

Knowing the Territory

Basic Legal Guidelines for
Washington City, County and
Special Purpose District Officials

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Basic Powers

THE SEPARATION AND DISTRIBUTION OF GOVERNMENTAL POWERS

Local government officials, including county commissioners or councilmembers, mayors, councilmembers, city managers, and special purpose district board members or commissioners should understand the roles of their respective offices and how those roles interact with those of other officers and staff at their agency. This brief discussion is meant to provide some basic guidelines to promote harmony and avoid unnecessary conflicts.

NATURE AND POWERS GENERALLY

Counties, Cities and Special Purpose Districts

Cities and towns are created under our constitution and general laws as municipal corporations (Washington State [Const. art. XI](#), § 10; [RCW 35.02.010](#)). Because their nature and structure are essentially the same, this publication will refer to both cities and towns as cities.

Counties are also established under the state constitution as political subdivisions of the state (Washington State [Const. art. XI](#), §§ 1, 3). They are considered municipal corporations, or, at least, quasi-municipal corporations. See [King County v. Tax Commission](#) (1963).

While cities and counties exercise general governmental authority, special purpose districts are created for a particular purpose and their powers are limited to those areas within their jurisdiction. Special purpose districts are authorized by state legislation and are municipal corporations. ([Lauterbach v. Centralia](#) (1956); [King County Water District No. 54 v. King County Boundary Review Board](#) (1976).

Counties, cities, and special purpose districts are created by the state, exercising only powers delegated to them or implied by the constitution and laws of the state. Under [article XI](#), section 11 of the state constitution, cities and counties possess broad police power to legislate for the safety and welfare of their inhabitants, consistent with general law.

Additionally, one theory of local government holds that cities and charter counties hold a broad degree of self-government or “home rule” authority. This home rule authority seems to be clearer for first class (charter) cities (Washington State [Const. art. XI](#), § 10), code cities ([Title 35 RCW](#)), and charter counties (Washington State [Const. art. XI](#), § 4).

Non-charter counties, second class cities, and towns may also have some degree of home rule authority under the state constitution, but the statutory and case law basis for that proposition is less clear. As corporate entities, cities, counties, and special purpose districts are capable of contracting, suing, and being sued, like private corporations.

Additionally, when exercising a proprietary (business) function, such as the operation of electrical or water service, a government’s powers are more liberally construed than when exercising a governmental function, such as taxation ([Tacoma v. Taxpayers](#) (1987)). Counties, cities, and special purpose districts, however, are subject to limitations imposed expressly or impliedly by state law. See [Snohomish County v. Anderson](#) (1994) and [Massie v. Brown](#) (1974).

Officers

Regardless of how broad the powers of a municipal corporation may be, its officers have only those powers that are prescribed by law ([State v. Volkmer](#) (1994); [Brougham v. Seattle](#) (1938)). For example, the powers of a mayor or city manager are, even in a code city, limited to those powers that are delegated by law to that officer.

When statutes are unclear as to whether or why a municipal officer should exercise a particular power or function, resorting to fundamental principles may be helpful to answer the question. One such principle is embodied in the separation of powers doctrine, described in the next section.

THE SEPARATION OF POWERS DOCTRINE

Background

Under our political system at both federal and state levels, governmental powers are distributed among three separate branches or departments: legislative, executive, and judicial. The governmental structure of city and county – and, to a more limited degree, special purpose districts – reflects the philosophy now firmly embedded in our society known as the separation of powers doctrine. Under that doctrine, each of the three branches exercise certain defined powers, free from unreasonable interference by the other branches; yet, all branches interact with and upon each other as a part of a check and balance system. See [In Re Juvenile Director](#) (1976).

Local government agencies are typically structured like state governments. The role of the council, commissioner, or board is comparable to that of the legislature in establishing local public policy. The mayor or manager, county executive or administrator, or district superintendent or director, like the governor, heads the executive branch. The municipal courts and superior courts exercise judicial functions as provided by statute. The board of county commissioners or county council may possess both legislative and executive powers. Some non-charter counties delegate executive powers to a county administrator. Some of the charter counties have established a board of county commissioners or county council with legislative powers only and have created a county executive position that exercises executive powers.

For special purpose districts, the district board or commission possesses primarily legislative powers. The district has the authority to hire staff, but in some smaller districts, the board or commission handles the executive functions as well as the legislative ones.

Doctrine Application

The legislative body establishes local laws and policies consistent with state law. This is done through the enactment of ordinances, resolutions, or other adopted motions. The legislative body also exercises general oversight and control over the jurisdiction's finances, primarily through the budget process.

In cities, it is the council's function to create subordinate positions, prescribe duties, and establish salaries ([RCW 35.23.021](#); [35.27.070](#); [35A.12.020](#); and [35A.13.090](#)). However, state law says the appointment of subordinate officers and employees is the prerogative of the executive ([RCW 35.23.021](#); [35.27.070](#); [35A.12.090](#); and [35A.13.080](#)).

Accordingly, though the council has general supervision over the city's operations, neither that body nor its committees or individual councilmembers should attempt to exercise powers that are assigned by law to the executive branch. In fact, in cities operating under the council-manager form of government, the law forbids

councilmembers from interfering in certain administrative matters, although the council may discuss those matters with the city manager in open session ([RCW 35.18.110](#) and [35A.13.120](#)).

The executive branch of a city, headed by the mayor (or the manager in those cities having a council-manager form of government), is responsible for the day-to-day administration of city affairs. The executive officer is responsible for employing, disciplining, and dismissing department heads and employees (subject to any applicable civil service provisions, such as [chapters 41.08](#) and [41.12 RCW](#), as well as collective bargaining agreements).

Some statutes authorize the city council to appoint or approve the appointment of a particular officer. For instance, the council appoints and discharges the city manager. See [RCW 35A.13.010](#); [35A.13.130](#); [35.18.010](#); and [35.18.120](#). Certain mayoral appointments are or may be made subject to confirmation by the council ([RCW 35.23.021](#) and [35A.12.090](#)). On the other hand, a council's power to confirm an appointment does not include the power to veto a subsequent dismissal of that appointee or to require the dismissal of an appointee.

The application of this doctrine is different in counties. The various county elected officials (commissioners, prosecutor, assessor, auditor, clerk, treasurer, coroner, and sheriff) have the authority to establish subordinate positions and appoint people to fill those positions. However, this can be done only with the consent of the board of commissioners, which also sets salaries for those positions ([RCW 36.16.070](#)).

Each elected official (and the commissioners as a body) has executive authority and supervises the day-to-day administration of their departments. The board of county commissioners has no authority with respect to the daily operation of the offices of the other elected county officials but may adopt certain county-wide personnel policies (*Smith v. Board of Walla Walla County Comm'rs* (1987); *Osborn v. Grant County* (1996)). Other case law and attorney general opinions indicate that the board of commissioners generally has limited authority to impose requirements regarding other personnel matters related to non-union county officers and employees hired by and under the control of other county elected officials, unless the other elected officials agree that the board can impose those requirements (*Crossler v. Hille* (1998)).

The application of the separation of powers doctrine to special purpose districts is more difficult to generalize since the operation of special purpose districts is more limited and varied. Special purpose districts do not have judicial departments. Some districts are sufficiently small that their boards may, by statute or necessity, perform both legislative and executive or administrative functions. On the other hand, in some districts, such as school districts, the board exercises authority over policy matters while the superintendent oversees executive or administrative duties. For some districts, governance is through the county legislative body.

Basic Duties, Liabilities, and Immunities of Officers

Holding a public office requires the trust of the public. Actions that betray that trust can result in liability, both for the municipality and the officeholder. However, court decisions have carved out exceptions to strict liability, allowing officeholders and government employees to exercise some discretion in their actions without undue fear of personal liability. If officials perform their duties in good faith, local governments can defend officials against lawsuits, and support them if an adverse decision is reached in a lawsuit.

DUTIES

Courts have held that a public officer's relationship with the public is that of a fiduciary, defined as a manager of property or money on the public's behalf (*Northport v. Northport Townsite Co.* (1902)). The language codified at [RCW 42.17A.001](#) reinforces this fiduciary relationship, saying, in part:

(2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the *public trust* and private interests. (Emphasis supplied.)

LIABILITY

Public officers and employees are generally accountable for their actions under civil and criminal laws (*Babcock v. State* (1989)). There are additional statutory provisions and case law governing the conduct of public officials, including but not limited to: state and federal civil rights laws ([42 U.S.C. § 1983](#)); ethics and conflict of interest laws ([chapters 42.20](#) and [42.23 RCW](#)); penalties for violations of the Open Public Meetings Act ([chapter 42.30 RCW](#)), and violations of competitive bid laws ([RCW 39.30.020](#)).

State law holds local government agencies responsible for their negligent conduct. [RCW 4.96.010](#) provides:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

Case law has continued to recognize a narrow ground of immunity for a municipality and its officials from "torts," defined as negligent acts or omissions, but only for what was described as a "discretionary act involving a basic policy determination by an executive level officer which is the product of a considered policy decision," or a decision by a city council to enact a particular ordinance (*Chambers-Castanes v. King County* (1983)).

In 1987, the state legislature enacted what is now [RCW 4.24.470](#), providing in part as follows:

(1) An appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity, but liability shall remain on the public agency for the tortious conduct of its officials or members of the governing body.

This statutory language appears to grant somewhat broader immunity to officials than the supreme court's language did in previous cases summarized earlier in this section.

PUBLIC DUTY DOCTRINE

Some additional immunity is provided in case law by the “public duty doctrine.” Under that doctrine, when a city, county, or special purpose district's duty is owed to the public at large (such as for general law enforcement) instead of to an individual, an individual who is injured by a breach of that duty has no valid claim against the city, county, or district, its officers, or employees.

There are certain exceptions; e.g., in cases where a special relationship is created (such as when an officer or employee makes direct assurances to a member of the public under circumstances where the person justifiably relies on those assurances); or when an officer or employee, such as a building official, knows about an inherently dangerous condition, has a duty to correct it, and fails to perform that duty ([Taylor v. Stevens County](#) (1988)). Washington courts have also said that doctrine does not apply when the alleged breach is based on common law duties ([Beltran-Serrano v. Tacoma](#) (2019)) or in tort cases where a plaintiff's claim is based on a common law duty as opposed to a statutory duty ([Norg v. City of Seattle](#) (2023)).

There are other protections from personal tort liability, such as insurance and indemnification, available to municipal officers and employees, even though the municipality itself may be liable. These other protections will be discussed later in this publication.

CUSTODIANS OF PUBLIC FUNDS

Because they manage public funds, the law places strict duties on treasurers and other custodians of public funds. Case law in Washington and other states holds that custodians of public funds are actually insurers; they and their bonding companies are absolutely liable for any losses of public funds in their custody, except for “acts of God” (floods and similar natural catastrophes), or “acts of a public enemy” (war) ([State ex rel. O'Connell v. Engen](#) (1962)).

The surety bonds (“official” bonds) that must be posted by those and other officers are to protect the public, not the officer, and are paid for by the agency ([RCW 48.28.040](#), [RCW 42.08.080](#), and [Nelson v. Bartell](#) (1940)). For personal protection, insurance may be available for officers and employees who act in good faith. This subject will be discussed in more detail in a later section of this handbook.

IMMUNITIES FROM TORT LIABILITY

Under state law, appointed and elected officials are immune from civil liability to third parties for making or failing to make a discretionary decision in the course of their official duties ([RCW 4.24.470](#)). See [Evangelical United Brethren Church v. State](#) (1965). This immunity is qualified because damages can be assessed for

violation of the Federal Civil Rights Act ([42 U.S.C. §1983](#)) if the officer's conduct violates clearly established statutory or constitutional rights that a reasonable person should have known (*Sintra v. Seattle* (1992)). The U.S. Supreme Court has held that local legislators are entitled to absolute immunity from civil liability for their legislative activities under [42 U.S.C. §1983](#). See *Bogan v. Scott-Harris* (1998).

Courts have also recognized certain immunities under the Federal Civil Rights Act ([42 U.S.C. § 1983](#)) such as absolute prosecutorial immunity, e.g., when a city attorney prosecutes a defendant for allegedly violating a city ordinance or when a county prosecutor does so for violation of a state or county law (*Tanner v. Federal Way* (2000)). That absolute immunity is limited, however, to when the criminal prosecutor is performing the traditional functions of an advocate (*Kalina v. Fletcher* (1997)); it does not apply to administrative acts, such as conducting investigations.

However, the municipal corporation itself may be held liable even though those individual officers may be protected ([RCW 4.24.470\(1\)](#); [4.96.010\(1\)](#); *Babcock v. State* (1991)). Cities, counties, and special purpose districts, like the state, have the authority to provide liability insurance to protect their officers and employees from loss due to their acts or omissions in the course of their duties.¹ Other special purposes districts may have similar authority.

State law also provides indemnifications, or “hold harmless” provisions, for agency personnel acting in good faith. [RCW 4.96.041](#) says that when a claim for damages is brought against an official or employee because of something done, or that should have been done, as part of their official duties, then that person may ask the agency to either defend, or pay for an attorney to defend, against the claim. The agency can also agree to pay any damages if agency personnel were acting within the scope of their official duties.

While [RCW 4.96.041](#) allows the local government to defend and indemnify its officers and employees, it requires the local governments to adopt local ordinances or resolutions providing terms and conditions for the defense and indemnification of their officials, employees, and volunteers.

¹ See [RCW 35.21.205](#); [35.21.209](#); [36.16.138](#); [52.12.071](#) (fire protection districts); [53.08.205](#) (port districts); and [54.16.095](#) (public utility districts).

Potential Conflicts and Ethical Guidelines

Maintaining public trust requires high standards of conduct. To assure the public's trust, court decisions, state laws and local codes have placed limits on the personal interests and relationships officeholders can have with subjects and actions under their control. Violations can have profound consequences, both to the officeholders and their local jurisdictions.

PROHIBITED USES OF PUBLIC OFFICE

Our state supreme court, citing principles “as old as the law itself,” has held that councilmembers may not vote on a matter where they would be especially benefitted ([Smith v. Centralia](#) (1909); vacation of an abutting street). With some limited exceptions, statutory law forbids municipal officials from having personal financial interests in municipal employment or other contracts under their jurisdiction, regardless of if they vote on the matter.

CODE OF ETHICS

State law, codified at [RCW 42.23.070](#), provides a code of ethics for county, city, and special purpose district officials. The code of ethics has four provisions, as follows:

1. No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself or others;
2. No municipal officer may, directly or indirectly, give or receive any compensation, gift, gratuity, or reward from any source, except the employing municipality, for a matter connected with or related to the officer's services unless otherwise provided by law;
3. No municipal officer may accept employment or engage in business that the officer might reasonably expect would require him or her to disclose confidential information acquired by reason of his or her official position;
4. No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer use such information for his or her personal gain.

This last provision applies to disclosure of information learned when attending an executive session. While executive sessions are meant to be confidential, the Open Public Meetings Act does not specifically address this issue.



Does the statute prohibit local officials from accepting gifts of minimal intrinsic value from someone who does or may seek to do business with their office?

A strict reading of the statute would prohibit accepting any gift. The comparable provision for state officials allows them to accept gifts of limited value. Many local agencies adopt similar “de minimis” rules.

STATUTORY PROHIBITION AGAINST PRIVATE INTERESTS IN PUBLIC CONTRACTS

Basics

[Chapter 42.23 RCW](#) also prohibits municipal officers from having a financial interest in contracts they are responsible for as part of their official duties. [RCW 42.23.030](#) sets out the general rule that:

No municipal officer shall be beneficially interested, directly or indirectly, in any contract which may be made by, through, or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein...

General Application

- [Chapter 42.23 RCW](#) applies to all municipal and quasi-municipal corporations, including cities, towns, counties, special purpose districts, and others. For charter cities or counties, however, more stringent charter provisions control over this chapter. The standards contained in the chapter are considered to be minimum requirements and local agencies may adopt stricter requirements ([RCW 42.23.060](#)).
- Although the chapter refers to “officers,” rather than employees, the word “officers” is broadly defined to include deputies and assistants, such as a deputy or assistant clerk, and any others who undertake to perform the duties of an officer ([RCW 42.23.020\(2\)](#)). But it is not clear whether the chapter refers to all employees. Local government agencies should consider whether they want to specifically make these restrictions applicable to all employees (and volunteers).
- The word “contract” includes employment, sales, purchases, leases, and other financial transactions of a contractual nature. (There are some monetary and other exceptions and qualified exceptions, which will be described in later paragraphs.)
- The phrase “contracting party” includes any person or firm employed by or doing business with a municipality ([RCW 42.23.020\(4\)](#)).

Interpretation

- The beneficial interests in contracts prohibited by [RCW 42.23.030](#) are financial interests only ([Barry v. Johns](#) (1996)).
- The statutory language of [RCW 42.23.030](#), unlike earlier laws, does not prohibit an officer from being interested in any and all contracts with the municipality. However, it does apply to the control or supervision over the making of those contracts (whether exercised or not) and to contracts made for the benefit of their office.
- In other words, assuming that the clerk or treasurer has been given no power of supervision or control over a city’s contracts, they would be prohibited from having an interest only in contracts affecting their own office, such as the purchasing of supplies or services for that office’s operation. Members of a governing body are more broadly and directly affected because the municipality’s contracts are made, generally, by or under the supervision of that body, in whole or in part. It does not matter whether the member of the governing body voted on the contract in which they had a financial interest; the prohibition still applies ([City of Raymond v. Runyon](#) (1998)).
- The employment and other contracting powers of executive officials, such as city managers, mayors, and county or other elected officials, also are generally covered by the broad provisions of the act.

- Subject to certain “remote interest” exceptions, explained later in this section, a member of a governing body who has a forbidden interest may not escape liability simply by abstaining or taking no part in the governing body’s action in making or approving the contract. See [AGO 53-55 No. 317](#).
- Both direct and indirect financial interests are prohibited, and the law also prohibits an officer from receiving financial benefits from anyone else having a contract with the municipality if the benefits are in any way connected with the contract. In an early case involving a similar statute, where a mayor had subcontracted with a prospective prime contractor to provide certain materials, the state supreme court struck down the entire contract with the following expression of its disapproval:

Long experience has taught lawmakers and courts the innumerable and insidious evasions of this salutary principle that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly, but indirectly. However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void ([Northport v. Northport Townsite Co.](#) (1902)).

- The statute ordinarily prohibits public officers from hiring their spouse as an employee because of the financial interest each spouse possesses in the other’s earnings under Washington community property law. However, a bona fide separate property agreement between the spouses may eliminate such a prohibited conflict if the proper legal requirements for maintaining a separate property agreement are followed ([State v. Miller](#) (1948)).

Because of a similar financial relationship, a contract with a minor child or other dependent of the officer may be prohibited. However, [chapter 42.23 RCW](#) is not an anti-nepotism law and, absent such a direct or indirect financial interest, does not prohibit employing or contracting with an official’s relatives. An emotional or sentimental interest is not the type of interest prohibited by that chapter ([Mumma v. Town of Brewster](#) (1933)).

A question often arises when the spouse of a local government employee or contractor is elected or appointed to an office of that local government that has authority over the spouse’s employment or other contract:



Must an existing employment or contract be terminated immediately?

The answer to the question is, ordinarily, “no;” however, any subsequent renewal or modification of the employment or other contract probably would be prohibited ([Attorney General’s letter to the State Auditor, dated June 8, 1970](#)).



May local officials permit an individual or company to pay their expenses for travel to view a site or plant in connection with business related to the official’s office?

The statute can be construed to prevent an official from being “compensated” in that manner. On the other hand, payment of expenses for a business trip does not constitute compensation. Prudence suggests that if the trip is determined to be of benefit to the agency (and assuming that there is no potential violation of the appearance of fairness doctrine, described in a later chapter), the city, county, or district itself should pay the expenses and any payment or reimbursement from a private source should be made to the jurisdiction.



May a city, county or special purpose district official accept a valuable gift from a foreign dignitary in connection with a visit?

A common policy is to allow the acceptance of such a gift on behalf of the jurisdiction, but not for personal use. Under the wording of [RCW 42.23.070\(2\)](#), a jurisdiction may adopt a formal policy by local “law” governing such occasions, allowing exceptions in appropriate cases involving personal items, subject to disclosure and other procedures to guard against abuse.

Exceptions

[RCW 42.23.030](#) exempts certain types of contracts, such as:

1. The furnishing of electrical, water, or other utility services by a municipality to its officials, at the same rate and on the same terms as are available to the public generally.
2. The designation of public depositories for municipal funds. Conversely, this does not permit an official to be a director or officer of a financial institution which contracts with the city or county for more than mere “depository” services.
3. The publication of legal notices required by law to be published by a municipality, upon competitive bidding or at rates not higher than prescribed by law for members of the public.
4. Except in cities with a population of over 1,500, counties with a population of 125,000 or more, irrigation district encompassing more than 50,000 acres, or in a first-class school district; the employment of any person for unskilled day labor at wages not exceeding \$3,000 in any calendar month.
5. Other contracts in cities with a population of less than 10,000 and in counties with a population of less than 125,000, except for contracts for legal services, other than for the reimbursement of expenditures, and except sales or leases by the municipality as seller or lessor,² provided:

That the total amount received under the contract or contracts by the municipal officer or the municipal officer’s business does not exceed \$3,000 in any calendar month.

However, in a second class city, town, non-charter code city, or for a member of any county fair board in a county which has not established a county purchasing department, the amount received by the officer or the officer’s business may exceed \$3,000 in any calendar month but must not exceed \$36,000 in any calendar year. The exception does not apply to contracts with cities having a population of 10,000 or more or with counties having a population of 125,000 or more. This exemption, if available, is allowed with the following condition:

A municipal officer may not vote in the authorization, approval, or ratification of a contract in which he or she is beneficially interested even though one of the exemptions allowing the awarding of such a contract applies. The interest of the municipal officer must be disclosed to the governing body of the municipality and noted in the official minutes or similar records of the municipality before the formation of the contract.

It is important to note that the language of this section is so structured that the statute cannot be evaded by making a contract or contracts for larger amounts than permitted in a particular period and then spreading the payments over future periods.

² The statute allows no exception, based on value or otherwise, for a sale or lease by the city or county to an official under whom the contract would be made or supervised.

Additional exceptions include:

- In a rural public hospital district ([RCW 70.44.460](#)) the total amount of a contract or contracts authorized “may exceed \$1,500 in any calendar month, but shall not exceed \$24,000 in any calendar year,” with the maximum calendar year limit subject to additional increases determined according to annual changes in the consumer price index (CPI) ([RCW 42.23.030\(6\)\(c\)\(ii\)](#)).
- The leasing by a port district as lessor of port district property to a municipal officer or to a contracting party in which a municipal officer may be beneficially interested, if in addition to all other legal requirements, a board of three disinterested appraisers and the superior court in the county where the property is situated finds that all terms and conditions of such lease are fair to the port district and are in the public interest.
- Other exceptions apply to the letting of contracts for: school bus drivers in a second class school district; substitute teachers or substitute educational aid in a second-class school district; substitute teachers, if the contracting party is the spouse of an officer in a school district; certificated or classified employees of a school district, if the contract is with the spouse of a school district officer and the employee is already under contract (except, in second class districts, the spouse need not already be under contract) ([RCW 42.23.030\(8-11\)](#)).
- Under certain defined circumstances, any employment contract with the spouse of a public hospital district commissioner.

If an exception applies to a particular contract, the municipal officer may not vote for its authorization, approval, or ratification and the interest of the municipal officer must be disclosed to the governing body and noted in the official minutes or other similar records before the contract is formed.

Qualified Exceptions

[RCW 42.23.040](#) permits a municipal officer to have a “remote” interest in municipal contracts under certain circumstances. Those types of interest are as follows:

- The interest of “a non-salaried officer of a nonprofit corporation.”
- The interest of an employee or agent of a contracting party where the compensation of such employee or agent “consists entirely of fixed wages or salaries” (i.e., without commissions or bonuses). For example, councilmembers may be employed by a contractor with whom the city does business for more than the amounts allowed under [RCW 42.23.030\(6\)](#) (if they apply), but not if any part of their compensation includes a commission or year-end bonus.
- That of “a landlord or tenant of a contracting party”; e.g., a county commissioner who rents an apartment from a contractor who bids on a county contract.
- That of “a holder of less than one percent of the shares of a corporation or cooperative which is a contracting party.”

The conditions for the exemption in those cases of “remote interest” are as follows:

- The officer must fully disclose the nature and extent of the interest, and it must be noted in the official minutes or similar records before the contract is made.
- The contract must be authorized, approved, or ratified after that disclosure and recording.
- The authorization, approval, or ratification must be made in good faith.

- Where the votes of a certain number of officers are required to transact business, that number must be met without counting the vote of the member who has a remote interest.
- The officer having the remote interest must not influence or attempt to influence any other officer to enter into the contract.



Practice Tip: Because there could be a question about whether an officer’s presence during action on a contract from which the officer has recused themselves is an “attempt to influence” the other officers, MRSC recommends that the officer with a remote interest not participate, or even appear to participate, in any manner in the governing body’s action on the contract.

Penalties

- A public officer who violates [chapter 42.23 RCW](#) may be held liable for a \$500 civil penalty “in addition to such other civil or criminal liability or penalty as may otherwise be imposed.”
- The contract is void, and the jurisdiction may avoid payment under the contract, even though it may have been fully performed by another party.
- The officer may have to forfeit their office.

DUAL OFFICE-HOLDING

Basics

The election or appointment of a person to public office, unlike “public employment,” is not considered to be a “contract” within the meaning of [chapter 42.23 RCW](#) and similar statutes (*Powerhouse Engineers v. State* (1977)). Under case law, however, it is unlawful for public officers to appoint themselves to other public offices unless clearly authorized by statute to do so.³

There are also statutory provisions and case law governing the holding of multiple offices by the same person. To apply those general principles, it is necessary to know the distinction between a public “office” and “employment.”

In an early case, *State ex rel. Brown v. Blew* (1944), the Washington State Supreme Court, quoting from another source, held the following five elements to be indispensable to make a public employment a “public office”:

1. It must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature;
2. It must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;
3. The powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority;

³ As an exception to this general rule, however, a councilmember may vote for himself or herself for appointment to a position, such as mayor pro tem, which must be filled from the membership of the council. See *Gayder v. Spiotta* (1985).

4. The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the legislature and by it placed under the general control of a superior officer or body; and
5. It must have some permanency and continuity and not be only temporary or occasional.

As the cases also point out, usually a public officer is required to execute and file an official oath and bond.

Statutory Provisions

There is no single statutory provision governing dual office-holding. In fact, statutory law is usually silent on that question except where the legislature has deemed it best either to prohibit or permit particular offices to be held by the same person regardless of whether they may or may not be compatible under common law principles. For example, [RCW 35.23.142](#), [35A.12.020](#), and [35.27.180](#) (the last of these permits the offices of clerk and treasurer to be combined in certain cases).

On the other hand, [RCW 35A.12.030](#) and [35A.13.020](#) prohibit a mayor or councilmember in a code city from holding any other public office or employment within the city's government "except as permitted under the provisions of chapter [42.23 RCW](#)."

A statute expressly permits city councilmembers to hold the position of volunteer fire fighter (but not chief), volunteer ambulance personnel, or reserve law enforcement officer, or two or more of such positions, but only if authorized by a resolution adopted by a two-thirds vote of the full city council ([RCW 35.21.770](#), [RCW 35A.11.110](#)).

Also [RCW 35.21.772](#) which allows volunteer members of a fire department, except a fire chief, to be candidates for elective office and be elected or appointed to office while remaining a fire department volunteer, but only if two-thirds of the full city council authorizes a resolution ([RCW 35.21.770](#) and [RCW 35A.11.110](#)). [RCW 35.21.772](#) also allows volunteer members of a fire department, except a fire chief, to be candidates for elective office and be elected or appointed to office while remaining a fire department volunteer.

In addition, [RCW 35A.13.060](#) expressly authorizes a city manager to serve two or more cities in that capacity at the same time. However, it also provides that a city council may require the city manager to devote their full time to the affairs of that code city.

Incompatible Offices

In the absence of a statute on the subject, the same person may hold two or more public offices unless those offices are incompatible. A particular body of judicial decisions (case law "doctrine") prohibits an individual from simultaneously holding two offices that are "incompatible."

The Washington State Supreme Court has said that:

Offices are incompatible when the nature and duties of the offices are such as to render it improper, from considerations of public policy, for one person to retain both.

"The question [of incompatibility] is ... whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest" ([Kennett v. Levine](#) (1957)).

Other authorities point out that the question is not whether the duties of both offices can be performed at the same time but whether the functions of the two offices are inconsistent where one office is subordinate to the other, or where the holder cannot always perform the duties of both offices.

Applying those tests, the Washington State Attorney General's Office has found various offices to be incompatible with each other, such as mayor and county commissioner ([AGO 57-58 No. 90](#)), county engineer and city engineer, mayor and port commissioner ([AGO 1978 No. 12](#)), commissioner of a fire protection district and the district's civil service commission ([AGO 1968 No. 16](#)), and others.

Courts in other jurisdictions have held incompatible the positions of mayor and councilmember, mayor and city manager, city marshal and councilmember, to mention a few.

Spouses and Relatives Also Serving as Officers

Nothing under state law prohibits either a spouse or a relative of a current officeholder from seeking or serving as an elected or appointed official for that same jurisdiction. For example, spouses may serve simultaneously as councilmembers, or a sibling of the county auditor may serve as a county commissioner. There might be a conflict of interest problem if one spouse contracts with the jurisdiction for which the other spouse serves as an officer, but that does not prevent spouses from simultaneously serving as officers for that jurisdiction.

The state conflict of interest law, [RCW 42.23.030](#), prohibits an officer from having an interest in a contract made by, through, or under the supervision of that officer, with some exceptions. Under Washington community laws, if the spouse of a councilmember sells supplies to the city for which their spouse is a councilmember, there might be a conflict of interest if the value of the contract exceeds a limit set by statute. But there is no conflict when both spouses serve as officers for the same jurisdiction, since officers receive their compensation by reason of their office, not by contract ([AGO 1978 No. 22](#)). Nothing else under state law prohibits both from serving.

Prohibition Against Pay Increases

As a means of preventing the use of public office for self-enrichment, the state constitution ([article XI](#), section 8) initially prohibited any changes in the pay applicable to an office having a fixed term, either after the election of that official or during their term. However, the constitution has been amended to permit pay increases for officials who do not fix their own compensation.

More recently, the ability to receive mid-term compensation increases was expanded to include councilmembers and commissioners if a local salary commission is established and the commission sets compensation at a higher level ([RCW 35.21.015](#) and [36.17.024](#)). Otherwise, members of governing bodies who set their own compensation still cannot, during the terms for which they are elected, receive any pay increase enacted by that body either after their election or during that term. This does not apply to a mayor's compensation unless the mayor casts the tie-breaking vote on the question. Mid-term or post-election decreases in compensation for elective officers are forbidden by [article XI](#), section 8 of the constitution.

The term "compensation" as used in that constitutional prohibition includes salaries and other forms of "pay." The cost of hospitalization and medical aid policies or plans is not considered additional compensation to elected officials ([RCW 41.04.190](#)) and compensation does not include rates of reimbursement for travel and subsistence expenses incurred on behalf of the municipality (*State ex rel. Jaspers v. West* (1942); *State ex rel. Todd v. Yelle* (1941)).

APPEARANCE OF FAIRNESS DOCTRINE IN HEARINGS

Until 1969, Washington law dealing with conflicts of interest generally applied only to financial interests, as opposed to conflicts of interest related to emotional, sentimental, or other biases. The “appearance of fairness doctrine,” however, which governs the conduct of certain hearings, covers broader ground. That doctrine was first applied in 1969. In two cases that year, the Washington State Supreme Court concluded that, when boards of county commissioners, city councils, planning commissions, civil service commissions, and similar bodies are required to hold hearings that affect individual or property rights (“quasi-judicial” proceedings), they should be governed by the same strict fairness rules that apply to court cases ([Smith v. Skagit County](#) (1969); [State ex rel. Beam v. Fulwiler](#) (1969)).

The rule requires that for justice to be done in such cases, the hearings must not only be fair; they must also be free from the appearance of unfairness. These cases usually involve zoning matters, but the doctrine has been applied to civil service and other hearings as well ([Bunko v. Puyallup Civil Service Commission](#) (1999)).

For additional information on this doctrine, see MRSC’s topic page, [Appearance of Fairness Doctrine](#).

As the listing also indicates, the appearance of fairness doctrine has been used to invalidate proceedings for a variety of reasons; for example, if a member of the hearing tribunal has a personal interest in the matter or takes evidence improperly outside the hearing (ex parte). In those cases, that member is required to completely disassociate him or herself from the case; otherwise, the entire proceeding can be overturned in court.

In 1982, the legislature reacted to the proliferation of appearance of fairness cases involving land use hearings by enacting what is now [chapter 42.36 RCW](#). This RCW chapter defines and codifies the appearance of fairness doctrine, insofar as it applies to local land use decisions. Those statutes now provide that in land use hearings:

- The appearance of fairness doctrine applies only to “quasi-judicial” actions of local decision-making bodies. “Quasi-judicial” actions are defined as:
 - actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding ([RCW 42.36.010](#)).
- The doctrine does not apply to local “legislative actions”
 - adopting, amending, or revising comprehensive, community, or neighborhood plans or other land use planning documents or the adoption of area-wide zoning ordinances or the adoption of a zoning amendment that is of area-wide significance ([RCW 42.36.010](#)).
- Candidates for public office may express their opinions about pending or proposed quasi-judicial actions while campaigning without being disqualified from participating in deciding those matters if they are later elected;
- Acceptance of campaign contributions by candidates who comply with the public disclosure and ethics laws will not later be a violation of the appearance of fairness doctrine ([Snohomish County Improvement Alliance v. Snohomish County](#) (1991));
- During pending quasi-judicial proceedings, no member of a decision-making body may engage in ex parte (outside the hearing) communications with proponents or opponents about a proposal involved in the pending proceeding, unless that member:

- Places on the record the substance of such oral or written communications; and
 - Provides that a public announcement of the content of the communication and of the parties' rights to rebut the substance of the communication shall be made at each hearing where action is taken or considered on that subject. This does not prohibit correspondence between citizens and their elected official if the correspondence is made a part of the record (when it pertains to the subject matter of a quasi-judicial proceeding).
- Participation by a member of a decision-making body in earlier proceedings that result in an advisory recommendation to a decision-making body does not disqualify that person from participating in any subsequent quasi-judicial proceedings;
 - Anyone seeking to disqualify a member of a decision-making body from participating in a decision on the basis of a violation of the appearance of fairness doctrine must raise the challenge as soon as the basis for disqualification is made known or reasonably should have been known prior to the issuance of the decision; upon failing to do so, the doctrine may not be relied on to invalidate the decision;
 - Challenged officials may participate and vote in proceedings if their absence would cause a lack of a quorum, or would result in failure to obtain a majority vote as required by law, provided a challenged official publicly discloses the basis for disqualification prior to rendering a decision; and
 - The appearance of fairness doctrine can be used to challenge land use decisions where a violation of an individual's right to a fair hearing is demonstrated. For instance, certain conduct otherwise permitted by these statutes may nevertheless be challenged if it would result in an unfair hearing (e.g., where campaign statements reflect an attitude or bias that continues after a candidate's election and into the hearing process) ([RCW 42.36.110](#)). Unfair hearings may also violate the constitutional "due process of law" rights of individuals ([State ex rel. Beam v. Fulwiler](#) (1969)). Questions of this nature may still have to be resolved on a case-by-case basis.

Prohibited Uses of Public Funds, Property or Credit

To help safeguard the public treasury, the state constitution limits the use of public monies by prohibiting gifts and credit lending. State laws also prohibit the use of public office facilities for the support or opposition of ballot measures and political campaigns.

CONSTITUTIONAL PROHIBITIONS

Basics

[Article 7](#), section 1 (Amendment 14) of the Washington State Constitution requires that taxes and other public funds be spent only for public purposes ([State ex rel. Collier v. Yelle](#) (1941); [AGO 1988 No. 21](#)).

[Article 11](#), section 15 also says that:

The making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.

Suits or prosecutions involving violations of that policy are ordinarily brought under specific civil or criminal statutes.

Prohibition Against Gifts or Lending of Credit

[Article 8](#), section 7 of the state constitution prohibits gifting of public funds or lending of the local agency's credit. That provision is as follows:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

Local governments are often asked to use their funds, property, or borrowing power (credit) to subsidize or assist endeavors by individuals or private organizations, such as the construction or operation of recreational facilities, economic development, tourist promotion, or other civic or charitable works. Certain economic development programs are a "public purpose" ([chapter 43.160 RCW](#)).

However, the characterization of a program as a "public purpose" may not justify a gift or credit loan to a private entity for that purpose. The Washington State Supreme Court has long held that no matter how worthy the purpose may be, it may not be accomplished by public gifts or loans to private persons or organizations, unless they are providing certain aid to the poor or infirm.⁴

⁴ [Johns v. Wadsworth](#) (1914) says that the legislature may not authorize the use of public funds to aid a private fair, and [Lassila v. Wenatchee](#) (1978) says a city may not buy a building for resale to a private movie theater operator. Although the language in the constitution reads "poor and infirm" (emphasis added), the courts have held that this should be interpreted as "poor or infirm" ([Health Care Facilities v. Ray](#) (1980)).

Other programs using non-recourse revenue bond funding may be authorized by the legislature without violating the constitution. However, municipal corporations (including “home rule” cities and counties) may need such express statutory authorization to do so. See attorney general’s [advisory memorandum to the state auditor](#) dated March 10, 1989.

As a measure of “aid to the poor,” the legislature has authorized cities and counties to assist in low-income housing by loans or grants to owners or developers of such housing. See [RCW 35.21.685](#); [RCW 36.32.415](#); and [RCW 84.38.070](#) (all municipal corporations to provide their utility services at reduced rates for low income senior citizens). Certain energy conservation programs have been considered not to provide a “gift” ([Tacoma v. Taxpayers](#) (1987)).

Often in cases where a loan or grant to a private organization may be prohibited, an appropriate contract can often accomplish the desired outcome by which the private organization provides the services in question as an agent or contractor for the local government agency. For instance, a city may provide recreational programs for its residents by contracting with a youth agency or senior citizens’ organization to operate recreational programs for those groups, under appropriate city supervision. The contract should have specific terms of service, however, so that the program or project remains the city’s own operation and is not an unlawfully broad delegation of city authority, or grant of city funds, to a private agency.

USE OF PUBLIC FACILITIES FORBIDDEN FOR POLITICAL PURPOSES

In addition to the constitutional prohibition against gifting public funds, state law more specifically forbids the use of public facilities for certain political purposes. [RCW 42.17A.555](#) says:

No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. The provisions of this section shall not apply to the following activities:

1. Action taken at an open public meeting by members of an elected legislative body to express a collective decision or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
2. A statement by an elective official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
3. Activities which are a part of the normal and regular conduct of the office or agency.

The facilities of a public office may be made available on a non-discriminatory, equal access basis, for political uses ([WAC 390-05-271\(2\)\(a\)](#)).

As part of putting a measure on the ballot a city, county, or special district may make “an objective and fair presentation of facts relevant to a ballot proposition,” if such an action is part of the normal and regular conduct of the agency ([WAC 390-05-271\(2\)\(b\)](#)).

The term “normal and regular conduct” is defined by in [WAC 390-05-273](#) as conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner).

If they are candidates in upcoming elections, elected municipal officers are prohibited from speaking or appearing in public service announcements that will be broadcast, shown, or distributed in any form during the period beginning January 1st and continuing through the general election ([RCW 42.17A.575](#)).

Washington State’s Public Disclosure Commission has adopted [Guidelines for Local Government Agencies in Election Campaigns](#). These guidelines provide an overview of Washington state law in an easy-to-read format indicating what activities are permitted, as well as general questions to consider.

Competitive Bidding Requirements

To help assure fairness in awarding public contracts and to achieve lower prices for the goods and services local governments requires, the state has adopted procedures that must be followed for the construction of public works and the purchase of supplies, materials, and equipment and for the acquisition of some services.

The procedural requirements for municipal purchasing and public works projects are extensive and varied; consequently, they are treated separately and in depth in other publications. See [MRSC's City Bidding Book](#) and [County Bidding Book](#). The following discussion is to acquaint readers with bidding requirements and penalties for intentionally not following them.

BASICS

Even when it is not legally required, using a competitive bidding or selection process for municipal purchases and contracts ensures bargains for the public and discourages favoritism, collusion, and fraud ([Edwards v. Renton](#) (1965)). Accordingly, requirements in statutes, charter provisions, and ordinances requiring a competitive process are liberally construed, while exceptions are narrowly construed ([Gostovich v. West Richland](#) (1969)).

In this state, most major purchases and public works projects by local governments are subject to statutory competitive bidding requirements. Purchases and public works by second class cities, towns, and code cities have requirements under [RCW 35.23.352](#) and [RCW 35A.40.210](#). Purchases and public works by counties are controlled by [RCW 36.32.235-.270](#). A county or city's charter or ordinances may provide additional bidding or other competitive selection requirements. Other statutes set out the bid requirements for special purpose districts.⁵

In cases where competitive bidding is not required, the law still may require notice or other less-stringent procedures. Some of these procedures are described in [chapter 39.04 RCW](#). There are also specific requirements in connection with the procurement of architectural and engineering services in [chapter 39.80 RCW](#).

COMPETITIVE BID LAW VIOLATION PENALTIES

[RCW 39.30.020](#) provides for civil and criminal penalties for violating contracting law. In some cases, a criminal conviction can result in the municipal officer forfeiting their office.

⁵ A few examples include [RCW 54.04.070](#) and [.082](#) for public utility districts; [RCW 70.44.140](#) for public hospital districts; [RCW 28A.335.190](#) for school districts; [RCW 53.08.120](#) for port districts; [RCW 52.14.110](#) for fire protection districts; and [RCW 57.08.050](#) for water-sewer districts. (Even if your type of agency is not listed here there may still be requirements in the statute, so have your purchasing staff check).

Open Public Meetings Act (OPMA)

The law requires that the decisions made by public officials occur in meetings open to the public. These open public meetings provide opportunities for decisions to be scrutinized and for the officials who have made them to be held accountable.

BASICS

The Open Public Meetings Act (OPMA) ([chapter 42.30 RCW](#)) requires that all meetings of state and municipal governing bodies be open and public. Exceptions include courts and the legislature.

This publication briefly discusses the OPMA. MRSC's [OPMA page](#) and [OPMA publication](#) provide greater detail on this subject.

PURPOSE

The declared purpose of the OPMA is to make all meetings of the governing bodies of public agencies, even “informal” sessions, open and accessible to the public, with only minor specific exceptions.

- The legislature intends that public agencies’ actions and deliberations be conducted openly ([RCW 42.30.010](#)).
- Meetings must be open and public; all persons must be allowed to attend unless otherwise provided by law ([RCW 42.30.030](#)).
- Ordinances, resolutions, rules, regulations, orders, and directives must be adopted at public meetings; otherwise they are invalid ([RCW 42.30.060](#)). See [Slaughter v. Fire District No. 20](#), rev. denied (1989) and [Mason County v. PERC](#) (1989).
- A vote by secret ballot at any meeting that is required to be open is also declared null and void ([RCW 42.30.060\(2\)](#)).
- The OPMA must be liberally construed to accomplish its purpose ([RCW 42.30.910](#)).

APPLICATIONS

The OPMA applies to all meetings of:

- All multi-member governing bodies of state and local agencies, and their subagencies ([RCW 42.30.020](#)).

Certain policy groups representing participants who have contracted for the output of an operating agency’s (WPPSS’) generating plant ([RCW 42.30.020\(1\)\(d\)](#)).

The OPMA does not apply to:

- Courts or the state legislature ([RCW 42.30.020\(1\)\(a\)](#)).
- Proceedings expressly excluded by [RCW 42.30.140](#), namely:

- Certain licensing and disciplinary proceedings.
 - Certain quasi-judicial proceedings that affect only individual rights; e.g., a civil service hearing affecting only the rights of an individual employee, and not the general public.
 - Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; also, that portion of a meeting held during labor or professional negotiations, or grievance or mediation proceedings, to formulate strategy or to consider proposals submitted.
 - Generally, matters governed by the State Administrative Procedure Act ([chapter 34.05 RCW](#)).
- Social gatherings if no “action” (as defined in [RCW 42.30.020\(3\)](#)) is taken ([RCW 42.30.070](#)). Note, however, the ensuing definition of the term “action.”

The OPMA also applies to a committee created by a governing body in the following circumstances:

- When it acts on behalf of the governing body
- When it conducts hearings, or
- When it takes testimony or public comment.

A committee acts on behalf of the governing body when it exercises actual or de facto decision-making authority, as opposed to where it simply provides advice or information to the governing body ([Citizens Alliance v. San Juan County](#) (2015)).

Keep in mind that it is effective public policy to open the meetings of local government boards, commissions, and committees to the public, even if it is uncertain or doubtful that the OPMA applies to them. This approach is consistent with the OPMA’s focus on transparency and its basic intent that the actions of governmental bodies “be taken openly and that their deliberations be conducted openly” ([RCW 42.30.010](#)).

KEY DEFINITIONS

- “Meeting” means meetings at which “action” is taken ([RCW 42.30.020\(4\)](#)).
- “Action” means all transacting of a governing body’s business, including receipt of public testimony, deliberations, discussions, considerations, reviews, and evaluations, as well as “final” action ([RCW 42.30.010](#) and [42.30.020\(3\)](#)). As you can see, the definition of “action” is broad and is not limited to just voting.
- “Subagency” means a board, commission, or similar entity created by or pursuant to state or local legislation, including planning commissions and others ([RCW 42.30.020\(1\)\(c\)](#)).
- “Governing body” includes a committee of a council or other governing body “when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment” ([RCW 42.30.020](#)).

KINDS OF MEETINGS

Regular Meetings

- Definition: A recurring meeting held according to a schedule fixed by statute, ordinance, or other appropriate rule.

- If the designated time falls on a holiday, the regular meeting is held on the next business day.
- There is no statutory limitation as to the kind of business that may be transacted at a “regular” (as distinguished from “special”) meeting.

The date and time of regular meetings must be established by ordinance, resolution, order, or rule, as may be required for the governing body. The location of the regular meeting should also be designated. The OPMA itself does not require any special notice of a regular meeting.

Other statutes require municipal governing bodies to establish a procedure for notifying the public of all meeting agendas ([RCW 35.27.300](#); [35.23.221](#); [35.22.288](#); and [35A.12.160](#)). Additionally, agencies are required to post their regular meeting agendas on their websites unless they meet the exception requirements in [RCW 42.30.077](#).

Special Meetings ([RCW 42.30.080](#))

- Definition: Any meeting other than “regular.”
- May be called by the presiding officer or a majority of the members.
- Must be announced by written notice to all members of the governing body and to members of the news media who have filed written requests for such notice. The notice of a special meeting:
 - Must specify the time and place of the meeting and the business to be transacted. The agency may discuss, but may not vote, on items not included in the meeting notice.
 - Must be delivered personally, or by mail, fax, or e-mail 24 hours in advance.
 - Must be posted on the agency’s website, if any, so long as the agency has at least ten full-time employees and has a designated employee or contractor responsible for updating the website.
 - May be waived by a member.
 - Is not necessary in specified emergencies. See also [RCW 42.30.070](#).

MEETING PLACE

- As far as the OPMA is concerned, a meeting may be held at any place within or outside the territorial jurisdiction of the body unless otherwise provided in the law under which the agency was formed ([RCW 42.30.070](#)). However, the meeting place should not be selected so as to effectively exclude members of the public ([RCW 42.30.030](#)).
- The place of a special meeting must be designated in the notice ([RCW 42.30.080](#)).
- In certain emergencies requiring expedited action, the meeting or meetings may be held in such place as is designated by the presiding officer and notice requirements are suspended ([RCW 42.30.070](#) and [42.30.080](#)).
- An improper “serial” meeting may occur by telephone, email, or other electronic means if a quorum of the body discusses a topic of business through an active exchange of information and opinions by telephone or e-mail ([Battle Ground School District v. Wood](#) (2001); [Egan v. City of Seattle](#) (2020)).
- Notice must be posted on the agency’s website unless the agency does not have a website, employs no full-time equivalent employees, or does not employ personnel whose job it is to maintain or update the website.

MEETING CONDUCT

- All persons must be permitted to attend ([RCW 42.30.030](#)) except unruly persons as provided in [RCW 42.30.050](#).
- Attendance may not be conditioned upon registration or similar requirements ([RCW42.30.040](#)). (The OPMA does not prohibit a requirement that persons identify themselves prior to testifying at hearings or to speak during a public comment period.)
- In cases of disorderly conduct:
 - Disorderly persons may be expelled.
 - If expulsion is insufficient to restore order, the meeting place may be cleared and/or relocated.
 - Non-offending members of the news media may not be excluded.
 - If the meeting is relocated, final action may be taken only on agenda items ([RCW 42.30.050](#)).
- Adjournments/Continuances ([RCW 42.30.090 -100](#)):
 - Any meeting (including hearings) may be adjourned or continued to a specified time and place.
 - Less than a quorum may adjourn.
 - The clerk or secretary may adjourn a meeting to a stated time and place, if no members are present, thereafter giving the same written notice as required for a special meeting.
 - A copy of the order or notice must be posted immediately on or near the door where the meeting was being (or would have been) held.
 - An adjourned regular meeting continues to be a regular meeting for all purposes.

EXECUTIVE SESSIONS

The OPMA only allows a local agency to exclude the public from meetings of the governing body in limited circumstances. It never requires the agency to exclude the public. But, where public knowledge of the discussion could create financial or legal harm to the agency, the governing body can choose to exclude the public.

There are only a few executive sessions where the agency's attorney must be present, either physically or by phone or video conference. If the attorney is not present, the members of the governing body and the presiding officer have a duty to limit the discussion in executive session only to those matters allowed by the OPMA.

Executive sessions are permissible when allowed by statute ([RCW 42.30.110\(1\)\(b\)-\(i\)](#)); here are most commonly-used reasons:⁶

- (b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;
- (c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;

⁶ The listing of matters for which a local governing body may meet in executive session includes here only those that such a body would address. There are others identified in the statute (e.g., financial and commercial information supplied by private persons to an export trading company) not identified here.

- (d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;
 - (e) To consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;
 - (f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;
 - (g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to [RCW 42.30.140\(4\)](#), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;
 - (h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;
 - (i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.
- Public hospitals may conduct executive sessions regarding staff privileges and quality improvement, similar to the authority granted to public hospital districts. Meetings concerning the granting, denial, revocation, restriction, or other consideration of the clinical staff privileges of a health provider are confidential and may be conducted in executive session. Final action, however, must be taken in public. Meetings, proceedings and deliberations of a quality improvement committee of a public hospital and all meetings, proceedings, and deliberations to review the activities of a quality improvement committee may, at the discretion of the governing body of the hospital, be confidential and conducted in executive session ([RCW 42.30.110\(l\)](#)).

Potential litigation is defined as being matters protected under the attorney-client privilege and as either: specifically threatened; reasonably believed and may be commenced by or against the agency, the governing body, or a member acting in an official capacity; or as litigation or legal risks of a proposed action or current practice that the agency has identified when public discussion of the litigation or legal risks is likely to result in an adverse legal or financial consequence to the agency. The presence of an attorney at a session does not in itself allow the meeting to be held as an executive session ([RCW 42.30.110\(1\)\(i\)](#)).

- Conduct of Executive Sessions:
 - An executive session must be part of a regular or special meeting ([RCW 42.30.110](#)).
 - Before convening an executive session, the presiding officer must publicly announce the purpose for excluding the public and the time when the executive session will conclude.
 - The executive session may be extended by announcement of the presiding officer ([RCW 42.30.120\(2\)](#)).

- Final adoption of an “ordinance, resolution, rule, regulation, order or directive” must be done in the “open” meeting ([RCW 42.30.120](#)).
- Improper Disclosure of Information Learned in Executive Session:
 - It is the clear intent of the provisions relating to executive sessions that information learned in executive session be treated as confidential. However, there is no specific sanction or penalty in the Open Public Meetings Act for disclosure of information learned in executive session.
 - A more general provision is provided in [RCW 42.23.070](#) prohibiting disclosure of confidential information learned by reason of the official position of a city officer. This general provision would seem to apply to information that is considered confidential and is obtained in executive sessions.

MINUTES

- Minutes of regular and special meetings must be promptly recorded and open to public inspection. (The statute does not specify any particular kind of “recording.”) ([RCW 42.30.035](#)).
- No minutes are required to be recorded for executive sessions. If minutes are kept for an executive session, be aware that there is no categorical exemption for executive session minutes under the Public Records Act. (The Public Records Act is discussed in the next chapter.) The announced purpose of an executive session must be included in the minutes.

VIOLATIONS

- Ordinances, rules, resolutions, regulations, orders, or directives adopted or secret ballots taken, in violation of the OPMA, are invalid ([RCW 42.30.060](#)). Agreements negotiated or adopted in closed meetings held in violation of the act also may be invalid.
- A member of a governing body who knowingly participates in violating the OPMA is subject to a \$500 civil penalty for the first violation and \$1,000 for a subsequent one ([RCW 42.30.120](#)).
- Mandamus or injunctive action may be brought to stop or prevent violations ([RCW 42.30.130](#)).
- Any person may sue to recover the penalty or to stop or prevent violations ([RCW 42.30.120-130](#)).
- A person prevailing against an agency is entitled to be awarded all costs including reasonable attorneys’ fees. However, if the court finds that the action was frivolous and advanced without reasonable cause, it may award to the agency reasonable expenses and attorney fees ([RCW 42.30.120\(2\)](#)).
- A knowing or intentional violation of the OPMA may provide a legal basis for recall of an elected member of a governing body, although recall is not a penalty under the OPMA.⁷

⁷ See *In re Recall of Ward* (2012); *In re Beasley* (1996); *In re Roberts* (1990); *Estey v. Dempsey* (1985); *Teaford v. Howard* (1985); *In re Recall Charges Against Davis* (2008).

Public Records

State law requires that records prepared, owned, used, or retained by their government officials and employees be made available for inspection and copying. The rules developed by the courts and through legislative amendments to support openness are sometimes complex; they balance the public's need to know with the protection for certain confidential records specified in state law. Failure to provide records as required can be expensive for agencies, both monetarily and in the loss of public trust.

MRSC addresses this issue in more detail in our [Public Records Act \(PRA\) guide](#) and [publication](#). While we cover the basics in this chapter, reviewing those other materials will help legislative bodies plan for adopting policies and budgets. Doing so will also help executives and administrators understand and plan for the work required to comply with public records requirements. If you are a smaller agency and your governing body members also process public records requests, you will want to look at our [OPMA and PRA Practice Tips and Checklists](#) for practice tips and short checklists that provide practical guidance.

PURPOSE

The PRA is “a strongly worded mandate for broad disclosure of public records” ([Hearst Corp. v. Hoppe](#) (1978)):

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created ([RCW 42.56.030](#)).

The PRA is to be “liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected” ([RCW 42.56.030](#)).

Courts frequently cite these principles in deciding public records cases and it is important to recognize that the principles behind the PRA all favor disclosure of records to the public.

Agency's Statutory Obligations

The PRA identifies basic first steps all agencies must take in establishing their PRA program.

Step 1: Identify the Agency's Public Records Officer (PRO)

Identifying the PRO is critical for the ease and efficiency of receiving and processing PRA requests. The PRO is responsible for overseeing the agency's PRA compliance. The PRO's contact information must be visibly posted on the agency website and relevant publications, as well as in the agency's place of business.

Step 2: Adopt an Agency PRA Policy

The PRA requires state and local government agencies adopt an agency-specific PRA policy; that policy must facilitate public access to public records, while at same time “prevent interference with other essential functions of the agency” ([RCW 42.56.100](#) and [42.56.040](#)).

Step 3: Publish and Maintain a List of Exemptions Outside the PRA

Each agency is obligated to “publish and maintain a current list containing every law, other than those listed [in the PRA] that the agency believes exempts or prohibits disclosure of specific information or records of the agency” ([RCW 42.56.070\(2\)](#)). While some publish their own list, others adopt by reference the list of exemptions published annually by the Code Reviser’s Office, which can be accessed on the Attorney General’s [Sunshine Committee webpage](#).

Step 4: Maintain an Index

Although one of the basic PRA requirements is to maintain a public records index, [RCW 42.56.070\(4\)](#) establishes that agencies do not have to maintain an index of public records if it is unduly burdensome to do so. Instead, agencies may adopt a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with their operations. For example, see [Port Townsend Municipal Code Sec. 2.76.050](#) and [Spokane’s executive order \(2008\)](#).

Step 5: Adopt a PRA Fee Schedule

An agency must publish the fees it charges for copying public records; agencies may charge actual copying costs supported by a statement of factors or can charge the PRA’s default charges if calculating actual costs is unduly burdensome. For a more in-depth review of this topic, see our webpage [Copying Charges for Public Records](#).

Step 6: Provide for a Review Procedure for Denials

An internal agency review procedure must be available to any person who objects to the agency’s denial of a records request ([RCW 42.56.520\(4\)](#)). The petitioner must provide their objection in writing and identify the agency’s denial so the agency can adequately respond.

Step 7: Ensure All Members of Governing Bodies and Public Records Officers Complete PRA Training

PRA training for all members of governing bodies and public records officers must be completed within 90 days of taking the oath of office or assuming duties. A refresher PRA training is also required every four years ([RCW 42.56.150](#) and [42.56.152](#)). For more information, see the Washington State Attorney General’s webpage on [Open Government Training](#).

Training for Mayors and Councilmembers

MRSC and the Association of Washington Cities (AWC) have created a [Public Records online course](#) to help mayors and councilmembers fulfill these training requirements.

Additional Training Requirement for Public Record Officers

PRA and records retention training for public record officers must include training on retention, production, and disclosure of electronic documents, including updating and improving technology information systems. For further information, see the Office of the Attorney General’s Open Government Trainings Act [supplemental information sheet](#) and [RCW 42.56.152](#).

WHAT RECORDS ARE PUBLIC RECORDS?

A public record is defined in [RCW 42.56.010\(3\)](#) as any writing that is prepared, owned, used, or retained by any state or local government agency, and which contains information that relates to the conduct of government, or the performance of any governmental or proprietary function.

The term “writing” is broadly defined to include not only traditional written records, but also photos, maps, videos, voicemails, webpage and social media content, emails, text messages and tweets, and databases ([RCW 42.56.010\(4\)](#)).

While the PRA easily applies to records on agency-owned devices and accounts, it also applies to agency-related communications on personal devices and accounts ([Nissen v. Pierce County \(2015\)](#)). People who hold public office can wear two hats: Sometimes, they act as private individuals, and other times they are government actors. While they [maintain their First Amendment rights](#) when acting as private individuals, they are subject to the limits the First Amendment places on the government whenever they’re doing government work. A communication on a personal device or account will be a public record if the communication is one that an agency employee or official prepares, owns, uses, or retains within the scope of employment or official duties. A communication is “within the scope of employment” or duties only when the job requires it, the employer directs it, or it furthers the employer’s interests. Your agency can require you to search personal computers and accounts, and to provide copies of public records and/or an affidavit saying that you did not find any responsive records.

A social media post that only minimally or incidentally furthers an interest of the government, without more, is not a public record. See [West v. City of Puyallup \(2018\)](#). Active two-way communication with the public will likely cause a social media post to be considered a public record.



Practice Tip: If your agency gives you a computer or email account or access to an official social media account, you can conduct the agency’s business via a remote connection to the agency’s server and not save items to your personal computer. If this is not possible, and you must use your personal computer, keep a separate file on your personal computer for any agency business.

MANAGING PUBLIC RECORDS REQUESTS

For all but the smaller agencies, staff will manage the daily processing of public records requests. Elected officials still need to know a few things about the process.

First, recognize a request when you see one. If someone asks you (verbally or in writing) for a document, consider it a records request and either direct the person to your public records officer (PRO) or forward the request to the PRO. If the person asks a question or for information, that is not a records request, and you can manage their inquiry according to your agency’s policies.

Second, when you are asked to search for records, remember that you must search any agency-provided devices and your personal devices and accounts. For searches on personal devices and accounts, you will need to certify that you have done the search by signing an affidavit or declaration that details the extent and nature of your search. The affidavit or declaration must be “reasonably detailed” and “nonconclusory,” and should describe the accounts, devices, and locations searched and the names and search terms used to locate responsive records. Your agency should have an attorney-approved form for this declaration.

RECORDS RETENTION

[Chapter 40.14 RCW](#) governs the retention, preservation and lawful destruction of public records. Because public records are public property, agencies are the custodians of this public property and your agency must adopt policies and procedures to manage those records. Intentionally mutilating, destroying, concealing, erasing, obliterating or falsifying a public record is a felony ([RCW 40.16.010](#) and [RCW 40.16.020](#)).

PENALTIES

If a court finds that an agency has improperly withheld records, [RCW 42.56.550\(4\)](#) requires that a court award costs, including attorney fees. The court also has the discretion to award penalties. The amount of the penalty can be as much as one hundred dollars per record per day. The court will apply a combination of non-exclusive factors that will increase or decrease penalty amounts ([Yousoufian v. Office of Ron Sims](#) (2010)). The penalties are designed in large part to act as deterrents for non-compliance with the PRA.

State law does provide for both individual and agency penalties related to records retention and production. The PRA does not include individual penalties, but individual criminal penalties can be assessed for the intentional destruction of public records ([RCW 40.16.010](#) and [40.16.020](#)).

For policymakers and managers, the important thing to remember is that the court is likely to reduce the penalty amounts if the agency adopts and diligently follows policies, trains its staff, and provides adequate funding for records management and records request processing. On the other hand, if the agency does not have an effective system in place, the court is likely to increase penalty amounts. In a 2022 case, the Court of Appeals sent a case back to the trial court to reassess the penalties awarded ([Cantu v. Yakima School District No. 7](#) (2022)). The court said that the agency failed to train its personnel, provide adequate staffing, and prioritize public records requests despite having a budget surplus.



Practice Tip: Courts will look at the size and budget of the agency when determining whether the agency has provided appropriate resources to manage records and records requests.

POLICY CONSIDERATIONS

Agencies are required to adopt PRA policies. In addition to the required elements of a policy, such as adopting fees, you should consider adopting policies that balance the requirement to make records available with your resources. As we note on our [Public Records Act Basics topic page](#), some agencies restrict the amount of time spent responding to PRA requests. Other policies establish categories for prioritizing and processing PRA requests.

Agencies are required to track and log information related to processing PRA requests ([RCW 40.14.026](#)). Depending on the size of your agency and the amount of time you spend on PRA matters, your agency might be required to submit a report to the [Joint Legislative Audit and Review Committee](#) (JLARC). Even if your agency is not required to submit a report, it might consider doing so. The information provided to JLARC has helped agencies make the case for increasing statutory copying charges. The reports also can help you as policymakers compare your agency's budget and staffing levels to similar agencies.

TRAINING

While elected officials and PROs are required by law to receive training, MRSC strongly recommends your agency adopt training requirements for **all** staff and volunteers. This training should include the basics of records management, identifying public records requests, and how to search for records that are responsive to requests.

RECORDS MANAGEMENT

While not technically a PRA issue, records management is a vital part of managing your agency. Agencies should consider making records management part of both your on-boarding and off-boarding policies and practices. For on-boarding new officers and employees, discuss classification, storage, and eventual destruction (or archiving) of records. For off-boarding departing officers and employees, consider a checklist for reviewing existing records and a policy that details how to transfer them to someone else in the department for disposition.

City Attorney, Prosecuting Attorney and Legal Counsel Roles

City attorneys, county prosecuting attorneys, and legal counsel for special purpose districts have similar roles. They serve as legal advisors who advise local officials, prosecute on behalf of their jurisdictions, and defend actions against their jurisdictions.

Washington state operates on the “entity” model of legal representation. The agency attorney represents the agency through its elected and appointed officials.

Washington State law requires that every city and town in the state have a city or town attorney. In some cities, the attorney will be a full-time, in-house officer of the city. In other cities, the city attorney will maintain a private practice of law but be on retainer to the city to perform the required duties. In either case, the city attorney advises city officials and employees concerning all legal matters pertaining to the business of the city.

All counties have an elected prosecuting attorney. Unlike the city attorney, the duties of the prosecuting attorney are extensively set out by statute ([RCW 36.27.020](#)). In addition to having the authority to appoint deputies, the county prosecuting attorney has the authority to contract with “special deputy prosecuting attorneys” for limited and identified purposes ([RCW 36.27.040](#)).

A county legislative authority may also appoint a “special attorney” “to perform any duty which any prosecuting attorney is authorized or required by law to perform,” but only if the appointment is approved by the presiding superior court judge ([RCW 36.32.200](#)). The prosecuting attorney provides legal advice and assistance to some special purpose districts, such as school districts ([RCW 36.27.020\(2\)](#)); other special purpose districts may have in-house attorneys or hire outside legal counsel for assistance. See [RCW 70.44.060](#) (10) regarding public hospital districts.

Although there is no specific authority for a city council to hire outside legal counsel separate and apart from the city attorney, the courts have permitted a council to do so in certain circumstances. Normally, the city attorney advises all city officials, including councilmembers, and the city council should not hire separate outside council to receive advice on city affairs. In rare cases, the city attorney may have a conflict and not be in a position to advise both the city council and the mayor ([State v. Volkmer](#) (1994); [Koler v. Black Diamond](#) (2021); and [Tukwila v. Todd](#) (1977)).

Recognize also that while the agency as a whole is always the “client,” there are situations where it is impractical for the agency’s attorney to advise all the officials involved in a case or hearing. As an example, if the police chief has been terminated by the city and requests a hearing before the civil service commission, the city attorney cannot ethically advise the city administration, the civil service commission, and the police chief at the same time. This would require the attorney to be an advocate for the police chief at the same time the attorney is providing objective legal advice to the commission. While a professional attorney could separate the two functions, it will always appear as if the attorney is favoring one “customer” over the other. When analyzing a problem, the legal practitioner should always ask if there is more than one “customer” involved (council, mayor, commissioners, board, and city manager) and whether there is a conflict between these “customers.”

It is beyond the scope of this publication to review these issues in detail. You should talk to your agency attorney about the scope of representation issues and make sure everyone agrees on how these potential conflicts will be managed. There have been several articles written on aspects of this subject that have been presented at meetings of the Washington State Association of Municipal Attorneys and the Washington Association of Prosecuting Attorneys over the years. Any of these articles may be obtained from MRSC on request.

Conclusion

MRSC hopes this publication will help local government agencies avoid trouble areas frequently encountered by local officials. Although it is meant to be comprehensive, the guide does not include all potentially relevant statutes and regulations. Furthermore, the law changes frequently, and even up-to-date legal interpretations may vary depending upon the facts of a particular case.

We encourage you to seek additional information and advice, especially on legal matters. The result may make the difference between success or failure in asserting a claim or defense, particularly when the good faith of the official may be an issue in the lawsuit. The consultant staff of the Municipal Research and Services Center (MRSC) serves city attorneys, county prosecutors, attorneys representing special purpose districts, and all other city, county, and district officials and employees in this important work.


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