

Open Public Meetings Act Update 2020



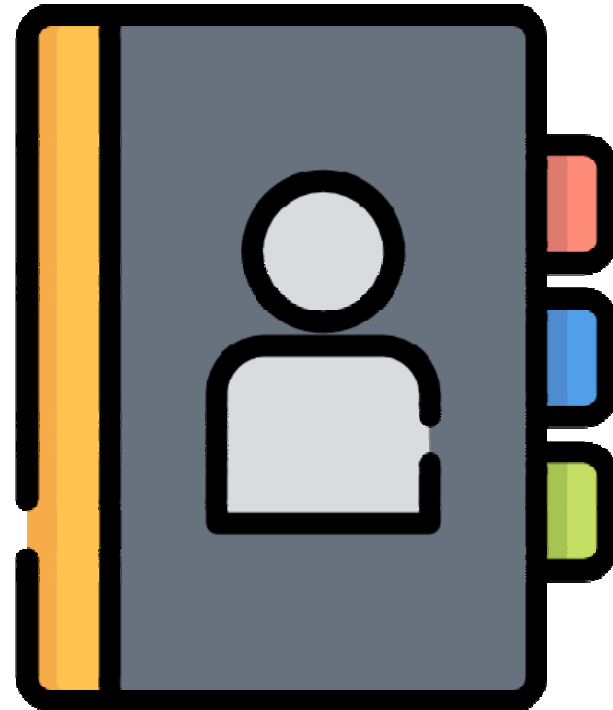
LEOFF 2 Board Meeting
September 23, 2020 – Online Only

Presented by Tor Jernudd / AAG.
Not legal advice. Not the official opinion of the:
Office of the Attorney General



Agenda

- History and Purpose of OPMA
- Covid-19
- Washington State Response
- Recent / Relevant Cases
- Challenges
- Lessons
- Resources
- Questions?



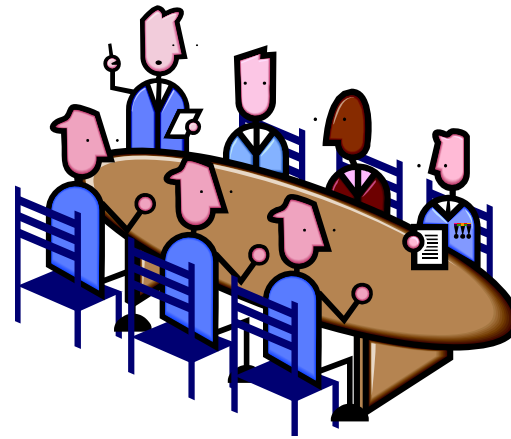
History and Purpose of OPMA

Open Public Meetings

RCW 42.30

Open Public Meetings Act (OPMA)

- “The people of this state do not yield their sovereignty to the agencies which 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 retain control over the instruments they have created.”
- Liberal construction.



History and Purpose of OPMA

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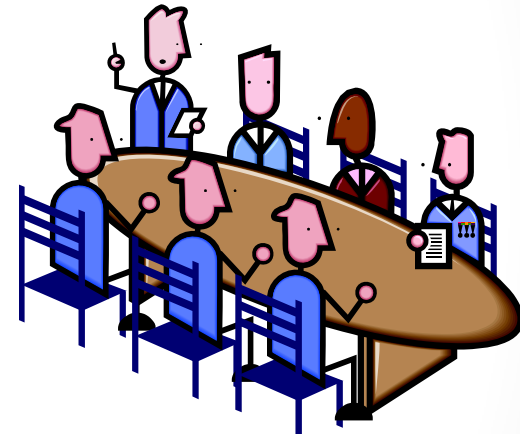
Open Public Meetings Act (OPMA)

Default rule is that all meetings are required to be open to public (unless limited exception applies)

What makes a meeting a meeting?

A majority or quorum -- need not be in same place, “serial meetings” possible

“Action” defined as “receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.”





- Uncertainty
- “Flu like,” high mortality, contagious
- First Reports December 2019 Hubei China
- First US case in Washington State January 2020 (Flu Study)
- Travel Bans / Late January 2020
- Person to person transmission
- <https://www.cdc.gov/>
- <https://www.doh.wa.gov/Emergencies/COVID19>
- Societal Impact

State Response

- RCW 43.06.220. Governor can declare state of emergency to mobilize response to an emergency. Permits the waiver/suspension of laws and rules that would “in any way prevent, hinder, or delay necessary action in coping with the emergency.”
- 30 day limit unless “extended in writing by the leadership of the senate and the house of representatives” RCW 43.06.220(4)
- February 29, 2020. Proclamation 20-05 State of Emergency declared in response to Covid-19 outbreak and person to person spread.
- March 24, 2020. Proclamation 20-28, waiving and suspending laws and rules concerning RCW 42.56, the Public Records Act, and RCW 42.30, the Open Public Meetings Act, that require any activity that occurs in an in-person setting to prevent further spread of the virus;
- Proclamation 20-28 states: “any public agency, subject to RCW 42.30, is: ***prohibited from conducting any meeting, subject to RCW 42.30 unless (a) the meeting is not conducted in-person and instead provides an option(s) for the public to attend the proceedings through, at minimum, telephonic access, and may also include other electronic, internet or other means of remote access, and (b) provides the ability for all attending the meeting to hear each other at the same time.***
- Proclamation 20-28 also ***prohibited agencies from taking “action,” as defined in RCW 42.30.020, unless those matters are necessary and routine matters or are matters necessary to respond to the COVID-19 outbreak and the current public health emergency, until such time as regular public participation under the Open Public Meetings Act is possible.***
- Proclamation 20-28 also waived requirement to physically post meeting notices.

State Response

- **TWO SUBSEQUENT CHANGES:**
 - The prohibition against non-routine action expired in June.
 - Limited exception subsequently created for in person meetings in “Phase 3 counties” for meetings with <10 persons, subject to significant restrictions, a requirement to also provide a “remote attendance option” and compliance with all applicable public health restrictions and guidelines, and subject to further requirement to immediately adjourn meeting if meeting became non-compliant (if eleventh person walks in door)
- Proclamation currently in effect through 11:59 p.m. on October 1, 2020

Recent /Relevant Cases



- ***Wood v. Battle Ground School District***

exchange of e-mails can constitute a “meeting”

but also

“...that the mere use or passive receipt of e-mail does not automatically constitute a “meeting.”

- ***Arthur West v. Seattle City Council , COA Div 1, 9/9/2020.***

COA Div 1 reverses and remands case that had been dismissed at summary judgment stage alleging that members of Seattle City Council violated the OPMA when they repealed the Employee Hour Tax.

“there are genuine issues of fact as to whether the seven council members, by agreeing to join the draft press release, collectively committed to vote to repeal the EHT and, thereby, took “action” in violation of the OPMA.”

Facebook Messages / Skype / Snapchat / Messenger / WhatsApp /

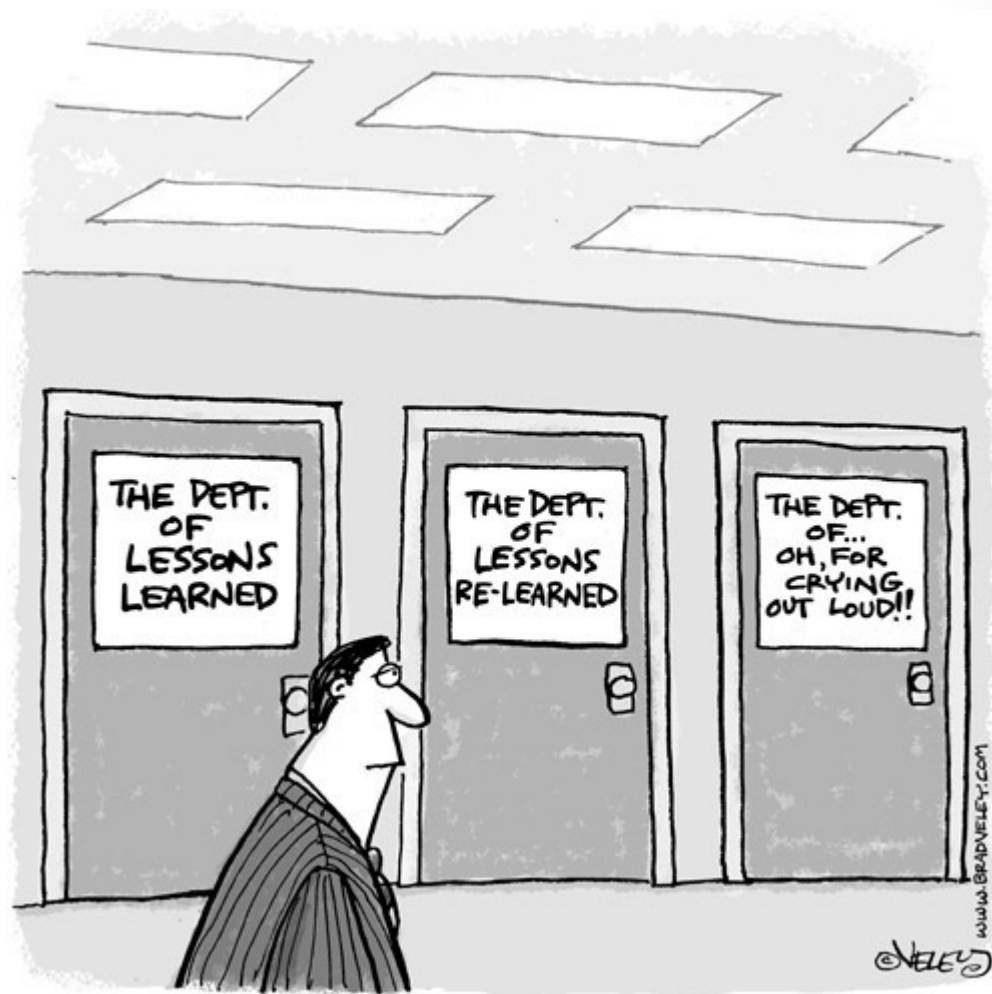
Competing Challenges

- Open Government
- Public Comment
- ADA
- Stakeholder expectations
- *Shifting requirements*
- *Conducting Agency Business*
- *Governance and Oversight in Remote only world*
- *Staying Safe*
- *Technology*



Lessons

- Liability is real, penalties plus attorney fees
- If it doesn't feel right....
- Common Sense
- Seek advice



Other Resources

- LEOFF 2 Board Assigned AAG: tor.Jernudd@atg.wa.gov
- <https://www.atg.wa.gov/opengovernment.aspx> AGO Open Government Resources Page.
- <http://mrsc.org/Home.aspx> The Municipal Research and Services Center (MRSC) is a nonprofit organization that helps local governments across Washington State better serve their citizens by providing legal and policy guidance on any topic.
- <https://coronavirus.wa.gov/> State Website.
- <https://www.governor.wa.gov/office-governor/official-actions/proclamations> Governor's Website (including proclamations).