSO LUMBER	- 147.68
PUGET SOUND ENERGY, INC	- 662.76
PUMPTECH	- 1,546.13
RICOH USA	- 237.95
RICOH USA FINANCIAL SVC	- 152.18
SPECIALTY ENGINEERING, INC	- 30,789.89
SSC - SANITARY SERVICE COMPANY	- 401.22
WA FEDERAL VISA CARD MEMBER SERVICES	- 1,921.94
WA ST DEPT OF L&I BOILER	- 199.40
WA ST DEPT OF REVENUE	- 70,691.30
WASHINGTON ENVIRONMENTAL	- 560.00
WESTERN CONFERENCE OF TEAMSTERS	- 5,365.50
WHATCOM FARMERS CO-OP	- 439.54
WILLIAM SCOTTSMAN	- 1,017.43
<b>GRAND TOTAL</b>	<b>- \$1,810,210.51</b>

**ACTION:** Commissioner Kenner motioned to approve the Minutes of the regular meeting held May 13, 2014 and the Claims of May 27, 2014. Commissioner Murphy second the motion. Motion passed unanimously.

◆ **Open Public Meetings Act and Public Records Training**

Note: This item was moved to the end of the agenda to allow for the small items to be presented first.

◆ **Strategic Planning Process**

Background: Legal Counsel Sitkin is working along with a consultant and formulating a proposal after meeting with key staff and commissioners. The process will be tied to the District budget planning process beginning in June and a follow up to the General Manager's evaluation in 2013 and is proposed to follow this development outline:

- District's mission statement
- Goals to achieve
- Pre-Planning workshops facilitated by the consultant and Sitkin
- Draft Strategic Plan, followed by an additional workshop and public review
- Adoption of Strategic Plan

Sitkin provided a brief update on the planning process and noted that the first Strategic Planning Session is scheduled for the June 10<sup>th</sup> Commission Meeting with tentative plans to be complete in October. With the slate of three candidates now set for the Commission election, Sitkin suggested that the Strategic Planning Process be postponed until after the November general election, and proposed that the District wait until January to proceed. There is the possibility of having three Commissioners take action on the strategic plan and then have a new Commissioner in January who may have a difference of opinion.

Commissioner Murphy noted that when he began as a new PUD Commissioner, there was plenty of background work for him to do to become familiar with. McClure added that he is supportive of setting the strategic planning process aside until after the New Year as long as it doesn't put the District in a bind. Jilk said there will be ample opportunity with the upcoming 2015/2016 operating and capital budget process to engage staff and commission and that postponing the strategic planning process until after the election would be okay.

No action was necessary on this item; however, it was decided to strike the Strategic Planning Process from the June 10<sup>th</sup> Agenda to be rescheduled at a later date.

◆ **Grandview/Northgate/I-5 Business Parks – Fire System Update**

Background – There are a number of issues relating to the fire system well, pump house and fire pond at Grandview which need to be addressed and were presented in a project update and slideshow at the April 8, 2014 Commission Meeting. Jilk provided an update on the following:

--Pond Pump System

The diesel pump has been replaced and tested: Pumped at 3000 gallons per minute (gpm) during the test period proved a good flow of dirty water. The next test will be done under the supervision of District Operations Staff and the Fire District.

--Pond System Review

A scope of work has been developed with Pacific Surveying and Engineering; this will include a review on the status of the infiltration system and well system; and, a review of permitting needs/options to dredge the pond and maintain intake system.

--Review Options of Getting out of Pond

- (1) Moving water rights to uphill location (ready to proceed)
- (2) Drilling an additional well (need hydrological work and costs)
- (3) Increase capacity of existing wells (engineering and costs)
- (4) Determine storage capacity needs (engineering and costs)
- (5) Determine feasibility of combining systems (DOH/DOE and costs)
- (6) Determine land needs for all system infrastructure (costs)
- (7) Determine costs for infrastructure needs

--Make Recommendations on:

- (1) Remaining in pond;
- (2) Moving out of pond and wells/storage improvements uphill with associated costs and timeliness.

--District staff has met with Whatcom County on land use, the Fire Marshal and Department of Natural Resources personnel and is waiting to meet with the Washington Department of Fish and Wildlife (DFW). (The interaction between the pond and flow into California Creek is an issue.)

--Recommendations/Follow Up

A report to the Commission and the Grandview/Northgate/I-5 businesses/property owners will be presented this fall.

Commissioner McClure appreciated the staff's work in such a short period of time. Jilk said the issue is determining the responsibility and liability for use of the pond. Sitkin added that the use of the pond as (1) fire retention, (2) fish protection and/or (3) storm water will depend on the DFW's interpretation and whether or not a drainage district was formed to manage the storm water for the system. The District's preference, at this time, is to eliminate the use of the pond for fire service water supply. Commissioner Murphy voiced his concern with DFW controlling the use of the pond and that fire flow is very important especially if there ever was a large fire.

Jilk indicated the cost of the engineering study may be about \$30,000. The next step will be to meet with the DFW to discuss the pond functions of fish habitat and dredging.

**ACTION:** No action requested. Information only.

◆ **Manager's Report**

WRIA1

The next Planning Unit meeting is tomorrow, May 28 and the Joint Board will meet on May 29<sup>th</sup>. Jilk is planning to attend both meetings.

WPUDA Attorney's Meeting

Sitkin will be attending the upcoming WPUDA Attorney's meeting and will report back any updates.

◆ **Recess**

At 8:28 a.m., Commissioner McClure requested a three minute break prior to the next agenda item.

◆ **Open Public Meetings Act and Public Records Training**

Background – The Washington State Legislature at its last session passed the Open Government Training Act: Effective July 1, 2014 members of governing bodies are to receive Open Meeting Act, Public Records Act and Record Retention training, as cited in Chapter 66, 2014 Laws (ESB 5964) (“Open Government Trainings Act”). Training can occur prior to July 1 and Refresher training occurs no later than every 4 years. Legal Counsel Sitkin provided the required training at today's meeting. Highlights of the presentation included:

*Part I – Open Public Meeting Act*

- Washington's Open Public Meeting Act (OPMA) was first passed in 1971 and requires meetings to be open to the public, gavel to gavel (*RCW 42.30*). Public commissions, boards, councils, etc. (listed in OPMA) of this state that exist to aid in the conduct of the people's business are agencies required to adhere. Meetings are to be taken openly and deliberations conducted openly. The purpose of the OPMA is to allow the public to view the “decision making process.”
  - The OPMA applies to the District and the business of the District conducted by the Commission and Staff. Any time a quorum of elected officials discusses Commission business whether or not they are in the same room. For example: telephone or video conference. The OPMA does not apply to social gatherings at which a quorum may be present. Examples: Awards banquets, similar events where no District business is conducted, discussions regarding labor negotiations (closed session).
- Governing Body: 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, except as otherwise provided in *RCW 42.30*.
  - A governing body is defined as a commission (i.e. elected officials) or any committee of such public agency when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment. *RCW 42.30.020*
- Meetings: “Meeting” means meetings at which the public agency takes “action.” Physical presence is not required – a meeting can occur by phone or e-mail. An exchange of email could constitute a meeting if, for example a quorum of the members participates in the e-mail exchange and discuss agency business. Simply receiving information without comment is not a meeting. It does not need to be titled “meeting” – OPMA also applies to retreats, workshops, study sessions, etc. No meeting occurs if the governing body lacks a quorum.
  - Action: Means the transaction of the official business of the public agency and includes, but is not limited to: public testimony, all deliberations, discussions, considerations, reviews, evaluations, final actions. The requirements of the OPMA are triggered whether or not “final” action is taken. *RWC 42.30.020*.
  - Final Action: Is a collective positive or negative decision, or an actual vote by a majority of the governing body, or by the “committee thereof”. It must be taken in public, even if deliberations were in closed session. Secret ballots are not allowed. *RCW 42.30.060, RCW 42.30.020*.
- Travel and Gathering: 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, so long as no action is taken. Discussion or consideration of official business would be action, triggering the requirements of the OPMA. Practical consideration – consider the political impact and appearance. *RCW 42.30.070*.

- Regular Meetings: Are reoccurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws or other rule. On June 12, 2014, new agenda notice requirements apply to regular meetings under OPMA – these requirements are in addition to those that may be applicable in other laws outside the OPMA for particular agencies. New agenda notice requirements to regular meetings will now require governing bodies to make the agenda of each regular meeting of the governing body available online, no later than 24 hours in advance of the published start time of the meeting. (The District already engages in this practice.) The new law does not restrict agencies from later modifying an agenda, invalidate otherwise legal actions taken at a regular meeting where agenda was not posted 24 hours in advance; satisfy public notice requirements established under other laws; or provide a basis to award attorneys fees or seek court order under OPMA if agenda is not posted in accordance with the new law. *RCW 42.30.070, RCW 42.30.075; Chap. 61, 2014 Laws*
- Special Meetings: Is a meeting that is not a regularly scheduled meeting, and is called by the presiding officer or majority of the members.
  - Notice/Timing: Is 24 hours before the special meeting, written notice must be (1) given to each member of the governing body (unless waived), (2) given to each local newspaper or general circulation, radio and TV station which has a notice request on file; (3) Posted on the district’s website; and (4) prominently displayed at the main entrance of the district’s principal location and the meeting site (if not the same location).
  - Notice Contents of the Special Meeting: Must specify time, place, business to be transacted (agenda), note that final disposition cannot be taken on any other matter at such meeting. *RCW 42.30.080.*
- Emergency Special Meetings: Notice is not required when special meeting is called to deal with an emergency. *RCW 42.30.080(4).*
- Public Attendance: A public agency can’t place conditions on public to attend meeting subject to OPMA. However, reasonable rules of conduct can be set. For example, time limit on public comment; can prohibit disruptive or threatening behavior.
  - Cameras and tape records are permitted unless disruptive (*AGO1998 No. 15.*)
  - No “public comment” period required by OPMA.
- Interruptions and Disruptions: The OPMA provides a procedure for dealing with disruptive situations or attendees. The meeting room can be cleared and meeting can continue, or meeting can be moved to another location, but final disposition can occur only on matters appearing on the agenda. More details are set out in the OPMA. *RCW 42.30.050.*
- Executive Session: Is defined as part of a regular or special meeting that is closed to the public. It is limited to specific purposes set out in the OPMA. Purposes of the executive session and the time it will end must be announced by the presiding officer before it begins; time may be extended by further announcement. Practice Tip: Be precise about the purpose and the statutory exemption. *RCW 42.30.110*
  - Executives Sessions – Specified purposes set out in OPMA includes (for example):
    - National Security
    - Real estate (site selection or acquisition, sales or lease)
    - Publically bid contracts
    - Evaluate qualifications of applicant for public employment
    - Meet with legal counsel regarding enforcement actions, litigation or potential litigation)
    - Other purposes listed in *RCW 42.30.110.*
  - Executive Session to Discuss Agency Enforcement Actions, Litigation or Potential Litigation: The Executive Session is not permitted just because legal counsel is present. It must address one of the following: (1) Agency enforcement action, (2) Agency litigation; or (3) Potential or threatened litigation. *RCW 42.30.110.*
    - There are three requirements: (1) Legal counsel representing the agency is present in person or by phone; (2) Purpose is to discuss agency enforcement action, litigation or potential litigation to which the agency, governing body, or a member acting in official capacity is, or is likely to become a party; or (3) Litigation risks when public knowledge regarding discussion likely to result in an adverse legal or financial consequence to the agency. *RCW 42.30.110.*
- Penalties for Violating the OPMA: A court can impose a \$100 civil penalty against each member (personal liability); Court will award costs and attorney fees to a successful party seeking the remedy; Action taken at meeting can be declared null and void. *RCW 42.30.120; RCW 42.30.130; RCW 42.30.060.*
- Minutes: Minutes or public meetings must be promptly recorded and open to public inspection. Minutes of an Executive Session are not required. There is no format specified in law. Practical Issues: How detailed should minutes be? Tape recording issues and “draft” minutes. *RCW 42.32.030.*

*Part 2 – Public Records Act – Chapter 42.56 RCW*

- Public Records are defined as “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.”
  - Writing is broadly defined and includes “...handwriting, typewriting, printing, Photostatting, 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...” *RCW 42.56.030.*
  - Public records can include records of agency business when they are created or retained by agency employees or officials on home computers or in non-agency email accounts; electronic mail is a public record regardless of where it is sent from.
- The Agency is not required to create a record to respond to a public record request. Creation of a response may be done as a courtesy, risks creating an expectation, or could be a guess at what a requestor is seeking when no specific record exists.
- The Agency should not speculate at reasons for request or at political motivations of the requestors, or guess at what a requestor would be interested in obtaining.
- General Public Records Procedures: Under the Act agencies must appoint a public records officer, publish procedures describing certain agency organization, operations, rules of procedure, and other items listed in the PRA. The agency should adopt rules/procedures to provide full public access to public records, protect public records from damage/disorganization, prevent excessive interference with other agency functions; provide fullest assistance to requesters; and provide most timely possible action on requests.
- Requests for Public Records: Persons can request identifiable public records from public agencies. The requester can use agency public records request form. If agency request form is not used, requester must provide “fair notice” that he/she is seeking public records. A request for “information” is not a request for “records” under the PRA. Requesters can ask to inspect records or request copies of records. Agencies can adopt procedures explaining where requests must be submitted and other procedures.
- District Response to Request: The District has five (5) business days to respond to a public records request. The District can: (1) Acknowledge receipt of the request and provide a reasonable estimate for a further response or; (2) Fulfill the request; or (3) Provide an internet address and link to the records on the agency’s website (which fulfills part or all of the request) or; (4) Seek clarification; or (5) Deny the request with an accompany written statement of the specific reasons.
- Estimate of Time for Further Response: An agency can provide an estimate of time for further response, the estimate is to be reasonable, and it is good practice to briefly explain why more time is needed to process a request. An agency can extend the time if needed. If an agency can’t produce all the records at once (particularly for large requests) an agency can provide records in installments.
- Common Exemptions: Attorney – Client privilege; protected health information; pending investigation records (in certain investigations); certain records/information contained in personnel files; and deliberative process exemptions where opinions expressed or policies formulated but only until the decision is made.
- Enforcement and Penalties: Public records violations are enforced by counts for those claims listed in the Act. A court can impose civil penalties, no proof of ‘damages’ is required. A court is to consider certain factors in assessing a penalty; a court will award the requester’s attorney fees and costs. *RCW 42.56.550, RCW 42.56.565; Yousoufian v. Sims.*
  - Penalty Factors: Mitigating (that can reduce a penalty) and Aggravating (that can increase a penalty).
- Retention of Electronic Records: Electronic records must be retained in electronic format. Printing and retaining a hard copy is not a substitute for the electronic version. Electronic records are public records if used for the transaction of government business, even when stored on a personal computer or in personal email accounts. Examples include but are not limited to blogs, texts, e-mails sent from personal accounts and all social media.
- OPMA Assistance: The Washington State Attorney General’s Office may provide information, technical assistance and training on the OPMA. Contact Assistant Attorney General for Open Government.
  - The AG Office may issue formal opinions about the OPMA for qualified requesters, and has helpful materials about the OPMA and other open government topics and resources on its website at [www.atg.wa.gov](http://www.atg.wa.gov).
  - The AG Office Open Government Training Web Page with training resources, videos and other materials is at [www.atg.wa.gov/OpenGovernmentTraining.aspx](http://www.atg.wa.gov/OpenGovernmentTraining.aspx). *RCW 42.30.210.*
- Conclusion of Training and Certificate of Completion of Training were distributed to the Commissioners, General Manager Stephan Jilk and Public Records Officer Ann Grimm.
- PowerPoint Slides of the Presentation – A copy will be attached to Minutes.

**ACTION:** No action requested. Information only.

◆ **Adjourn**

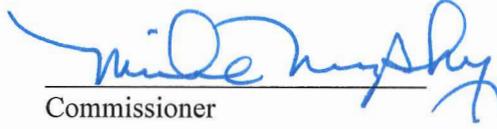
There being no further business for the regular meeting, the Commission adjourned the regular meeting at 9:38 a.m.



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President/Commissioner



\_\_\_\_\_  
Secretary/Commissioner



\_\_\_\_\_  
Commissioner

## Open Public Meetings Act RCW 42.30 and Public Records Act 42.56 RCW



Public Utility District  
Public Records Act Training  
May 27, 2014  
Ferndale, Washington

CHMELIK SITKIN & DAVIS P.S.  
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## Training

- Effective July 1, 2014 members of governing bodies to receive Open Meeting Act, Public Records Act and Record Retention training. Chapter 66, 2014 Laws (ESB 5964) ("Open Government Trainings Act"). Training can occur prior to July 1. Refresher training occurs no later than every 4 years.



- Training resources, videos, and more information about the Act (a "Q & A") are available on the Attorney General's Office Open Government Training Web Page:  
<http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

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## Open Government Laws Like the OPMA are Often Called "Transparency Laws" or "Sunshine Laws"

This is because they "shine light" on government. U.S. Supreme Court Justice Louis Brandeis once famously said, "*Sunlight is the best disinfectant.*"

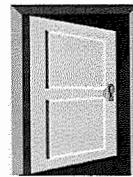


*Transparency builds public confidence in government.*

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## Washington's Open Public Meetings Act (OPMA)

- Passed in 1971
- Requires meetings to be open to the public, gavel to gavel
- RCW 42.30



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- Public commissions, boards, councils, etc. listed in OPMA are agencies of this state that exist to aid in the conduct of the people's business.
- Their actions are to be taken openly and deliberations conducted openly. ~ RCW 42.30.010
- Act is to be "liberally construed." ~ RCW 42.30.910
- The purpose of the OPMA is to allow the public to view the "decision making process." ~ Washington State Supreme Court



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## OPMA Applies To:

- Public Utility District No. 1 of Whatcom County, and the business of the District conducted by the Commission and Staff.
- Any time a quorum of elected officials discuss Commission business, whether or not they are in the same room. Example: Telephone conference, video conference



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## OPMA Does Not Apply To:

- Social gatherings at which a quorum may be present.
- Awards banquets.
- Similar events where no District business is conducted.
- Discussions regarding labor negotiations (closed session).



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## Governing Body

- 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, except as otherwise provided in RCW 42.30.

~ RCW 42.30.030



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## What is a Governing Body?

- Commission, i.e., elected officials **OR**
- Any **committee** of such public agency *when*:
  - the committee acts on behalf of the governing body,
  - conducts hearings, or
  - takes testimony or public comment



~ RCW 42.30.020

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## What is a Meeting?



- **"Meeting"** means meetings at which the public agency takes **"action"** ~ RCW 42.30.020
- Physical presence not required – can occur by phone or e-mail.
  - An exchange of e-mail could constitute a meeting if, for example, a quorum of the members participate in the e-mail exchange & discuss agency business. Simply receiving information without comment is not a meeting.
- Does not need to be titled "meeting" – OPMA also applies to "retreats," "workshops," "study sessions," etc.
- No meeting occurs if the governing body lacks a quorum.



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## Action

- **"Action"** means the transaction of the official business of the public agency and includes, but is not limited to:
  - Public testimony
  - All deliberations
  - Discussions
  - Considerations
  - Reviews
  - Evaluations
  - Final actions



The requirements of the OPMA are triggered

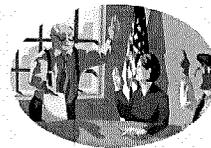
whether or not "final" action is taken. ~ RCW 42.30.020

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## Final Action

- **"Final action"** is a collective positive or negative decision, or an actual vote, by a majority of the governing body, or by the "committee thereof".
- Must be taken in public, even if deliberations were in closed session.
- Secret ballots are not allowed.

~ RCW 42.30.060, RCW 42.30.020



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## Travel and Gathering

- 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, so long as no action is taken.
- Discussion or consideration of official business would be action, triggering the requirements of the OPMA.
- **Practical Consideration:**  
Consider the political impact and appearance.



~ RCW 42.30.070

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## "Regular" Meetings



- **"Regular meetings"** are recurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws, or other rule.
- On June 12, 2014, new agenda notice requirements apply to regular meetings under OPMA (see next slide). (These requirements are in addition to those that may be applicable in other laws outside the OPMA for particular agencies.)

~ RCW 42.30.070, RCW 42.30.075; Chap. 61, 2014 Laws

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- Effective June 12, 2014, new agenda notice requirements apply to regular meetings.
- The OPMA will now require governing bodies to make the **agenda** of each regular meeting of the governing body **available online no later than 24 hours** in advance of the published start time of the meeting.
  - The District *already engages in this practice!*
- The new law **does not**:
  - Restrict agencies from later modifying an agenda.
  - Invalidate otherwise legal actions taken at a regular meeting where agenda was not posted 24 hours in advance.
  - Satisfy public notice requirements established under other laws.
  - Provide a basis to award attorneys fees or seek court order under OPMA if agenda is not posted in accordance with the new law.



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## "Special" Meetings



- A **"special meeting"** is a meeting that is not a regular meeting (not a regularly scheduled meeting).
- Called by presiding officer or majority of the members.
- **Notice - timing: 24 hours** before the special meeting, **written** notice must be:
  - Given to each **member** of the governing body (unless waived)
  - Given to each **local newspaper of general circulation, radio, and TV station** which has a notice request on file
  - Posted on the **district's website** unless i) does not have a website, ii) employs fewer than ten full-time equivalent employees; or iii) does not employ personnel whose duty, as defined by a job description or existing contract, is to maintain or update the web site
  - Prominently displayed at the **main entrance** of the district's principal location and the meeting site (if not that same location)

~ RCW 42.30.080

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- **Notice - contents:** The special meeting notice must specify:
  - Time
  - Place
  - Business to be transacted (agenda)
    - Final disposition cannot be taken on any other matter at such meeting



~ RCW 42.30.080



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## Emergency Special Meetings

- Notice is not required when special meeting called to deal with an emergency
  - Emergency involves injury or damage to persons or property or the likelihood of such injury or damage.
  - Where time requirements of notice make notice impractical and increase likelihood of such injury or damage.

~ RCW 42.30.080(4)



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## Public Attendance

- A public agency can't place conditions on public to attend meeting subject to OPMA:
  - BUT, reasonable rules of conduct can be set
    - Example: Time limit on public comment
    - Prohibit disruptive, or threatening behavior
- Cameras and tape recorders are permitted unless disruptive ~ AGO 1998 No. 15
- No "public comment" period required by OPMA.



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## Interruptions and Disruptions

- The OPMA provides a procedure for dealing with disruptive situations or attendees.
- Meeting room can be cleared and meeting can continue, or meeting can be moved to another location, but final disposition can occur only on matters appearing on the agenda. More details set out in the OPMA.

~ RCW 42.30.050



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## Executive Session

- Part of a regular or special meeting that is closed to the public.
- Limited to specific purposes set out in the OPMA
- Purpose of the executive session and the time it will end must be announced by the presiding officer before it begins; time may be extended by further announcement.
- Practice Tip: Be precise about the purpose and the statutory exemption.

~ RCW 42.30.110



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## Executive Sessions

Specified purposes set out in OPMA. Includes, for example:

- National security
- Publicly bid contracts
  - Review negotiations on performance
  - Public knowledge would like increase costs
- Real estate
  - Site selection or acquisition of real estate
    - Lease or purchase
    - Public knowledge would likely increase price
  - Sale or lease
    - Public knowledge would likely decrease price
    - Final action selling or leasing public property must be take at open meeting
- Evaluate qualifications of applicant for public employment
- Meet with legal counsel regarding enforcement actions, litigation, or potential litigation
- Other purposes listed in RCW 42.30.110

~ RCW 42.30.110

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## Executive Session to Discuss Agency Enforcement Actions, Litigation or Potential Litigation

- This executive session is not permitted just because legal counsel is present
- This executive session must address one of the following:
  - Agency enforcement action
  - Agency litigation or
  - Potential or threatened litigation



~ RCW 42.30.110

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## Executive Session to Discuss Agency Enforcement Actions, Litigation, or Potential Litigation: Three Requirements

- Legal counsel representing the agency is present in person or by phone.
- Purpose is to discuss agency enforcement action, litigation or potential litigation to which the agency, governing body, or a member acting in official capacity is, or is likely to become, a party; or
- Litigation risks when public knowledge regarding discussion likely to result in an adverse legal or financial consequence to the agency.

~ RCW 42.30.110

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## Penalties for Violating the OPMA

- A court can impose a \$100 civil penalty against each member (personal liability).
- Court will award costs and attorney fees to a successful party seeking the remedy.
- Action taken at meeting can be declared null and void.

~ RCW 42.30.120; RCW 42.30.130; RCW 42.30.060



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## Minutes – RCW 42.32.030

- Minutes of public meetings must be promptly recorded and open to public inspection
- Minutes of an executive session are not required
- No format specified in law
- Practical Issues:
  - How detailed should minutes be?
  - Tape recording issues
  - "Draft" minutes



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## Email and Serial Meeting Issues

- Email exchanges can constitute a meeting.
  - These are the clearest form of violation because they are documented.
- What are "serial meetings"? And, do they violate the OPMA?
- Use of General Manager to transmit information in advance of public meeting.

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## Questions?

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## Public Records Act Chapter 42.56 RCW

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## Public Records

- "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."

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- "Writing" is broadly defined and includes "handwriting, typewriting, printing, photostating, 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."

~ RCW 42.56.030

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## Public Records Can Include...

- Records of agency business when they are created or retained by agency employees or officials on home computers or in non-agency email accounts
- Electronic mail is a public record regardless of where it is sent from
  - Always use district email account
  - Try not to use home computer or personal device

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## Agency NOT required to...

- An agency is NOT required to create a record to respond to a public record request
  - Creation of a response may be done as a courtesy
  - Risks creating an expectation
- Guess at what a requestor is seeking when no specific record exists

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## Agency SHOULD NOT...

- Speculate at reasons for request or at political motivations of the requestor...
  - DOES NOT MATTER!...Can only lead to public mistrust
- Guess at what a requestor would be interested in obtaining
  - Response may be well intended, BUT
    - Risk of offending requestor
    - Expending public resources without a request
    - Risk of creating liability if response deemed non-responsive
    - Creating an expectation

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## General Public Records Procedures

- Under the Act, agencies must:
  - Appoint a **public records officer**.
  - Publish **procedures** describing certain agency organization, operations, rules of procedure, and other items listed in PRA.
  - Adopt **rules/procedures** to:
    - Provide full public access to public records,
    - Protect public records from damage/disorganization
    - Prevent excessive interference with other agency functions.
    - Provide fullest assistance to requesters
    - Provide most timely possible action on requests.

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## Requests for Public Records

- Persons can request **identifiable public records** from public agencies.
  - Requester can use agency public records request form.
  - If agency request form not used, requester must provide "fair notice" that he/she is seeking public records.
  - A request for "information" is not a request for "records" under the PRA.
- Requesters can ask to **inspect** records, or request **copies** of records.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.

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## District Response to Request

- The district has **five business days** to respond to a public records request.
- The District can:
  1. **Acknowledge receipt of the request and provide a reasonable estimate for a further response;** or
  2. **Fulfill the request;** or
  3. **Provide an internet address and link to the records on the agency's website (which fulfills part or all of the request);** or
  4. **Seek clarification;** or,
  5. **Deny the request with an accompanying written statement of the specific reasons.**

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## Estimate of Time for Further Response

- An agency can provide an estimate of time for further response.
- Estimate is to be reasonable.
- It is a good practice to briefly explain why more time is needed to process a request. Factors may include, for example, time needed to:
  - Get clarification if necessary.
  - Search for records. More time may be needed if request is large or complex.
  - Assemble and review records.
  - Provide notice to affected third persons/agencies if necessary.
  - Prepare an exemption log if necessary.
  - Perform other essential agency functions, considering agency resources including staff availability.
- An agency can extend the time if needed. Again, it is a good practice to explain why.
- If an agency can't produce all the records at once (particularly for large requests), an agency can provide records in installments.

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## Searches for Responsive Records

- The District should read the request carefully to understand what records are requested.
  - Clarify the request if needed.
  - An agency can also ask the requester to suggest search terms.
- An agency must conduct an adequate search for responsive records.
  - Consider all formats (paper, electronic, etc.)
  - Consider records of current staff/officials, and former staff/officials, if potentially responsive.
  - Consider possible locations (e.g., file cabinets, agency website, audio files, etc.)
- The search should be reasonably calculated to uncover responsive records.
- The search should follow obvious leads to possible locations where records are likely to be found.
- It is a good idea to document search efforts (locations, search terms used, etc.) The agency bears the burden of proof to show the adequacy of the search.

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## Exemptions

- All public records are presumed open
- Exemptions are "narrowly construed"
- The district has the burden of showing why a record should be "exempt"
- It is absolutely necessary to provide an exemption log if a record is being withheld as exempt
- The exemption log must include:
  - Date of record
  - Type of Record
  - Author and recipient(s)
  - Total number of pages withheld
  - The exemption and a brief explanation

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## Common exemptions

- Attorney client privilege
- Protected Health Information
- Pending investigation records (in certain investigations)
- Certain records/information contained in personnel files
- Deliberative Process Exemption
  - Opinions expressed or policies formulated
  - Only until the decision is made

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## Enforcement & Penalties



- Public records violations are enforced by courts for those claims listed in the Act.
- A court can impose **civil penalties**.
- No proof of “damages” required.
- A court is to consider certain factors in assessing a penalty.
- A court will award the requester’s **attorneys fees and costs**.

~ RCW 42.56.550, RCW 42.56.565; *Yousoufian v. Sims*

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## Penalty Factors

### ■ Mitigating factors (factors that can **reduce** a penalty):

- A lack of clarity in the PRA request.
- The agency’s prompt response
- The agency’s 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.



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### ■ 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.

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## A Few Comments about Record Retention

- Proper record retention reduces searching time and allows for easier destruction of records
- Examples of public records to be retained:
  - Created in the course of business
  - Received for action
  - Documents business activities and actions
  - Mandated by laws, statute or regulations
  - Supports financial obligations or legal claims
  - Communicates business requirements
  - Final reports or recommendations

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### ■ Examples of records with no retention value:

- Personal papers not related to conduct of business
- Convenience copies
- Published reference materials
- Copies of agency memoranda, bulletins or directions of a general information and non-continuing nature
- Announcements of social events, such as retirement parties or holiday celebrations

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## Retention of Electronic Records

- Electronic records must be retained in electronic format. Printing and retaining a hard copy is not a substitute for the electronic version.
- Electronic records are public records if used for the transaction of government business, even when stored on personal computers or in personal email accounts
  - Blogs
  - Texts
  - E-mails sent from personal accounts
  - All social media

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## Training

- Effective July 1, 2014 members of governing bodies to receive Open Meeting Act, Public Records Act and Record Retention training. Chapter 66, 2014 Laws (ESB 5964) (“Open Government Trainings Act”). They can take training sooner than July 1. Refresher training occurs no later than every 4 years. Training can be taken online, in person, or by other means.



- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General’s Office Open Government Training Web Page:  
<http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

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## OPMA Assistance

- The Washington State Attorney General's Office may provide information, technical assistance, and training on the OPMA. Contact Assistant Attorney General for Open Government.
- The Attorney General's Office may issue formal opinions about the OPMA for qualified requesters.
- The Attorney General's Office has helpful materials about the OPMA, and other open government topics and resources, on its website at [www.atg.wa.gov](http://www.atg.wa.gov).
- The Attorney General's Office Open Government Training Web Page with training resources, videos, and other materials is at: <http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

~ RCW 42.30.210



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## Questions?

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