

PRACTICE TIPS

For Local Government Success



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 <ul style="list-style-type: none"> <input type="checkbox"/> City or Town Councilmember or Mayor <input type="checkbox"/> County Commissioner or County Councilmember <input type="checkbox"/> Special Purpose District Commissioner/Board Member 	Yes
Member of a subagency created by ordinance or legislative act, e.g.: <ul style="list-style-type: none"> <input type="checkbox"/> Planning Commission <input type="checkbox"/> Library Board <input type="checkbox"/> Parks Board <input type="checkbox"/> Civil Service Commission 	Yes
Member of a committee <ul style="list-style-type: none"> <input type="checkbox"/> Committees that act on behalf of (exercise actual or de facto decision-making authority for) the governing body, conduct hearings, or take testimony or public comment <input type="checkbox"/> Committees that are purely advisory 	Yes No
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 \$500 for any member of a governing body who attends a meeting knowing that it violates the OPMA and \$1,000 for any subsequent OPMA violation. [RCW 42.30.120\(1\)\(2\)](#).
- **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

- 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. [RCW 42.30.205\(1\)](#).
- 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. [RCW 42.30.205\(2\)](#).

*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 counsel about this topic as well.

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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.*

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. However, the participants must collectively intend to meet to conduct agency business.

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 a majority of 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 if the members collectively intend to meet and conduct agency business.

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 phone, email or other electronic means.

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.

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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

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.

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.

DO'S AND DON'TS

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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*, available along with other resources at 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: <ul style="list-style-type: none"> • 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.)

Personal Email Account	<p>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.</p>	<p>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.</p>
Texting on Agency Devices and Personal Devices	<p>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.</p>	<p>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.</p>
Voice Mail Messages on Agency Phones and Personal Phones	<p>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.</p>	<p>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.</p>
Agency Social Media	<p>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.</p>	<p>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.</p>
Personal Social Media	<p>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.</p>	<p>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.</p>

*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.