

Open Public Meetings Act 2022 Update/Refresher



Disclaimer: This presentation reflects the personal opinion of AAG Tor Jernudd only, and is not official opinion or guidance of the Office of the Attorney General.

Today's agenda



- Open Public Meetings Act (OPMA) Today
- Lessons from Covid
- New Revised OPMA



Purpose



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. RCW 42.56.030.



Open & Public



- ***All meetings** of the governing body of a public agency shall be **open** and **public** and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter. RCW 42.30.030.*
- No conditions to attendance



What is a Meeting?



- Action*
- Public testimony , deliberations, discussions, reviews, evaluations & Final action....
- AND
- Quorum (set by statute or rules)
- *Final Action is final vote by a majority of Board or Commissions, or a “committee thereof” and must be in public, no secret ballots



Notice / Agenda



- On a regular published schedule (filed with Code Reviser)
- On website
- Special Meetings, notice to all members, and to the press, including time, place and agenda
- Emergency meetings, notice and agenda requirements waived to deal with natural disaster or emergency (and involves injury to persons or property and notice would increase likelihood).

Public Comment



- Not required
- Good Practice



Disruptions



- Board may remove a disruptive person, must be based on reasonable legal justification
- When a group of people render the orderly conduct of a meeting unfeasible and order can not be restored, the Board may order room cleared and either continue or adjourn and reconvene in another location.



Executive Sessions



Permitted only for a finite number of reasons, including, but not limited to:

- Evaluate the performance of a public employee
- Discuss litigation and potential litigation with AAG / counsel, when public discussion would have adverse effect on agency
- Chair must announce reason for executive session and time when executive session will end—Can be extended





OPMA Issues

- Reply All



- Accidental meetings



OPMA related lessons during Covid



Public health emergency made in person meetings impossible. Challenges (and opportunities) included:

- Providing public access (dial-ins, notice, zoom links, muting issues)
- Integrating opportunity for public comment
- Bandwidth/connection issues for participants
- Inclusion/exclusion while holding executive sessions
- Inclusion (highly variable access to technology and internet)
- Cat lawyer



New Revised OPMA



- Anticipating a hybrid future
- Legislature finds and declares world has changed and tele and video conferences are here to stay, and because disasters and pandemics may require government to meet remotely, barring public from in person observation and participation. Bad for democracy.
- Updating OPMA in light of “technological advances” while balancing policy goals (vibrant democracy) with public safety.
- Governing bodies are encouraged to make public access easier in emergency meeting planning.



HB 1329, Section 1 Expanded Purpose



*The legislature further finds people **participating** in their government, especially through public comment, is **an essential part of developing public policy**. The legislature finds that there are numerous developing technologies that can be used to **facilitate public comment**, especially for those with disabilities, underserved communities, and those who face **time or distance** challenges when traveling to public meetings. Therefore, the legislature intends to encourage public agencies to make use of remote access tools **as fully as practicable** to encourage **public engagement** and better serve their communities.*

New Meeting Standard(s)



- “Regular Meetings” (held during a time with no declared emergency)

and

- Meetings held after emergency declaration and an agency finding that regular meeting cannot be held without compromising public safety.

Regular Meetings

(held during a time with no declared emergency)



Appears to assume that regular meetings are by default NOT remote (notice and access to a physical location must be provided); and:

- *Nothing in this section alters the ability of public agencies to have members of a governing body participate in a meeting remotely with no declared emergency.*

Further....

- *Notwithstanding any other provision in this section, any governing body of a public agency which held some of its regular meetings remotely prior to March 1, 2020, may continue to hold some of its regular meetings remotely with no declared emergency so long as the public agency provides an option for the public to listen to the proceedings pursuant to subsection (2) of this section.*

Declaration of Emergency



1. If there is a Declaration of Emergency, AND
2. If the agency makes Finding that meeting can't be held safely

Then:

- Physical location not required
- And/or public can be excluded
- Must provide remote public access
- Notice must include access instructions
- No action unless access provided (but not necessarily comment), except emergency action



New Public Comment Before Action



- *Except in an **emergency situation**, the governing body of a public agency shall provide an opportunity at or before every regular meeting at which final action is taken for public comment.*
- Oral; or
- In advance, in writing, must be distributed in advance to members, and, may be subject to reasonable advance deadline





Executive Session Must Be Documented in Minutes



Online Streaming of All Meetings Encouraged



Public agencies are encouraged to make an audio or video recording of, or to provide an online streaming option for, all regular meetings of its governing body, and to make recordings of these meetings available online for a minimum of six months.



Online Streaming Continued



*Public agencies are encouraged to provide for the increased ability of the public to observe and **participate** in the meetings of governing bodies through real-time telephonic, electronic, internet, or other readily available means of remote access that do not require an additional cost to access the meeting.*



Open Questions re: OPMA



Comment in advance of action:

- Requires reasonable notice of possible action (agenda), requires reasonable time to consider action item and to compose comment, and requires reasonable time for prior distribution to, and consideration of, such written comment by board members
- Hard to reconcile with minimum 24-hour advance posting of agenda items



Open Questions re: OPMA



- *If, after the declaration of an emergency by a local or state government or agency, or by the federal government, a public agency determines that it cannot hold a meeting of the governing body with members or public attendance in person with reasonable safety because of the emergency, the public agency may . . . Hold a remote meeting.*
- A practical question: Who makes that determination? Is such a determination final action?

Open Questions re: OPMA



- What exactly does public “participation” mean, over and beyond “observation?”
- Does the opportunity for written and/or oral comment fully encompass “participation?”
- What about access to online tools like voting buttons, emojis, and hand-clapping or thumbs up or thumbs down tools?
- What record keeping requirements follow?



Open Questions re: OPMA



- Does this mean public must be able to comment prior to approval of prior meeting minutes?
- Should chair initiate every meeting with opportunity for comment, or prior to every agenda item requiring final action?



Open Questions re: OPMA



- Facilitating opportunity to provide oral comment remotely for any person “*who will have difficulty attending*” if oral comment is to be taken by persons in attendance.
- “*if feasible*”



Risks



- A superior court can impose a \$100 civil penalty against each member and award costs and attorney fees to a successful party seeking the remedy.
- An action taken at an improperly closed meeting can be declared null and void.

