

OPEN GOVERNMENT LAWS AND PUBLIC CONTRACTS
Overview of Washington Laws and Practice Tips for Obtaining Records

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A. INTRODUCTION: General Policy in Favor of Public Bidding

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives.

Letter to W.T. Barry, Aug. 4, 1822, 9, *The Writings of James Madison* 103 (Gaillard Hunt ed., 1910).

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (access to information essential “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).

This presentation is not designed to provide a thorough illustration and analysis of the detailed statutes controlling the creation of, and various processes related to, public contracting. The following is a basic description of the purpose, policy, and basic law regarding public contracts and then an application of one state’s laws – Washington State – to illustrate the intersection of the laws of open government laws and public procurement. Every state has its own open government laws with its own unique requirements and exemptions. This summary focuses on Washington law as an example of the application of the laws of open government laws and public procurement and an illustration of the policies in place throughout other state laws regarding public access to information. The authors provide a list of other state laws and resources in appendices at the end of this summary.

Public contracts and the many rules regarding their creation, the public bidding process, bonds, prevailing wages, etc., are largely governed in Washington State by Title 39 RCW, “Public Contracts and Indebtedness” and its subchapters. Interwoven in the public contract arena is the general requirement that public and competitive bidding take place for contracts for public works. Counties in Washington are required to use the public bidding process for projects that fall under a certain estimated cost. *See generally* RCW 39.04 (“Public Works”). The public competitive bidding requirements are outlined within a variety of chapters in the RCW, separated by the nature of the public work and the district involved (*e.g.*, public hospital, port, public utility, sewer, fire protection, etc.). *See e.g.* RCW 36.32.240-.270 (discussing competitive bidding requirements and exemptions for certain public works projects).

The general policy behind public bidding statutes is best articulated by McQuillin’s treatise *Municipal Corporations*, where it states:

The provisions of statutes, charters, and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition; to guard against favoritism, improvidence, extravagance, fraud, and corruption; and to secure the best

work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.

10 McQuillin Mun. Corp. § 29:34 (3rd ed. 2009). These principles have been explicitly recognized and cited by the Washington State Supreme Court on multiple occasions. *See, e.g., Southwest Wash. Chapter, Nat. Elec. Contractors Ass'n v. Pierce County*, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983) (“NECA”); *Savage v. State*, 75 Wn.2d 618, 621, 453 P.2d 613 (1969) (citation omitted); *Edwards v. City of Renton*, 67 Wn.2d 598, 602, 409 P.2d 153 (1965). NECA further articulated the policy in favor of competitive bidding statutes as being twofold:

(1) Protection of the general public from fraud, collusion, and favoritism; and (2) Provision of a fair forum for those interested in bidding on public contracts. Permitting rejection of bids due to failure to meet published affirmative action requirements presents no danger of fraud, collusion, or favoritism and in fact advances the broader public interest by alleviating the effects of past discrimination.

100 Wn.2d at 116 (citing *Gostovich v. West Richland*, 75 Wn.2d 583, 587, 452 P.2d 737 (1969)). *See generally* MUNICIPAL RESEARCH AND SERVICES CENTER, “The Bidding Book For Washington Counties”, Report No. 52 Revised (January 2010).¹

In this respect, the policies served by keeping the bidding requirements for public works public are strongly analogous with the policies served by keeping government activities open to the public: to minimize government waste, fraud and corruption, to incentivize transparency, to keep agencies and their agents accountable for their actions, and to keep the public as informed as possible of how and why its tax dollars are being spent by the “instruments that they have created.” RCW 42.56.030 (PRA policy provision).

PART ONE: WASHINGTON’S PUBLIC RECORDS ACT

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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.

¹ The most current version of the MRSC’s Bidding Book is available online at the “Index of Publications” section of MRSC’s website, at <http://www.mrsc.org/Publications/mrscpubs.aspx>.

Washington's Public Disclosure Act was adopted in 1972 by a direct vote of the people of Washington and provides for broad rights of access to public records. The law was renamed the Public Records Act ("PRA") in 2006. See *Bellevue John Does 1-11 v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). It requires all records to be made available unless there is a specific exemption authorizing nondisclosure. *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005); see also *Rental Housing Ass'n of Puget Sound v. City of Des Moines* ("RHA"), 165 Wn.2d 525, 535, 199 P.3d 393 (2009). The burden of proof is on public agencies to demonstrate why a record should not be made available. RCW 42.56.550(1); *Bellevue John Does 1-11*, 164 Wn.2d at 209.

The Washington Supreme Court described the Act as follows:

It is a strongly worded mandate for broad public disclosure. While mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. The provisions of the act are to be liberally construed to promote full access to public records so as to assure continuing public confidence in governmental processes, and to assure that the public interest will be fully protected.

Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 33, 769 P.2d 283 (1989). The Court has further held that "[w]ithout tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests." *Progressive Animal Welfare Soc'y v. Univ. of Washington* ("PAWS II"), 125 Wn.2d 243, 251, 884 P.2d 592 (1994). For a complete analysis of the PRA and case law interpreting the Act, see PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS ("PRA DESKBOOK") (Greg Overstreet, ed. Wash. State Bar Assoc. 2006).

The PRA applies to the public records of all state and local agencies. RCW 42.56.070(1) & .010(1) & .010(2).

B. "Agency" Under the PRA

"Agency" is defined in the PRA as:

[Including] all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1). This definition is written very broadly as it was designed to encompass all governmental agencies within Washington. This includes state agencies, see, e.g., *O'Connor v. State Dept. of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001); cities, see e.g., *RHA*, 165 Wn.2d 525; counties, see, e.g., *Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009); ports, see, e.g., *West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008). Even

individual municipal officials acting in their official capacities have been deemed “agencies” for the purposes of a PRA suit, *see, e.g., Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993).

Whether an entity is an “agency” under the “other local public agency” language of the above definition is determined by a four-factor “functional equivalency” test: “(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government.” *Telford v. Thurston County Bd. of Comm’rs*, 95 Wn. App. 149, 162, 974 P.2d 886 (1999); *see also Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192-95, 181 P.3d 881 (2008) (applying *Telford* functional equivalency test in concluding entity was an “agency” under the PRA); *see also* WAC 44-14-01001 (comment to the Attorney General’s non-binding model rules on public records).

Important here, in *Clarke*, the court concluded that an otherwise private organization became an “agency” subject to the PRA’s disclosure requirements by contracting with a city or county to perform certain specified duties—in that case, contracting under the animal control services statute. 144 Wn. App. at 192-93. Thus, the existence of a contract between an agency and a non-agency may ultimately play a critical role in a court determining that that non-agency is the functional equivalent of an agency, and is thus subject to the broad disclosure provisions of the PRA.

However, another case under the PRA concluded that a contract between an agency and a private non-profit organization, which contained an “independent contractor” clause explicitly designating the organization as not an employee or agent of the agency, did not necessarily subject that organization to the PRA as a functional equivalent of an agency. *See Spokane Research & Def. Fund v. West Cent. Comm. Dev.*, 133 Wn. App. 602, 609, 137 P.3d 120 (2006). Thus, the existence of a public contract between an agency and a non-agency does not equate to that non-agency being subject to the PRA; however, the public contract, if it was at issue in this case, would almost certainly have been available if requested from the agency (city of Spokane).

C. “Public Record” Under the PRA

The PRA only applies to public records, so the determination of whether the records at issue are “public” is often a threshold inquiry in PRA cases. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998); *see also O’Neill v. City of Shoreline*, 145 Wn. App. 913, 922, 187 P.3d 822 (2008), *review granted*, ___Wn.2d___, 208 P.3d 554 (2009) (“A threshold issue under the PRA is whether the requested documents are public records.”) (citation omitted).

Under the PRA, a “public record” includes

any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

RCW 42.56.010(2).

Further, a “writing” as defined by the PRA means any

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.010(3).

As with the definition of “agency”, the definition of “public record” is construed broadly under the PRA to effectuate the PRA’s purpose of allowing full access to government records. *See Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 323, 890 P.2d 544 (1995); *see also Ames of City of Fircrest*, 71 Wn. App. 284, 291, 857 P.2d 1083 (1993). *See also* Attorney General Open Government Internet Manual (“Att’y Gen. Manual”), Chapter 1, §1.2. Part of this threshold inquiry also involves whether the record is “identifiable,” meaning that the request must be with sufficient clarity to “give the agency fair notice that it has received a request for a public record.” *Beal v. City of Seattle*, 150 Wn. App. 865, 872-73, 209 P.3d 872 (2009) (citing *Wood v. Lowe*, 102 Wn. App. 872, 878, 10 P.3d 494 (2000)).

Thus, to be subject to the PRA, a record must meet a 3-part test: it must **(1)** be a writing, **(2)** containing information relating to the conduct of government or the performance of any governmental or proprietary function, **(3)** prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. *Confederated Tribes*, 135 Wn.2d at 746; *see also Dragonslayer, Inc. v. Washington State Gambling Comm’n*, 139 Wn. App. 433, 444, 161 P.3d 428 (2007) (“All three elements of this three-prong test must be satisfied for a record to be a public record.”) (citation omitted).

D. General Rules for Exemptions Under the PRA

Agencies are required to make all public records available for inspection or copying unless the record falls within the specific exemptions of Title 42.56 or some other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070. In addition to statutory exemptions permitting nondisclosure, agencies are not authorized to give, sell or provide access to lists of individuals requested for commercial purposes. RCW 42.56.070. Although “commercial purpose” is not defined in the PRA, the restriction in RCW 42.56.070 has been read broadly and interpreted to apply to situations other than ones in which the requester intends to directly solicit individuals on the list. AGO 1998 No. 2 (basing a broad reading of “commercial purpose” on the court’s broad reading of an exemption for law enforcement records in *Newman v. King County*, 133 Wn.2d 565 (1997)). The restriction in RCW 42.56.070, however, applies only to names of people, not corporations or other entities, in list form. AGO 1975 No. 15.

Because the public policy behind the PRA is to favor disclosure, all exemptions are to be narrowly construed. RCW 42.56.030; *Hoppe*, 90 Wn.2d at 128; *see also Livingston v. Cedeno*, 164 Wn.2d 46, 50-51, 186 P.3d 1055 (2008); PAWS II, 125 Wn.2d at 260 (“[the Legislature took] the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly.”); WAC 44-14-01003 (“The [PRA] emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records.”). The agency bears the burden of proof to show that its refusal to allow access to public records “is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550; *see also Limstrom v. Ladenburg*, 136 Wn.2d 595, 612, 963 P.2d 869 (1998).

There are now several specific classes of public records that are exempt under RCW 42.56. These exemptions are for the most part permissive and not mandatory; thus, in many cases an agency may waive an exemption if it chooses to do so as long as no person’s privacy is violated by the disclosure. AGO 1980 No. 1. An agency cannot be held liable “for any loss or damage based upon the release of a public record if the [agency] acted in good faith.” RCW 42.56.060.

If an agency refuses to allow access to a public record, in whole or in part, the agency’s response must point to the specific exemption that authorizes withholding the record and must include an explanation of how the exemption applies to the record. RCW 42.56.210(3); *RHA*, 165 Wn.2d at 537-40. Further, agencies cannot define the scope of a statutory exemption through their own rule making or policy. *See Servais v. Port of Bellingham*, 127 Wn.2d 820, 834-35, 904 P.2d 1124 (1995); *see also* WAC 44-14-06002(1). Also, none of the exemptions allow an agency to withhold any statistical information that is “not descriptive of any readily identifiable person or persons.” RCW 42.56.210(1). Furthermore, if information, “the disclosure of which would violate personal privacy or vital governmental interests,” can be redacted from a public record, then the agency must release the rest of the record after redacting that information. *Id.*; *Hoppe*, 90 Wn.2d at 132.

RCW 42.56.210(1) requires:

Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

By stating that exemptions are “inapplicable” if information which violates personal privacy or vital governmental interests can be deleted, these authors contend that pursuant to the statute, unless such a violation occurs, the agency may not claim an exemption under the PRA. Records cannot be withheld if information that violates personal privacy or vital governmental interests can be deleted.

A person’s privacy is “invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate

concern to the public.” RCW 42.56.050 (codifying the standard adopted in *Hoppe*, 90 Wn.2d at 135-36) (emphasis added). The agency must meet both prongs of this test in order to withhold a record based on a claim that disclosure would violate a person’s privacy. *See Dawson*, 120 Wn.2d at 797. Moreover, since there is no free-standing “privacy” exemption under the PRA, an agency cannot redact or withhold public records on such a basis without citing an explicit statute. *See* 1988 AGO No. 12 at 3 (“The Legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy”); *see also PAWS II*, 125 Wn.2d at 258 (agency must show record falls within specific statutory exemption); *see also* WAC 44-14-06002(2); PRA DESKBOOK, Ch. 13, at 13-2 (“Instead of a stand-alone ‘privacy’ exemption, the PRA incorporates ‘privacy’ as one of the elements of other specific exemptions.”).

No court decision has yet provided guidance on when a government interest is “vital” enough to justify withholding a public record. However, agencies should not lose sight of the fact that the Legislature chose the word “vital,” as opposed to “important,” an obvious alternate choice. AGO 1976 No. 47.

II. ACCESS TO PUBLIC CONTRACT RECORDS UNDER THE PRA

A. Public Contract Records as Public Records

As stated above, “public record” under the PRA is defined very broadly, and is meant to encompass virtually any written material in the possession of a state or local agency. *See* PRA DESKBOOK, Ch. 3, § 3.2(1) (“[t]he PRA’s definition of ‘public record’—any writing ‘regardless of physical form or characteristics’—is so broad that it is hard to conceive of a form of information that is not covered.”); *see also* WAC 44-14-03001(2) (“[a]most all records held by an agency relate to the conduct of government”). Again, however, in order to be subject to the PRA, a record must meet a 3-part test: it must (1) be a writing, (2) containing information relating to the conduct of government or the performance of any governmental or proprietary function, (3) prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. *Confederated Tribes*, 135 Wn.2d at 746.

Case law under the PRA has demonstrated how this broad interpretation of “public record” has been applied to a wide variety of records held by an agency. *See, e.g., Morgan v. City of Federal Way*, 166 Wn.2d 747, 753-54, 213 P.3d 596 (2009) (city report related to an investigation concerning accusations of a municipal court judge creating a hostile work environment); *Columbian Publ’g. Co. v. City of Vancouver*, 36 Wn. App. 25, 28, 671 P.2d 280 (1983) (police officer’s statements about chief of police); *Comaroto v. Pierce County Med. Examiner’s Office*, 111 Wn. App. 69, 74, 43 P.3d 539 (2002) (suicide note in medical examiner’s file).

Public contracts are disclosable under both the PRA and also specific public works statutes. *See* RCW 39.04.100 (stating, in part, “[a]ll plans, specifications, estimates, and copies of accounts or records and all certificates attached thereto shall, when filed, become public records and shall at all reasonable times be subject to public inspection”).

Moreover, as public records, public contracts are subject to the retention schedules mandated by statute. In Washington, the preservation and destruction of public records is guided by Title 40.14 RCW. *See Kitsap County v. Smith*, 143 Wn. App. 893, 911, 180 P.3d 834 (2008). For purposes of the retention statute, “public record” includes:

[A]ll original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use, and disposition of all public property and public income from all sources whatsoever; *all agreements and contracts to which the state of Washington or any agency thereof may be a party*[.]

RCW 40.14.010(1). The lawful destruction of public records is governed by retention schedules, and the unlawful destruction of public records can be a crime. *See* WAC 44-14-03005 (citing RCW 40.16.010 and 40.16.020); RCW 40.14.060-.070 (destruction of public records authorized when pursuant to State-approved schedule). The PRA has a related provision, RCW 42.56.100, which specifically requires that an agency retain a requested public record until the request is “resolved”, regardless of whether the agency would otherwise be allowed to destroy the record according to the requisite guidelines. *See Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 741-42, 218 P.3d 196 (2009) (Division II of the Court of Appeals suggesting in dicta that had the requestor been able to show that requested records were improperly deleted in violation of the retention schedule, that fact could support a violation of the PRA as well).

Case law under the PRA has ruled that records related to public works projects are “public records”, and thus disclosable under the PRA. For instance, in *Laborers Int'l Union of North Am., Local No. 374 v. City of Aberdeen*, 31 Wn. App. 445, 642 P.2d 418, *rev. denied* 97 Wn.2d 1024 (1982), the court addressed the issue of whether a labor union was entitled under the PRA to copies of a private contractor’s payroll records that were filed with a city pursuant to a public contract. 31 Wn. App. at 446. The city had awarded a contract to a private contractor for a project designed to repair the city’s sewer system. *Id.* The labor union wanted the records to verify the contractor’s adherence to the federal wage laws implicated by the contract. *Id.* After the contractor refused to provide the payroll records, the union made a request under the PRA to the city. *Id.* The city provided the records, but deleted names to protect the privacy of the employees. *Id.* at 447. When the laborers brought an action, the city conceded that the records were public records; the contractor had first contended that they were not public, but then argued that if they were, they were exempt. *Id.* at 447-48.

The court ultimately ruled on the “public record” issue by concluding that “[t]he records involved are a ‘writing.’ They are ‘retained’ by the city. The city is a local agency. Do they contain information relating to the performance of any governmental function? We hold that they do.” *Id.* at 447. The court also addressed several exemptions cited by the parties, which are addressed below.

Other cases under the PRA have likewise made clear that public contracts and agreements, and records related to competitive bidding protocols, can be public records. *See, e.g., Yakima Newspapers v City of Yakima*, 77 Wn. App 319, 323-24, 890 P.2d 544 (1995) (in addressing whether a settlement agreement was a “public record”, court stating: “[o]ther

jurisdictions have considered whether settlement agreements are public records under their disclosure laws and have uniformly held they are, even when the settlement specified, as it did here, that it was to remain confidential”); *Quinn Const. Co., L.L.C. v. King County Fire Protection Dist. No. 26*, 2002 WL 418036 *6 n.6 (March 11, 2002) (unpublished Division I opinion where court acknowledged PRA would have applied to the records sought related to public works competitive bidding process at issue).

B. Other Jurisdictions

Generally speaking, other state jurisdictions follow the same fundamental principles in regards to both the policy behind public bidding and also characterizing public contracts as public records. These “fundamental rules”, some of which are outlined above, include how public bidding statutes are for the benefit of the public, must be strictly construed, that there must be a fair opportunity for competition amongst bidders, and that all provisions apply equally to all bidders, etc. *See* 10 McQuillin Mun. Corp. § 29:34 (3rd ed. 2010). Likewise, the general rules for the forms of bids, the substance of public bids, the advertisements and solicitation of bids, and the construing of bids is largely uniform amongst jurisdictions but with significant deviations. *See* 64 Am. Jur.2d Public Works and Contracts § 53 (2010); *see also* Noralyn O. Harlow, “Public Contracts: Authority of State or Its Subdivision to Reject All Bids”, 52 A.L.R.4th 186 (4th Ed. 2009).

Likewise, most state and federal jurisdictions are in agreement that public contracts are almost uniformly considered “public records” under state disclosure statutes and the federal Freedom of Information Act (“FOIA”). *See International Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 164 (Colo. App 1994) (records related to subcontractor’s proposal for construction of stadium subject to Colorado public disclosure laws); *Dutton v Guste*, 395 So.2d 683 (La. 1981) (settlement agreement with public entity subject to Louisiana public disclosure laws); *Ryan v. Com., Pennsylvania Higher Educ. Assistance Agency*, 448 A.2d 669 (Pa. 1982) (contracts involving state educational agency as a party subject to Pennsylvania public disclosure laws); *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 684 N.E.2d 1222 (Ohio 1997) (settlement agreement in civil rights case subject to Ohio public disclosure laws once finalized). *See also* Andrea G. Nagel, “What are ‘Records’ of Agency Which Must Be Made Available Under State Freedom of Information Act”, 27 A.L.R.4th 680 (2009); Nagel, “What Constitutes Personal Matters Exempt From Disclosure By Invasion of Privacy Exemption Under State Freedom of Information Act”, 26 A.L.R.4th 666 (2009).²

Obviously, a thorough analysis of all the various interpretations of “public record” within each jurisdiction is inappropriate here. For a helpful summary of the most relevant statutory citations for the public records laws for a select number of the most populous states, please see **Attachment A**.³

² For further reference of what categories of records are available under FOIA, please see “A Citizen’s Guide on Using the Freedom of Information Act that Privacy Act of 1974 to Request Government Records”, *available at* <http://www.fas.org/sgp/foia/citizen.html> (last accessed March 24, 2010); *see also* The Department of Justice Guide to The Freedom of Information Act (2009 ed.), *available at* http://www.justice.gov/oip/foia_guide09.htm (March 24, 2010).

³ *See also* The Citizen Media Law Project’s provided summaries for these jurisdictions’ public records laws,

C. Exemptions Under the PRA Potentially Applicable to Requests for Public Record Contracts

Because RCW 42.56 contains over a hundred exemptions, not all of the exemptions are discussed in this overview. In particular, because privacy-related concerns are not likely to be an issue within a public contract, an in-depth analysis of those related exemptions is unnecessary. What follows instead is a review of exemptions that would likely be applicable to requests for, and the disclosure of, public contracts and their related materials.

1. Research Data

RCW 42.56.270(1) exempts from public inspection and copying:

Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.

This exemption is designed “to prevent private persons from using the Act to appropriate potentially valuable intellectual property for private gain.” PAWS II, 125 Wn.2d at 255. The PRA “protects recently acquired intellectual property from being converted to private gain.” *Id.* In order for this exemption to apply, the agency must show that disclosure would lead to both private gain and public loss. *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 576, 983 P.2d 676 (1999) (citing *Servais*, 127 Wn.2d at 823; PAWS II, 125 Wn.2d at 255). “Research data” was defined by the Court in *Servais* as “a body of facts and information collected for a specific purpose and derived from close, careful study, or from scholarly or scientific investigation or inquiry.” 127 Wn.2d at 832; *see also West v. Port of Olympia*, 146 Wn. App. 108, 119, 192 P.3d 926 (2008) (citing *Servais*). In discussing the scope of the exemption, the Court in *Servais* relied in part in its earlier opinion in PAWS II, where it stated:

[I]n science, data and hypotheses are inextricably intertwined. Valuable “research data” include not only raw data but also the guiding hypotheses that structure the data.... If the data or hypotheses ... were prematurely released, the disclosure would produce both the private gain constituted by potential intellectual property piracy and the public loss of patent or other rights....

Id. at 830 (quoting PAWS II, 125 Wn.2d at 255).

Where an agency fails to show that any public loss would flow from disclosure, records are not exempt under the “research data” exemption. *Spokane Research*, 96 Wn. App. at 576-77.

available at <http://www.citmedialaw.org/legal-guide/access-records-from-state-governments> (last accessed March 24, 2010).

This exemption has not been the subject of much appellate case law under the PRA. In *PAWS II*, the State Supreme Court ruled that because “data and hypotheses are inextricably intertwined” within the scientific world, “[v]aluable ‘research data’ include not only raw data but also the guiding hypotheses that structure the data. Accordingly, the trial court properly excised hypotheses and other information from which an informed reader might deduce relevant data or hypotheses.” 125 Wn.2d at 255. The Court in *PAWS II* ruled that the research data involving experiment on animals related to an unfunded grant proposal was ultimately exempt from disclosure, and affirmed the trial court’s application of the exemption. *Id.*

In *Servais*, the State Supreme Court analyzed the exemption in concluding that the cash flow analysis records of a port’s properties for a port’s sole use in negotiations with prospective business partners were exempt from disclosure. 127 Wn.2d at 835-36. The *Servais* Court relied on the earlier findings by the trial and appellate courts that “private developers would benefit by insight into the Port’s negotiating position if the financial data were disclosed, thereby resulting in a loss to the public.” *Id.* at 832 (internal quotations omitted).

The interpretations of the exemption by the lower courts have been more or less consistent with the above principles established by the Court. In *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 244-45, 110 P.3d 858 (2005), EFF made multiple requests to a state agency for disclosure of an agreement between the agency and Boeing regarding plans to develop an airplane facility in Everett, Washington to construct 787s. The records related to the agreement contained design plans for the project. The agency withheld portions of the records, citing the “research data” exemption, and asserted that the withheld records contained information related to the “siting, recruitment, expansion, retention, or relocation of Boeing’s business.” *Id.* at 246. Citing *Servais*, the court largely agreed, ruling that

Public release of these details could arguably lead to private gain and public loss. Private parties could interfere with, or compete with, project plans to benefit their own company. Such private interference would, in turn, harm the public if it compromised the viability of the Department’s agreement with Boeing.

Id. at 249-50.

In *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 570 983 P.2d 676 (1999), a requestor sought an anchor tenant lease and other documents used by professors and accountants hired by the city in its efforts related to a loan for the construction of a private shopping center. In analyzing one of the records at issue, an assigned contract with Nordstrom, the appellate court concluded that the contract was not exempt under the “research data” exemption because it simply “outlin[ed] the obligations of the parties”, and the contract “may be the end product of research, but it would not disclose the research.” *Id.* at 576. The court agreed with the trial court’s assessment that the agency had not shown that the release of the requested documents would result in both a private gain and a public loss, as required for the exemption to apply. *Id.* at 566-67. Specifically, the court concluded:

Unlike in *PAWS* and *Servais*, the City has not indicated a public loss if the *pro formas* or other documents were disclosed following the loan application process. The City’s uses appear limited to completed decision making, negotiations, and facilitation of the

loan application, nothing more. The City's remaining responsibilities are related to the ministerial functions incident to oversight of the completed project. Accordingly, we conclude the three items are not research data exempt from disclosure under [RCW 42.56.270(1)].

Id. at 577.

In terms of a specific request for public contracts, the Municipal Research and Services Center has recommended that agencies “immediately” notify the person who may have submitted materials they have an intellectual property interest in so that they could move for an injunction blocking disclosure under RCW 42.56.540 (discussed below). *See* MUNICIPAL RESEARCH AND SERVICES CENTER, *Public Records Act for Washington Cities, Counties, and Special Purpose Districts*, Report Number 61 (November 2009) (“MRSC PRA Report”) at 16.⁴ However, case law in Washington has held that even a person with a copyright interest in requested public records is not an indispensable party and that the requestor may be nonetheless entitled to the public records if the “fair use” exception to the federal copyright statutes applied. *See Lindberg v. Kitsap County*, 133 Wn.2d 729, 745, 948 P.2d 805 (1997) (discussed below).

Providing notice to possibly affected parties is also crucial, notes MRSC, in the context of the public bidding process referenced above. Within the public bidding process, “local governments often obtain information which bidders would not voluntarily divulge to their competitors. Such information may be exempt, if the ‘public loss’ factor can be met.” MRSC PRA Report at 16 (citing Rocco J. Treppiedi, “Disclosing Proprietary Information Obtained in Competitive Bidding,” *Legal Notes Information Bulletin* No. 432 (1985) and Kyle J. Crews, “Second Update on Public Disclosure, Public Bidding Documents,” *Legal Notes Information Bulletin* No. 491 (1995)); *see also* PRA DESKBOOK, Ch. 9, § 9.2 & Ch. 18, § 18(2)(a).

2. Deliberative Process

RCW 42.56.280 exempts from public inspection and copying:

Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.

The purpose of this exemption is to protect an agency’s deliberative process, and this purpose “severely limits its scope.” *Hoppe*, 90 Wn.2d at 133. In order for intra-agency documents to be exempt:

an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions;

⁴ The 2009 version of the MRSC PRA Report is available online (under “Introduction”) at <http://www.mrsc.org/Subjects/Legal/prd/prd.aspx> (last accessed March 24, 2010).

and . . . that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.

PAWS II, 125 Wn.2d at 256 (citing *Columbian Publ'g Co.*, 36 Wn. App. at 31-32).

This exemption affords protection “only until the policies or recommendations contained in the requested documents have been implemented.” *Dawson*, 120 Wn.2d at 793; *see also PAWS II*, 125 Wn.2d at 257; *West v. Port of Olympia*, 146 Wn. App. 108, 112, 192 P.3d 926 (2008) (affirming that “[o]nce an agency implements a policy or recommendation, records pertaining to that policy or recommendation no longer fall within the ambit of the deliberative process exemption of the public records act”). The Washington Supreme Court has “specifically rejected” the argument that this exemption applies “to all documents in which opinions are expressed” *PAWS II*, 125 Wn.2d at 256. Records are not exempt unless the opinions expressed in those records relate to policy formulation. *Id.* Records that concern implementing policy instead of making policy are not exempt. *Brouillet*, 114 Wn.2d at 790. Only records containing agency opinions or recommendations are thus exempt under the “deliberative process” exemption.

Moreover, the deliberative process exemption does not apply to facts or raw data. Factual data, even if contained in a record otherwise exempt under RCW 42.56.280, must be released. *Hoppe*, 90 Wn.2d at 133. If an agency treats subjective opinions as factual material, then those opinions are not exempt. *Id.* at 134; *see also Overlake Fund v. City of Bellevue*, 60 Wn. App. 787, 794 n.5, 810 P.2d 507 (1991) (evaluation of property site was not exempt under this exemption because it was not part of the city’s policy-making process and appeared to “contain a certain amount of factual data”).

For illustration, the MRSC describes a scenario in which the exemption would, and would not, apply:

Factual materials which are being considered as background material on a particular issue or problem are not exempt. For example, if a city treasurer or finance officer prepares a financial report for the mayor detailing the status of the city’s expenditures for the current budget year, that document is not exempt from disclosure. Conversely, if that report contains recommendations for fiscal policy changes, any portions containing the recommendations would be exempt from disclosure. Also, memos concerning possible fiscal policy changes written between a mayor, finance officer, or department heads are exempt.

MRSC PRA Report at 16-17.

In *American Civil Liberties Union v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004) (“*ACLU*”), Division I of the Court of Appeals dealt with the issue of whether lists of issues for upcoming negotiations exchanged between a labor union and the city were exempt from disclosure under the PRA under the deliberative process exemption. The court determined that a remand to the trial court was necessary because the threshold issue was “how the lists were generated and their function in the context of the decision-making process”, and both parties had conflicting interpretations of the lists. 121 Wn. App. at 549-50. However, the court

disagreed with the ACLU's argument that such records do not fall under the exemption because they were not "intra-agency records," not prepared by a government agency, and that the city had failed to show that disclosure would be injurious to the deliberative process. *Id.* at 551. Citing *PAWS II*, the court concluded that the statute does not limit its application to only intra-agency memos prepared by the agency or agency subordinates, and that the city had submitted enough evidence to show that disclosure of the lists would be injurious to the deliberative process. *Id.* at 550-53. Specifically, the court rejected the ACLU's attempt to distinguish between inhibiting the flow of information in negotiations and the flow of information to policymakers:

The negotiations themselves are an integral part of a deliberative process that culminates in the policies the City decides to adopt concerning the police department. The lists are only a starting point for a complex and delicate policy-making process. If the negotiations are negatively impacted, then so would be the City's deliberative policy-making process.

...

The problem with the ACLU's position on this issue is that it fails to recognize that labor negotiations are an ongoing process in which the City's negotiators...must respond to the ever-changing tableau of collective bargaining... This ongoing process involves negotiators and City officials in what is the essence of the deliberative process.

Id. at 553-54. Division I thus affirmed the trial court's conclusion that the records were exempt under the deliberative process exemption.

In the context of public contracts, this exemption would likely apply to the documents that have been prepared and reviewed by an agency in deciding to adopt, modify, or reject a contract from either another agency or a private party. The information exchanged during negotiations for such a contract would likely fall under the deliberative process exemption if it meets the test described above. Again, however, the deliberative process exemption is narrow in scope, and as with all other exemptions, must be narrowly interpreted by a reviewing court, and once the policies or recommendations are implemented, such as in the form of a ratified binding public contract, the records that would have been exempt would now be otherwise disclosable. *See also* PRA DESKBOOK, Ch. 7, § 7.3(4).

3. Trade Secrets

The PRA specifically incorporates "other statutes" into its list of applicable exemptions from disclosure. RCW 42.56.070(1); *see also PAWS II*, 125 Wn.2d at 261-62. This provision creates a PRA exemption for any "other statute which exempts or prohibits disclosure of specific information or records." However, the PRA must be liberally construed, and if another statute conflicts with its provisions, the PRA controls. RCW 42.56.030. This means that hundreds of statutes provide the bases for exempting public records from disclosure under the PRA, including statutes from arenas such Agriculture (Title 15 RCW), Professional Licenses (Title 18 RCW), and Health Care (Titles 43, 68, and 70 RCW). *See generally* PRA DESKBOOK, Ch. 12 & Appx.

Most relevant here is how the PRA incorporates provisions from trade secret statutes to exempt protected information from disclosure. The Court in *PAWS II* expressly held that the Uniform Trade Secrets Act (UTSA), RCW 19.108, is an “other statute” that provides a basis for an agency, or third-party blocker under RCW 42.56.540, to claim an exemption. *See also Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005); *ACLU v. City of Seattle*, 121 Wn. App. 544, 556-57, 89 P.3d 295 (2004) (citing *PAWS II*).

The UTSA defines a “trade secret” as

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) derives independent value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who obtain economic value from its disclosure or use; and
- (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4).

A trade secret does not somehow lose its status as confidential when it is submitted to a state or local agency. *See Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 52, 738 P.2d 665 (1987). However, the burden is on the party asserting that there is a legally-protectable trade secret. *Id.* at 49. Further, “[t]o fall within the ambit of the trade secret exemption such information must be ‘novel’ in the sense that the information must not be readily ascertainable from another source.” *West v. Port of Olympia*, 146 Wn. App. 108, 120, 192 P.3d 926 (2008) (citation omitted). What information constitutes a “trade secret” has been developed almost uniformly outside the context of the PRA. *See, e.g., Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 971 P.2d 936 (1999); *Precision Moulding & Frame, Inc. v. Simpson Door Co.*, 77 Wn. App. 20, 888 P.2d 1239 (1995).

However, case law under the PRA has specifically discussed the application of the incorporated “trade secret” exemption. As stated above, in *PAWS II*, the State Supreme Court concluded that the UTSA provides a separate statute by which an agency can redact or withhold public records. 125 Wn.2d at 262-63. The Court, when discussing the disclosability of an unfunded grant proposal, cited the existence of an injunction provision under the UTSA to protect the release of trade secrets, and concluded that despite the broad language of the “trade secret” definition, “[g]iven the *potential* for unfunded biomedical grant proposals to eventuate in trade secrets as broadly defined by the statute, this ‘other statute’ operates as an independent limit on disclosure of portions of the records at issue here that have even potential economic value.” *Id.* at 262 (emphasis in original).

The Court, four years later in *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 260 (1998), rejected the arguments asserted by the third-party Tribes (which sought to block disclosure) that the agency’s compilations of community contributions and records, related to the costs of gambling impacts, that were used in negotiating compacts and their amendments were exempt as trade secrets because their

competitors would gain an advantage because disclosure of the percentage of community contribution would allow such a competitor to calculate the Tribes' gross revenue. The Court refused to apply the trade secret exemption, concluding that

[T]here is no evidence in the record before us that knowledge of a casino's profitability could not be generally ascertained by visiting the casino site, through newspaper articles about the casino, or through employees, tribal members, or local service agencies which are recipients of community contributions. Even if the information were not readily ascertainable, there is no evidence in the record to support the Tribes' contention that the information derives "independent economic value" from not being generally known.

Id. at 749-50.

The lower appellate courts in Washington have also been reticent to apply the trade secret exemption within the PRA context. In *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999), the appellate court affirmed the trial court in denying application of the trade secret exemption to an anchor tenant lease and studies from professor and accountants hired to perform credit verification in the HUD loan process for a private shopping center. The court concluded that a lease is not "inherently novel" and that "[n]either the formula, pattern, method, technique or process from which the *pro formas* and studies were derived are shown to be novel." *Id.* at 578. The court also concluded that the developers asserting the exemption based their argument that disclosure would cause them harm on mere speculation, and that the studies would be disclosable anyway in the case of default. *Id.* at 578-79 ("Secrecy for the lease is not possible in the event of default because the lease will be disclosed."). However, the most important reason that the records did not qualify as trade secrets was for the simple fact that the records were produced for the city—not the developers—and the fact that the private interests of the developers were advanced did not alter the fact that the records were produced for a public purpose. *Id.* at 578; *see also Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 447-48, 161 P.3d 428 (2007) (refusing to discuss trade secret argument by parties because not raised as error in trial court, but ordering trial court to consider the issue on remand).

Because whether or not records contain "trade secrets" as defined above is often complicated, and necessarily involves a factual inquiry beyond the scope of knowledge of an agency that holds the record, agencies are often unsure of how to properly respond to a PRA request that may involve such information. The non-binding Model Rules for the PRA, promulgated by the Washington State Attorney General's Office, describe what the appropriate response from an agency should look like in the event the records requested contain, or may contain, trade secrets. First, an agency is allowed to ask for more time to respond to a PRA request in order to determine whether an exemption applies. RCW 42.56.520. Second, an agency should contact the holder of the trade secret to give them an opportunity to initiate a third-party injunction under RCW 42.56.540 to block disclosure—and to also indicate that the record will be released on a given date absent such an injunction. *See* WAC 44-14-070(7). The agency should also contemporaneously communicate to the requestor that it has contacted the third-party. The Model Rules also state that an agency can ask the holder of the potential trade secret for an explanation of why the holder thinks he or she has a trade secret, and that their

explanation will be shared with the requestor. *Id.* If the agency believes that the record is arguably exempt, “it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure[.]” *Id.*

In other words, in the context of public contracts, the rights of a holder of a trade secret is largely dependent upon the agency’s willingness to communicate with the holder about an outstanding request for records that may impact the holder’s rights. As noted by the Model Rules, agencies rarely assert the trade secret exemption, which makes sense because agencies are not traditionally the holders of “trade secrets” and would not want to be potentially liable for mandatory attorney fees and penalties under the PRA if a court determines the exemption does not apply when it is not their interest to protect a third party’s property right. WAC 44-14-070(7).⁵ *See also* PRA DESKBOOK, Ch. 9, § 9.2 & Ch. 18, § 18.2(2)(b).

4. Copyright

Related to the “trade secret” exemption, there is a potential that material that a third-party owns a copyright interest in may be contained within a public contract, or more likely, within the submitted materials that would ordinarily accompany a bid or offer. The Washington State Supreme Court dealt with the exemption in *Lindberg v. Kitsap County*, 133 Wn.2d 729, 948 P.2d 805 (1997), where requestors sought records from the county relating to siting, drainage and erosion control plans for a proposed residential development. The records were submitted by a third-party engineering company for the plat-application process. 133 Wn.2d at 733-34. Initially, the county responded by essentially not responding, and then denied the requests without offering an explanation. *Id.* at 734. The agency finally responded by noting, under advice of the prosecuting attorney of the county, that because the engineering documents contained copyrighted material, the requestors could access and inspect the documents but could not copy the documents without permission of the copyright owners. *Id.* at 734-35. The county believed that the records were exempt because the Federal Copyright Act preempts the PRA. *Id.* at 735.

The Court concluded, affirming the trial court in relevant part, that the copyright holder was not an indispensable party to a lawsuit involving the copyrighted material, and that

⁵ RCW 42.56.270 contains numerous exemptions potentially applicable to public contracts that have been requested under the PRA. Besides the cases listed above dealing with trade secrets and research data, there is minimal case law on these exemptions. Some of them, however, directly address information related to the bidding for certain public works. For instance, RCW 42.56.270(2) exempts “[f]inancial information supplied by or on behalf of a person, firm, or corporation for the purpose of qualifying to submit a bid or proposal for [ferry system construction or repair contract or highway construction or improvement].

There is some case law dealing with RCW 42.56.270(4), which exempts from disclosure

Financial and commercial information and records supplied by businesses or individuals during application for loans or program services provided by chapters 43.325, 43.163, 43.160, 43.330, and 43.168 RCW, or during application for economic development loans or program services provided by any local agency;

The Washington State Supreme Court briefly addressed the exemption in *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997), when it ruled that the requested addendum was exempt from disclosure because it pertained to a project for which a HUD loan was pending. 133 Wn.2d at 475.

allowing the requestors to copy the documents was appropriate under the equitable “fair use” exception to the federal copyright protections. *Id.* at 745-46. However, the Court affirmed the portion of the trial court’s ruling that the scope of how requestors can use the requested records was limited by the aforementioned “fair use” doctrine. *Id.* at 745.⁶ *See also* PRA DESKBOOK, Ch. 9, § 9.4.

D. Litigation-Based Exemptions

These general exemptions have been incorporated into the PRA by the discovery and evidentiary rules and apply to a wide variety of conduct and public records, including public contracts and their related materials.

1. Work-Product

RCW 42.56.290 exempts from public inspection and copying:

Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

This exemption allows an agency to withhold information that it would be able to withhold from discovery under the civil rules for superior courts, CR 26, even if the request is for records created in a criminal proceeding. *Limstrom*, 136 Wn.2d at 609; *cf. O’Connor v. Department of Soc. & Health Servs.*, 143 Wn.2d 895, 906-07 (2001) (looking to CR 26 in a civil case). “[P]ublic records from a public agency available to litigants against the agency by discovery under the Civil Rules are not exempt from the [PRA] under RCW [42.56.290]. The Civil Rules do not conflict with the [PRA].” *O’Connor*, 143 Wn.2d at 910. In particular, “records [are] not exempt if they are available to another party under superior court rules of pretrial discovery.” *Id.* at 912.

Under CR 26, documents that contain “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation” have absolute immunity. These documents may always be withheld under RCW 42.56.290. However, other trial preparation material is discoverable “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” CR 26. Moreover, “[t]he work product doctrine does not shield records created during the ordinary course of business.” *Morgan v. City of Federal Way*, 166 Wn.2d 747, 754-55, 213 P.3d 596 (2009). *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007) affirmed that “notes or memoranda prepared by the attorney from oral communications should receive

⁶ The Court in *PAWS II* briefly dealt with the copyright issue as well. The agency in that case argued that federal copyright law forbade “even partial disclosure” of the requested records, which included materials related to an unfunded grant proposal. *Id.* at 267. The Court flatly rejected the agency’s argument, ruling that the copyright protections “only protects against unauthorized copying, performance, or creation of derivative works,” and do not “ensure confidentiality.” *Id.* (citing 17 U.S.C. § 106). The Court succinctly concluded, “copyright protection does not preclude inspection of copyrighted material.” *Id.*

heightened protection” and that “[o]nly in rare circumstances, for example when the attorney's mental impressions are directly at issue, can an attorney or legal team member's notes reflecting oral communications be revealed. 162 Wn.2d at 741. The Court further concluded that work product necessarily encompassed “an attorney or legal team's notes regarding witness interviews.” *Id.* at 743.

The work product must relate to a specific “controversy,” which is “defined as completed, existing, or reasonably anticipated litigation.” *Dawson*, 120 Wn.2d at 791. The work product exemption will still apply after settlement of litigation, provided that the records sought are genuinely work-product. *See Soter*, 162 Wn.2d 716 (holding work-product relating to suit against school district for wrongful death of student with severe peanut allergy who died as a result of school provided lunch on a field trip was exempt from disclosure after case settled). It is not necessary that the person seeking public records be a party to the completed, existing or reasonably anticipated litigation. If a party to litigation against the agency could discover the public record sought, the agency must release it to anyone, including the litigant, making a request for public records under the PRA. *See, e.g., O'Connor*, 143 Wn.2d at 912. Thus, if any party to litigation against the agency would be able to meet this test and discover the material, then the agency cannot rely on this exemption to withhold the material. *See also* PRA DESKBOOK, Ch. 10, § 10.4.

2. Attorney-Client Privilege

This privilege exists to allow clients to communicate openly with their counsel without the concern of opposition seeking those communications in discovery. *Soter*, 162 Wn.2d at 745 (citation omitted). “The attorney-client privilege applies to communications and advice between an attorney and client *and extends to documents that contain a privileged communication.*” *Id.* (citation omitted) (emphasis in original).

In Washington, the attorney-client privilege is covered by RCW 5.60.060(2) which provides: “an attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.” The Washington Supreme Court has recognized this as “another statute” exempting disclosure pursuant to 42.56.070(1). *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004). However, the Supreme Court also cautioned, that the attorney-client privilege is a narrow privilege and protects only “communications and advice between attorney and client; . . .” *Id.* at 452. The Washington State Supreme Court further warned that “should an agency prepare a document for a purpose other than communicating with its attorney, and then claim that the document is protected by the attorney-client privilege, the requesting party might well claim that the agency has acted in bad faith.” *Id.* at 452. The scope of the privilege is thus narrow, and “does not protect documents that are prepared for some other purpose than communicating with an attorney.” *Hangartner*, 151 Wn.2d at 452; *see also Morgan*, 166 Wn.2d 747.

The Court provided a further elaboration on the privilege/exemption in *Soter*, where it reaffirmed that CR 26(b) governs the discoverability of materials made in preparation for trial proceedings, and because it codifies the work product rule cited above, also precluded from disclosure material that would not be discoverable. 162 Wn.2d at 733-34, 739. The *Soter* case

involved a young child that died after ingesting a peanut-butter cookie while on a school field trip, and a request was made for records related to the school district's preparation for a wrongful death lawsuit by the child's parents. The Court described the nature of the documents at issue as including handwritten attorney notes of interviews by the school district attorneys with the teachers of the deceased child, with a volunteer nurse, and with other school employees. *Id.* at 745-48. The *Soter* Court specifically held that trial preparation materials are only discoverable if they are not otherwise protected by privilege. *Id.* at 745 (citing CR 26(b)(1)). The Court ruled that all of the documents at issue were either exempt as work product or because they contain material protected by the attorney client privilege and thus fall under CR 26(b). *Id.* at 749 ("These documents are exempt from public disclosure under RCW 42.56.290, which incorporates CR 26(b)."). In its reasoning, the Court stated,

It is essential that lawyers representing our public agencies work with a certain degree of privacy free from unnecessary intrusion, in order to assemble information, sift what they consider to be the relevant from the irrelevant facts, prepare legal theories, and plan strategy without undue interference.

Id. at 748-49 (citation omitted); *but see Morgan*, 166 Wn.2d at 755-57 (refusing to apply privilege because there was no attorney-client relationship, the documents did not contain any legal analysis or recommendations, and any potential privilege for one record was destroyed when shared with a third-party). *See also* PRA DESKBOOK, Ch. 10, § 10.3.

E. Third-Party Injunction

The PRA contains an injunction provision, RCW 42.56.540, which allows for either an agency or a third-party whose rights may be affected by the disclosure of the requested records to seek an injunction blocking disclosure. *See Soter*, 162 Wn.2d 716. However, .540 does not provide a substantive basis for redacting or withholding public records—it is merely a procedural mechanism allowing for an injunction. *PAWS II*, 125 Wn.2d at 257-58; *Soter*, 162 Wn.2d at 755. Whether it is the agency or a third-party that is bringing the injunction, the burden is on the party seeking to block disclosure to show that a specific statutory exemption applies to the records and that disclosure of the records “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions.” *Id.*

Although an agency may seek an injunction against disclosure of the requested records, the normal purpose of RCW 42.56.540, is to allow “a person who is named in the record or to whom the records specifically pertains” to seek an injunction to enjoin disclosure of a public record. In describing the function of RCW 42.56.540, the MRSC states:

A local government may also notify the person who is named in the record or the person to whom the record specifically pertains, that a request for disclosure has been made and the local government intends to disclose the record(s). The purpose of notification is to allow the named individual the option of seeking a superior court injunction blocking disclosure.

MRSC PRA Report at 44 (citing *Doe I v. Washington State Patrol*, 80 Wn. App. 296, 301, 908 P.2d 914 (1996) (emphasis added). Further, the Model Rules on Public Records provide that:

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release.

WAC 44-14-04003(11) (emphasis added).

Because an agency that agrees to release the requested records and is restrained from releasing the records by a restraining order or temporary injunction, and has otherwise not violated the PRA, is not likely to be liable for mandatory fees and penalties entitled to a prevailing requestor if the records are ruled disclosable, there is a strong incentive for an agency to release requested public records—even if they believe the records could be exempt. *See Confederated Tribes*, 135 Wn.2d at 757-59; RCW 42.56.550(4). This reality makes the existence of the PRA’s injunction statute an invaluable tool to those persons or entities that have a legally-recognizable proprietary interest in materials within or related to requested public contracts. The PRA DESKBOOK, in fact, specifically notes that “[i]ndividuals and businesses often attempt to use the PRA to obtain access to information that their competitors have provided to a state or local agency or to information concerning the agency’s dealings with their competitors.” *Id.* at § 18.2(2).⁷ The literally hundreds of exemptions, and the availability of the PRA’s injunction statute to third-parties concerned about disclosure thus provide viable solutions to ameliorate those concerns.

The next section addresses the second of Washington primary open government laws, The Open Public Meetings Act.

PART TWO: WASHINGTON’S OPEN PUBLIC MEETINGS ACT

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people’s business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

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 retain control over the instruments they have created.

RCW 42.30.010.

⁷ Chapter 18 of the PRA DESKBOOK, specifically section 18.2(2)(c), articulates some of the many exemptions within the PRA related to the disclosure of financial information, including exemptions for information pertaining to ferry or road construction, private vocational schools, organic food products, commercial fertilizer, etc. The commercial information described within the exemptions is usually submitted to the state for licensing or bidding purposes, and is often exactly the type of information that is the subject of a PRA injunction suit under RCW 42.56.540.

I. THE PURPOSE OF THE OPMA

Washington's first open meetings act was adopted in 1953, requiring that final decisions be made in public. A broader act, the Open Public Meetings Act ("OPMA"), was enacted in 1971, requiring that "[a]ll 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. The purpose of the OPMA is to permit the public to observe all steps in the making of governmental decisions. *Cathcart v. Andersen*, 85 Wn.2d 102, 530 P.2d 313 (1975). The explicit policy statement contained within the OPMA, RCW 42.30.010 (shown above), was described by the Washington State Supreme Court as "some of the strongest language we have ever seen in any legislation." *Cathcart*, 85 Wn.2d at 107; *see also Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 482, 611 P.2d 396 (1980) (citing *Cathcart*). The Washington State Supreme Court in *Cathcart* continued, stating:

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country.... One purpose of [open meetings acts] was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Id. at 108 (discussing analogous law of another state).

II. WHICH GOVERNMENTAL BODIES ARE COVERED BY THE OPMA?

The OPMA applies to the "governing body" of any public agency or subagency at the state, local, county, municipal or local level. RCW 42.30.020(1). A "public agency" includes any state board, commission, committee, department, educational institution or other state agency created by or pursuant to statute other than courts and the legislature; any county, city, school district, special purpose district (*e.g.*, fire or weed control), or other municipal corporation or political subdivision of the state; any subagency of a public agency that is created by or pursuant to statute, ordinance or other legislative act, including, but not limited to, planning commissions, library or park boards, commissions and agencies; and any policy group whose membership includes representatives of publicly-owned utilities formed by or pursuant to state law. RCW 42.30.020(1); *see also* PRA DESKBOOK, Ch. 21, § 21.2.

A "governing body" is any multimember⁸ board, commission, committee, council or other policy or rulemaking body of a public agency or any committee of any governing body whenever it acts on behalf of the governing body, conducts hearings or takes testimony or public comment. RCW 42.30.020(2); *see also* PRA DESKBOOK, § 21.2(3), at 21-4. An advisory board or committee that is created by or pursuant to statute, ordinance or other

⁸ Agencies governed by a single individual do not fall within the "governing body" definition. *Salmon for All v. Dept. of Fisheries*, 118 Wn.2d 270, 821 P.2d 1211 (1992).

legislative act or that sets policy for an agency is treated like a governing body under the OPMA. RCW 42.30.020(1). The governing body is the body that actually makes the policy and rules of the agency, notwithstanding the capability of a higher agency to overrule such decisions. *Cathcart*, 85 Wn.2d at 107. For example, the following have been ruled to be governing bodies requiring that their meetings be open to the public: faculty meetings at a public college or university, *id.*; meetings of a student board of a recognized student association at a public college or university, RCW 42.30.200; meetings of services and activities fees committees at state higher educational institutions, Op. Atty. Gen. 1983, No.1; and school boards, Op. Atty. Gen. No. 33 at 7. In comparison, in *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902, 86 P.3d 835 (2004), a meeting between the mayor and special counsel regarding pending litigation was found not to come within the definition of “public agency” or “governing body” under the OPMA. Nor are private third-party entities subject to the OPMA. *Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004); *see also* PRA DESKBOOK, Ch. 21, § 21.2(1).

If a majority of a governing body of a particular agency meets with anyone else concerning agency business, the meeting is still considered a meeting of the governing body and is subject to the OPMA.

III. WHAT CONSTITUTES A MEETING?

A. General Rules

Except for specific statutory exemptions, all meetings of the “governing body” must be open to the public. To constitute a “meeting,” the event need not take place in a formal setting. A “meeting” is any occasion at which “action” is taken. RCW 42.30.020(4). “Action” is defined as the “transaction of official business” and includes discussion, consideration, public testimony, review, evaluation and other deliberation, as well as “final action.” RCW 42.30.020(3). “Action” is thus defined broadly and is not limited to “final action.” *Eugster v. City of Spokane*, 110 Wn. App. 212, 225, 39 P.3d 380 (2002); *see also* Attorney General Open Government Manual (“Att’y Gen. Open Gov’t Manual”), Chapter 3, § 3.4(B); *see also* *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 883, n.2, 913 P.2d 793 (1996) (“The plain language of the statute does not support [the] distinction between action and discussions short of action, as the definition of ‘action’ includes ‘discussion.’”). The OPMA specifically states in its definition of “action,” that what constitutes “action” is not limited to the examples in the statute. *See* RCW 42.30.020(3). Instead, the relevant inquiry in finding “action” is whether the activity relates to “the transaction of the official business of a public agency by a governing body.” *See* 1971 Att’y Gen. Op. No. 33 at 11-12; *see also* PRA DESKBOOK, § 21.3(1), at 21-5). Final action is a collective positive or negative decision, by formal motion or informal proposal, or vote by the majority of members of the governing body. RCW 42.30.020(3); *Miller v. City of Tacoma*, 138 Wn.2d 318, 331, 979 P.2d 429 (1999); *see generally* PRA DESKBOOK, § 21.3(1), at 21-5–21-6 (citing cases); *see also* Att’y Gen. Open Gov’t Manual, Chapter 3, § 3.4(B). An action to adopt an ordinance that takes place at a proper meeting is valid, even if previous action that led up to its adoption are held to violate the OPMA. *Heesan v. City of Lakewood*, 118 Wn. App. 341, 357, 75 P.3d 1003 (2005) (citing *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 882-84, 913 P.2d 793 (1996)). “Reaching a consensus on a position to be voted on at a *later* meeting qualifies as a collective

decision and, consequently, as ‘final action.’” PRA DESKBOOK, § 21.3(1), at 21-5–21-6 (citing *Miller*, 138 Wn.2d at 327; *Eugster*, 110 Wn. App. at 225) (emphasis added).

A “meeting” occurs whenever members of a governing body discuss agency business—even if no decisions are made. Courts in Washington, and in other jurisdictions, have repeatedly recognized a broad interpretation of “meeting” in open public meeting laws. See *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 562-63, 27 P.3d 1208 (2001) (“[C]ourts have generally adopted a broad definition of ‘meeting’ to effectuate open meetings laws that state legislatures enacted for the public benefit.”) (citation omitted). For example, the state auditor held in 1998 that the Algona Economic Development Corporation Public Development Authority violated the OPMA when it held dinner meetings on the Spirit of Washington Dinner Train and on cruises in the Puget Sound. In 1999, the auditor held that some members of the Monroe City Council violated the OPMA when they met at a local restaurant after public meetings. In both cases the members of the governing body discussed business in addition to socializing. The business discussions constituted “action,” and thus the gatherings were “meetings” held in violation of the OPMA.⁹

Therefore, a meeting need not be a formal meeting, but rather can include briefing sessions and informal discussions or gatherings—as long as “action,” such as “discussion” of official business, takes place. 1971 Op. Att’y Gen. No. 33 at 11. This interpretation of the OPMA has also been accepted by an association made up of local governments. See MUNICIPAL RESEARCH AND SERVICES CENTER, *The Open Public Meetings Act: How it Applies to Washington Cities, Counties, and Special Purposes Districts* (“MRSC OPMA Report”), Report Number 60 (May 2008), at 6). Indeed, unintentional meetings may occur whenever a quorum of the members of a governing body gathers in an informal setting. See 1971 Op. Atty. Gen. No. 33 at 19 (concluding that social function involving governing body members can be a “meeting” if it is scheduled or designed to discuss official business).

Within the context of discussions by a quorum of governing body members related to public contracts, there is little room to doubt that such discussions constitute a “meeting” under the OPMA, triggering its provisions. See *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 565-66, 27 P.3d 1208 (2001) (holding that emails between a quorum could constitute a meeting when discussing school board business, such as the state of an employee’s employment contract).

There is no quorum requirement within the statute for non-final action, though agencies often argue that “action” cannot be taken absent attendance by a majority of the members. Judicial decisions lend further support to this view. The Court of Appeals has held, “A ‘meeting takes place when a majority of the governing body meets and takes ‘action.’” *Eugster*, 110 Wn. App. at 222-23. This view can trace its roots not directly to the statute itself but to the aforementioned PRA DESKBOOK and to the Supreme Court’s interpretation of RCW 42.30.070 to be that a “majority of the members of a governing body are not prohibited from gathering

⁹ Where no meeting subject to the OPMA took place, no attorney fees are available under the OPMA. See *Loefelhoz v. Citizens for Leaders with Ethics and Accountability Now* (C.L.E.A.N.), 119 Wn. App. 665, 82 P.3d 1199 (2004).

together for purposes other than a regular or special meeting, so long as they take no ‘action.’” *In re Recall of Roberts*, 115 Wn.2d 551, 554, 799 P.2d 734 (1990).

The OPMA does not require that meetings be conducted in person. Exchanging email can constitute a meeting. *Wood*, 107 Wn. App. at 564. The *Wood* court noted, however, that “mere use or passive receipt of e-mail”—as opposed to the “active exchange of information and opinions” via email—“does not automatically constitute a ‘meeting.’” *Id.* at 564, 566. Other exchanges of information also have been found to constitute a “meeting.” In 1996, the state auditor held that two members of a three-member board violated the OPMA when one board member called another to discuss agency business. The calls lasted from one minute to up to one hour. The Attorney General’s Office in a 1991 letter opinion advised that if one member of a three-member commission called another member to discuss an issue of importance to the commission, this call would constitute a meeting and would violate the OPMA. Letter to Mike Heavey, State Representative, January 17, 1991. One Court of Appeals found that a meeting might have taken place when a city council member spoke with individual council members in an attempt to reach a consensus. *Eugster*, 110 Wn. App. at 224. In 1996, the state auditor found that the board that operates a public ambulance service in Skamania County violated the OPMA when two members of the three-member board used a third party to exchange information between the members that ultimately became part of an agreement signed by the board. If members performed action by way of email exchanges or other written exchanges, one could arguably classify the activity as a meeting.

Presumably, such meetings are not prohibited so long as there has been proper notice and there is a speakerphone, video display terminal or other method of observation for the public and press to observe or otherwise follow the proceedings. With the proper scheduling of meeting and agenda, such procedures should meet the requirements of the OPMA.

B. Discussions and Actions Related to Public Contracts

Within the context of discussions by a quorum of governing body members related to creating or modifying public contracts, there is little room to doubt that such discussions constitute a “meeting” under the OPMA, triggering its provisions. *See Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 565-66, 27 P.3d 1208 (2001) (holding that emails between a quorum could constitute a meeting when discussing school board business, such as the state of an employee’s employment contract); *see also Misich v. Marshland Flood Control Dist.*, 1998 WL 729606 **5-6 (1998) (unpublished Division I opinion discussing how governing body of flood control district must comply with OPMA to bind district to a valid settlement agreement); *Matter of Recall of Beasley*, 128 Wn.2d 419, 426, 908 P.2d 878 (1996) (“It may be assumed arguendo that discussions between a majority of the members of the school board regarding modification or extension of the superintendent’s contract would constitute “meetings” subject to the Open Public Meetings Act of 1971.”).

IV. WHO MAY ATTEND PUBLIC MEETINGS

“[A]ll persons” may attend the meeting of the governing body of a public agency. RCW 42.30.030. The governing body cannot place conditions on attendance such as asking people to sign in or complete a questionnaire in order to attend. RCW 42.30.040. A governing body may

set reasonable rules of conduct so meetings can be conducted in an orderly fashion, but access cannot be limited and cameras and tape recorders cannot be prohibited unless they are actually disruptive. RCW 42.30.050; *see also In re Recall of Kast*, 144 Wn.2d 807, 817-18, 31 P.3d 677 (2001) (body has discretion to remove disruptive party but must exercise discretion in a reasonable manner); Op. Atty. Gen. 1998, No. 15. If there is a disturbance and individuals are removed for disrupting the meeting, “[r]epresentatives of the press or other news media, except those participating in the disturbance,” must be allowed to remain in attendance. RCW 42.30.050. Members of the public not involved in the disturbance may also be allowed to stay. *Id.*

V. REQUIREMENTS FOR MEETINGS SUBJECT TO THE OPMA

The OPMA has separate requirements for “regular meetings,” for “special” or “emergency” meetings and for closed executive sessions.

A. Regular Meetings

Regular meetings are “recurring meetings held in accordance with a periodic schedule declared by statute or rule.” RCW 42.30.075; *see also* MRSC OPMA Report at 9. State and public agencies are required to give notice in accordance with statutes or rules pertaining to that agency under either RCW 42.30.070 (for public agencies) or .075 (for state agencies). The OPMA requires that public agencies establish a time for holding regular meetings “by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body.” RCW 42.30.070; *see also* PRA DESKBOOK, §21.4(1), at 21-9 (discussing regular meetings) (citation omitted); 1971 Att’y Gen. Op. No. 33 at 25-27 (“[I]f a particular governing body does hold regular meetings on a date fixed by law or rule, it must identify a time for such meetings by ordinance, resolution, etc.—and not, for example, by word of mouth or informal memo among the members or the like.”). State agencies must file a schedule of the time and place of regular meetings for publication with the Washington State Register on or before January of each year. Notice of any change from such schedule must be published in the State Register for distribution at least 20 days prior to the rescheduled meeting date. RCW 42.30.075.

If a governing body holds regularly recurring “study sessions,” “retreats,” or any other form of informal gathering where action takes place, those meetings should be included in the regular meeting schedule. “The primary requirement for regularly scheduled meetings is that they be ‘open to the public.’” *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 789, 650 P.2d 220 (1982). *See also Central Puget Sound Regional Transit Authority v. Miller*, 156 Wn.2d 403, 435, 128 P.3d 588 (2006) (Johnson, J., dissenting) (“Public notice that insufficiently apprises those who may be affected undermines the public confidence and trust that is placed into those legislative bodies and their decision-making abilities.”) (citing RCW 42.30.060(1)). The Attorney General’s Open Government Manual is instructive on this issue, stating:

The OPMA does not allow for “*study sessions*”, “*retreats*”, or similar efforts to discuss agency issues without the required notice. *Notice must be given just as if a formally scheduled meeting was to be held.*

Att’y Gen. Open Gov’t Manual, §3.4(B) (emphasis added)

An agenda is not required for regular meetings, though one will often be created. In the event of a disruption of a regular meeting in which members of the public are excluded but the media is allowed to remain, final action may only be taken on matters appearing on a written agenda. RCW 42.30.050. Regular meetings with no formal agenda cannot result in final action in such a situation. *Id.* There is no sanction against an agency for failing to hold regular meetings; however, if they do, they must comply with the notice provisions in the OPMA for regular meetings. *See* 1971 Att’y Gen. Op. No. 33 at 16. Moreover, if an agency has meetings without a regular meeting schedule, those meetings will by default be treated as special meetings—and, again, must comply with the relevant provisions of the OPMA (see below). *Id.*

B. Special or Emergency Meetings

A special meeting is “a meeting other than a scheduled regular meeting[.]” PRA DESKBOOK, § 21.4(2), at 21-9; *see also* RCW 42.30.080; Att’y Gen. Open Gov’t Manual, Ch. 3, §3.5(B). Special or emergency meetings may be called at any time by the presiding officer of the governing body or a majority or its members so long as 24 hours advance written notice is given to each member of the governing body and to each media organization that has on file with the governing body a written request to be notified of special meetings. *See* RCW 42.30.080¹⁰; *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 630 P.2d 930 (1981); *see also* Att’y Gen. Open Gov’t Manual, Ch.3, § 3.5(B) (special meetings must be called by presiding officer or majority of body). The notice must include an agenda specifying the business to be transacted at the meeting, and agency action at the meeting is limited to those items on the agenda. RCW 42.30.080.¹¹ With only vague and generalized descriptions for what exactly is going to be discussed, reviewed, considered, or ultimately acted upon at the special meeting, a member of the public, media, or even a Board member, would have no idea whether the body was authorized to take any final action. *See* RCW 42.30.080; *see also* Att’y Gen. Open Gov’t Manual, Ch. 3, § 3.5(B). Agencies can call special meetings without notice only in emergencies involving or threatening sudden, unexpected and severe physical damage to

¹⁰A special meeting may be called at any time by the presiding officer of the governing body of a public agency or by a majority of the members of the governing body by delivering written notice personally, by mail, by fax, or by electronic mail to each member of the governing body; and to each local newspaper of general circulation and to each local radio or television station which has on file with the governing body a written request to be notified of such special meeting or of all special meetings. Such notice must be delivered personally, by mail, by fax, or by electronic mail at least twenty-four hours before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body. Such written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the governing body a written waiver of notice. Such waiver may be given by telegram, by fax, or electronic mail. Such written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. The notices provided in this section may be dispensed with in the event a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage, when time requirements of such notice would make notice impractical and increase the likelihood of such injury or damage.

¹¹The state auditor held that the Bothell City Council violated the OPMA in 1999 when it discussed a topic not on the published agenda for a special meeting. Washington State Auditor Schedule of Audit Findings for 1/1/99-12/31/99.

persons or property and requiring immediate action. RCW 42.30.080; *Mead Sch. Dist. v. Mead Educ. Ass'n*, 85 Wn.2d 140, 530 P.2d 302 (1975). An impending teacher's strike, for example, is not such an emergency. *Mead*, 85 Wn.2d at 145. Only those to whom notice was required to be given have standing to bring a claim under the OPMA for failing to give adequate notice for a special meeting. *See Kirk*, 95 Wn.2d at 772-73.

C. Closed Meetings and Executive Sessions

Closed meetings or executive sessions are allowed under specific circumstances, discussed below. *See* PRA DESKBOOK, § 21.5(1) (discussing general requirements for a valid executive session); *see also* Att'y Gen. Open Gov't Manual, Ch. 4, §§ 4.2-4.3 (same). Although not explicitly defined under the OPMA, executive sessions are "understood to mean that part of a regular or special meeting of the governing body that is closed to the public." PRA DESKBOOK, Ch. 21, § 21.5, at 21-11. Governing bodies are allowed during a regular or special meeting to go into an executive session if the matter to be discussed falls within one of the exceptions to the OPMA. Because the public can be excluded, executive sessions are allowed only under these limited circumstances and for a narrow set of specifically-authorized purposes. *See id.*, § 21.5, at 21-11–21-12 (describing executive sessions); *see also Port Townsend Pub. Co., Inc. v. Brown*, 18 Wn. App. 80, 82 n.3, 567 P.2d 664 (1977) (same); *see also* Att'y Gen. Open Gov't Manual, Chapter 4, § 4.1. To meet in executive session, the topic of the governing body's meeting must fit within one of 13 specific grounds. *See* RCW 42.30.110(1)(a)–(m). *See also Miller*, 138 Wn.2d at 327 (action not specifically enumerated in executive session exception "must take place in public").

Before going into executive session, the presiding officer of the governing body must publicly announce to those in attendance that it is going into executive session and the purpose for excluding the public from the meeting place. RCW 42.30.110(2). It is clearly contemplated that the governing body will meet first in public before closing a meeting. *Id.*; *see also* PRA DESKBOOK, Ch. 21, § 21.5(1), at 21-11–21-12; Att'y Gen. Open Gov't Manual, Ch. 4, § 4.2; MRSC OPMA Report at 15 ("A governing body may hold an executive session only for specified purposes... and only during a regular or special meeting."). The public announcement should specifically identify the exemption of the Act that is involved and the general subject matter of the closed session. *See id.* Further, the announced purpose of the executive session "must contain enough detail to identify the purpose as falling within one of those identified in RCW 42.30.110(1)." *See* PRA DESKBOOK, Ch. 21, § 21.5(1), at 21-11; *see also* Att'y Gen. Open Gov't Manual, § 4.2. Therefore, "it would not be sufficient for a presiding officer to declare simply that the governing body will now meet in executive session to discuss 'personnel matters.'" *Miller*, 138 Wn.2d at 327; *see also* Att'y Gen. Open Gov't Manual, § 4.2 ("Discussion of personnel matters, in general, is not an authorized purpose for holding an executive session; only specific issues [authorized by RCW 42.30.120(1)] relating to personnel may be addressed in executive session."); MRSC OPMA Report at 23 ("[P]ersonnel matters' is too broad a purpose and could include purposes not authorized by statute."). *See also Feature Realty v. City of Spokane*, 331 F.3d 1082, 1089 (9th Cir. 2003) ("Unless the action is 'explicitly specified,' it is 'beyond the scope of the exception' and violates the Act.") (citation omitted).

At the time a meeting is closed, the presiding officer must announce when the executive session will be concluded and, if it is not concluded at that time, the presiding officer must

make a subsequent announcement on the extension of the time. RCW 42.30.110(2). *See* PRA DESKBOOK, Ch. 21 § 21.5, at 21-11; *see also* Att’y Gen. Open Gov’t Manual, Ch. 4, § 4.2 (same); MRSC OPMA Report at 16 (same). The purpose of this requirement is articulated in the Attorney General’s Open Government Manual:

If the governing body concludes the executive session *before* the time that was stated it would conclude, it should not reconvene in open session until the time stated. Otherwise, the public may, in effect, be excluded from that part of the open meeting that occurs between the close of the executive session and the time when the presiding officer announced the executive session would conclude.

Id. at § 4.2 (emphasis in original); *see also* PRA DESKBOOK, Ch. 21, §21.5(1), at 21-11–21-12.

D. Adjournments and Continuances

If a regular meeting or special meeting is adjourned to another date and time or a hearing at a meeting is continued, a notice shall be conspicuously placed on or near the door of the place where the meeting was held immediately after the adjournment or continuance. RCW 42.30.090-.100. The notice should state the location, date and time at which the meeting or hearing will resume. Notice must also be given to all members of the governing body and to all media entities that have filed requests for notice of special meetings in the same manner as required for notice of special meetings. *Id.*

E. Minutes

Though the OPMA does not have a provision regarding minutes, there is a separate state law that requires minutes of regular and special meetings to be promptly recorded and open to public inspection. *See* RCW 42.32.030 (“The minutes of all regular and special meetings except executive sessions of such boards, commissions, agencies or authorities shall be promptly recorded and such records shall be open to public inspection.”).¹² Written or taped minutes, whether from an open meeting or a closed meeting or executive session, are public records and are available under the Public Records Act unless they fall within an exemption to that Act. *See generally* RCW 42.56.

F. Final Decisions and Votes

Secret ballots are forbidden at any meeting required to be open under the OPMA. RCW 42.30.060. Members must cast their votes and make their recommendations openly so that observers know each member’s position. Final action taken by secret ballot vote is null and void. *Id.*

¹² The state auditor held that the King County Water District failed to comply with state law in 1998 when it failed to prepare minutes for one special meeting, failed to approve regular meeting minutes, made corrections to minutes without commissioners’ approval, made changes to prior minutes outside of a meeting without any indication in subsequent minutes or sufficiently describing or identifying changes, and added disbursement payment vouchers to minutes after minutes approval. Washington State Auditor Audit Report No. 61149 at 6, 9 (Mar. 17, 2000).

VI. PENALTIES FOR FAILURE TO COMPLY WITH THE OPMA

The OPMA provides:

No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public and then only at a meeting, the date of which is fixed by law or rule, or at a meeting of which notice has been given according to the provisions of this chapter. Any action taken at meetings failing to comply with the provisions of this subsection *shall be null and void*.

RCW 42.30.060(1) (emphasis added). The Legislature chose the word “shall,” meaning the nullification remedy is mandatory once a court finds that a meeting violated the OPMA in some manner. *See Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366, 371, 203 P.3d 1069 (2009) (“Unless clear contrary legislative intent exists, the word ‘shall’ in a statute is a mandatory directive.”) (citation omitted). Moreover, if an action made subsequent to the unlawful action merely ratifies the unlawful action, the ratification is also null and void. *See Clark v. City of Lakewood*, 259 F.3d 996, 1014 n.10 (9th Cir 2001) (citation omitted); *see also Miller*, 138 Wn.2d at 329-31. Final action taken at a meeting failing to comply with the requirements of the OPMA is null and void. RCW 42.30.060; *see, e.g., Responsible Urban Growth Group v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994); *Protect the Peninsula’s Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992); *Mason County v. Public Employment Relations Comm’n*, 54 Wn. App. 36, 771 P.2d 1185 (1989); *Slaughter v. Snohomish County Fire Protection Dist. No. 20*, 50 Wn. App. 733, 750 P.2d 656 (1988). Also, each member of the governing body who attends the meeting with knowledge that the meeting is in violation of the OPMA is personally liable for a mandatory civil penalty of \$100. RCW 42.30.120(1).

A. Preliminary Actions Taken at Meeting

In some cases, preliminary actions taken at a meeting held in violation of the OPMA could affect the validity of final action taken in a meeting that complied with the law. In *Clark v. City of Lakewood*, the Lakewood City Council developed and passed an ordinance in an open meeting but based its actions on the factual findings of a task force that met privately in violation of the OPMA. *Clark*, 259 F.3d at 1013-14. Because the task force developed those factual findings in violation of the OPMA, they were null and void and could provide no support to show the ordinance furthered a significant governmental interest. *Id.* at 1015. Consequently, the ordinance based on those findings might not survive a constitutional challenge. *Id.*

B. Standing and Elements of OPMA Claim

Any person or entity, including media organizations, may commence a court action for an injunction or mandamus to stop or prevent violations under the OPMA. RCW 42.30.130.¹³

¹³ The OPMA does not contain a specific statute of limitations for enforcement actions. The Washington State Supreme Court has stated that in situations where there is no statute of limitations provided for a particular cause of action, the court is to adopt the “catch-all” statute of limitations, RCW 4.16.130 (“An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.”).

See also 1971 Atty Gen. Op. No. 33 at 38 n.19 (discussing legislative history of standing requirement). See, e.g., *Wood*, 107 Wn. App. at 556 (suit by school employee to remedy closed meetings held by email); *Protect the Peninsula's Future*, 66 Wn. App. at 672 (suit by non-profit citizens group to remedy illegal executive sessions). To support a claim under the OPMA, and subject governing board members to personal liability, a plaintiff must show (1) members of a "governing body," (2) held a "meeting" of that body, (3) where that body took "action" in violation of the OPMA, and (4) members of that body knew that the meeting violated the statute. See *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902, 86 P.3d 835 (2004) (citations omitted); see also *Eugster*, 118 Wn. App. at 424 (citation omitted); see also *Wood*, 107 Wn. App. at 558. If a person prevails against an agency for a violation of the OPMA, he or she will recover his or her reasonable expenses and attorneys' fees in bringing the action. RCW 42.30.120(2). Again, to prevail, a party need only establish that an OPMA violation has occurred, not that the participants knowingly violated the law. See *Miller*, 138 Wn.2d at 331-32 (awarding attorneys' fees and costs despite finding that participants believed they were acting appropriately under the law).

C. Recall From Office as Penalty

A knowing violation of the OPMA can also result in recall from office. See, e.g., *In re Recall of Davis*, 164 Wn.2d 361, 193 P.3d 98 (2008); *In re Anderson*, 131 Wn.2d 92, 929 P.2d 410 (1997); *In re Recall of Roberts*, 115 Wn.2d 551, 799 P.2d 734 (1990); *Pederson v. Moser*, 99 Wn.2d 456, 662 P.2d 866 (1983); *Cole v. Webster*, 103 Wn.2d 280, 692 P.2d 799 (1984). The governor may also remove an appointee confirmed by the Senate if the governor believes the appointee has violated the OPMA. RCW 43.06.080; see also *Price v. City of Seattle*, 39 Wash. 376, 81 P. 847 (1905); *State v. Johns*, 139 Wash. 525, 248 P. 423 (1926) (confirming governor's plenary power to remove appointees believed to have committed misconduct or malfeasance).

D. Public Contracts Made or Modified in Violation of OPMA Can Be Void

There is no ambiguity as to the fact that private organizations, even those that have public contracts with state or local agencies, are not subject to the OPMA's open meeting provisions. See *Brigade v. Economic Dev. Bd. for Tacoma-Pierce County*, 61 Wn. App. 615, 623-24, 811 P.2d 697 (1991) (plaintiff unsuccessfully sought to enjoin use of public funds in contact with non-profit organization and declaration that organization meetings, which some public officials Board members, violated the OPMA).

There is some ambiguity, however, about the scope of what actions taken outside of a public meeting are null and void under RCW 42.30.060. The general rule is that actions taken outside a public meeting, such as finalizing a public contract, are void. In *Misich v. Marshland Flood Control Dist.*, 1998 WL 729606, an unpublished case from Division I of the Court of Appeals, the plaintiff argued that the district lacked authority to enter into a settlement agreement because it did not comply with the open meeting provisions of the OPMA. The

See Stenberg v. Pacific Power & Light Co., 104 Wn.2d 710, 721, 709 P.2d 793 (1985) ("[RCW 4.16.130] serves as a limitation for any cases not fitting into the other limitation provisions. This [catch-all provision] serves the State's purpose to compel prompt litigation and not leave persons fearful of litigation unlimited by time.").

district responded that it complied with the OPMA because the settlement contract gave it six months to comply with the terms of the settlement, and also with the open meeting requirements. *Id.* at **5-6. The court accepted the district’s argument, but more importantly, concluded that even if the contract was made by the district in violation of the OPMA, the contract was validated by later ratification at subsequent public meetings. *Id.* at *6; *see also Matter of Recall of Beasley*, 128 Wn.2d 419, 426-28, 908 P.2d 878 (1996) (Court assuming that employee contract discussions or modifications by governing body subject to the OPMA’s open meeting requirements, though plaintiff had failed to sufficiently make a showing of any such violation).

There is thus often an issue of whether the subsequent action taken by the governing body “cleanses” the prior actions taken in violation of the OPMA. *See Org. to Pres. Agric. Lands v. Adams County*, 128 Wn.2d 869, 883, 913 P.2d 793 (1996) (OPMA “does not, however, require that subsequent actions taken in compliance with the Act are also invalidated”). The court in *Org. to Pres. Agric. Lands*, in deciding not to invalidate the issuance of an unclassified use permit because of an alleged secret meeting held between two governing body members before a final vote was taken in public, specifically cited the Attorney General’s Opinion from 1971, which stated:

if the *final action* taken by the public agency is in accordance with our open public meetings act requirements, then it would appear to us that this action would be defensible even though there may have been a failure to comply with the act earlier during the governing body’s preliminary consideration of the subject. For example, if the members of the governing body had held an earlier meeting to discuss a certain proposal without complying with the act, but did comply in connection with the meeting at which the actual adoption of the proposal took place, the final action thus taken would be defensible.

128 Wn.2d at 883 (citing 33 Op.Att’y Gen. 40 (1971)).

On the other hand, *Miller*, 138 Wn.2d at 329-31, made clear that subsequent actions that merely ratify violative action under the OPMA are also null and void. This conclusion is consistent with *Mason County v. Public Employment Relations Comm’n, Teamsters Union, Local No. 378*, 54 Wn. App. 36, 771 P.2d 1185 (1989), where the appellate court specifically ruled that collective bargaining sessions are subject to the OPMA, and that because the bargaining sessions at issue in that case violated the Act, “the sessions and the agreement produced from them are a legal nullity.” *Id.* at 40-41. Thus, public contracts that are discussed or decided upon by a majority of the governing body while at a meeting not open to the public under the OPMA, are null and void and subsequent actions that merely ratify the product of those violations are necessarily null and void as well. *See also Clark*, 259 F.3d at 1014 n.10.

Another case involving public contracts and the OPMA was *Equitable Shipyards, Inc. v. State By and Through Dept. of Transp.*, 93 Wn.2d 465, 611 P.2d 396 (1980), where an out of state shipbuilder brought an action alleging that the defendant agency had unlawfully awarded a ferry construction contract to a domestic shipbuilder. The plaintiff sought to have the contract invalidated and have it instead awarded to plaintiff. 93 Wn.2d at 467. Amongst the various

claims alleged by the plaintiff was the claim that the agency violated the OPMA by holding a “secret” meeting and by having an executive session that did not comply with the statute’s requirements. *Id.* at 482. More important was the plaintiff’s argument that the denial of access of certain requested records for the out of state shipbuilder’s plans, coupled with the independent examination of those documents by agency members, constituted an OPMA violation. *Id.* The court ultimately rejected this argument, stating:

We do not find such independent examination, assuming it occurred, to be violative of this act. Independent separate examination of the documents constituted neither an “action” nor a “meeting” under the act. See RCW 42.30.020(3) and (4). The Commission took its “action” in an open public meeting following presentations by both firms, experts and the public.

Id.

VII. CLOSED MEETINGS THAT ARE ALLOWED UNDER THE OPMA

The OPMA is a remedial legislation, and its provisions are to be liberally construed. RCW 42.30.910. Accordingly, any exception to the Act must be narrowly confined. *Miller*, 138 Wn.2d at 324. The OPMA allows for closed meetings in only two circumstances.¹⁴ First, certain meetings may be closed because the OPMA is deemed not to apply to such meetings. RCW 42.30.140. Second, agencies are permitted, under certain circumstances, to have a closed executive session. RCW 42.30.110(1) (a)-(m). The areas not covered by the Act and the executive session exceptions are discretionary. In other words, there is no requirement that the meetings be closed or that the public be excluded.

A. Meetings to Which the OPMA Does Not Apply

Meetings may be closed in five situations where the OPMA has been deemed not to apply:

- (1) The formal granting or denying of a license, permit or certificate to engage in a business, occupation or profession, or disciplinary proceedings involving a member of such business, occupation or profession, or to issue a license for sports activity or to operate a motor vehicle or mechanical device, RCW 42.30.140(1).
- (2) Proceedings of a quasi-judicial nature relating to named parties, as opposed to a matter having a general effect on the public or on a class or group, RCW 42.30.140(2). A four-part test is used to determine if a proceeding is “quasi-judicial”:
 - (1) [w]hether a court could have been charged with making the agency’s decision;
 - (2) whether the action is one which historically has been performed by courts;
 - (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and

¹⁴ Though in the event of a disturbance at a meeting, the governing body may order the room clear of the public, such a situation does not allow the meeting to be closed as members of the media who were not involved in the disturbance must be allowed to remain. RCW 42.30.050.

(4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.

See *Protect the Peninsula's Future*, 66 Wn. App. at 676. Applying the test, a county commission's consideration of whether to grant a permit allowing the city to extend its sewer outfall, as a matter of significant public interest, was not a "quasi-judicial matter between named parties." *Id.*; but see *Pierce v. Lake Stevens School Dist. No. 4, Snohomish County*, 84 Wn.2d 772, 787, 529 P.2d 810 (1975) (affirming trial court's conclusion that "the decision to nonrenew a contract of a teacher is a quasi-judicial matter and therefore is expressly exempt" from the OPMA); *Boyle v. Renton School Dist. No. 403, King County*, 10 Wn. App. 523, 529, 518 P.2d 221 (1974).

- (3) Matters covered by the state Administrative Procedures Act ("APA").¹⁵ RCW 42.30.140(3). This typically involves adjudications by state administrative bodies. As a general rule, fact-finding by these bodies is open, but the deliberations are closed. This exemption has no impact on local government since the APA does not apply to local agencies. See *Victoria Tower P'ship v. City of Seattle*, 49 Wn. App. 755, 745 P.2d 1328 (1987).
- (4) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings and discussions relating to the interpretation or application of a labor agreement, RCW 42.30.140(4).
- (5) Meetings or portions of meetings concerning the strategy or position to be taken by the governing body during the course of collective bargaining, professional negotiations or grievance or mediation proceedings, or involving reviewing proposals made in such negotiations. *Id.*

In these limited situations, the OPMA and its open meeting provisions expressly do not apply. RCW 42.30.140.

However, it is important to note that a statutory allowance of non-public meetings in limited scenarios does not translate to an "other statute" exemption under the PRA for the written materials prepared in or for those meetings. In the aforementioned *ACLU v. City of Seattle*, 121 Wn. App. 544, 89 P.3d 295 (2004), Division I of the Court of Appeals addressed the issue of whether the OPMA can serve as an exemption from disclosure as an "other statute" under the PRA. In *ACLU*, a private labor union representing city police officers was negotiating with the city for a new contract. 121 Wn. App. at 548. Both sides exchanged a list of issues to be addressed in preparation for those negotiations. *Id.* The ACLU requested copies of both lists, but the city refused, successfully arguing at trial that the lists were exempt under the PRA. *Id.* The trial court also ruled that the OPMA, because it specifically does not apply to "[c]ollective bargaining sessions with employee organizations, including contract negotiations", written records produced for those meetings falling within the meeting exemptions are exempt under the PRA. *Id.* at 555-57. The court of appeals rejected this argument and reversed partially on those grounds, concluding, citing *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791

¹⁵ Ch. 34.05 RCW.

P.2d 526 (1990), that a provision allowing for closed meetings does not constitute an “other statute” exemption under the PRA. *Id.* at 557. Specifically, the court in *ACLU* held that:

Although the Legislatures decision to exempt collective bargaining negotiations from the OPMA suggests the material prepared for those negotiations could be protected from disclosure, absent express language in the statute, we may not so conclude. *Because there is no express exemption in the OPMA protecting written collective bargaining materials, we hold they are not protected from disclosure by OPMA as an other statute under the Act.*

Id. (emphasis added).

B. Executive Session Justifications

As stated above, executive sessions may be called for 13 specific purposes. Since all “action” (not simply “final action”) must ordinarily be performed in an open meeting, any action performed in an executive session violates the OPMA unless it falls within the specific parameters of an executive session exception. *Miller*, 138 Wn.2d at 326-27. It is illegal to engage in any action in an executive session, including initial discussions, on a subject or for a purpose beyond that specifically identified by an executive session exception. *Id.* Thus, if an exception allows a governing body to “evaluate” or “consider” a subject, the governing body may not attempt to reach a collective decision on the subject in executive session. *Id.* at 326. For example, in *Feature Realty v. City of Spokane*, the Ninth Circuit held that although an exception to the OPMA applied to the distribution of a confidential memorandum detailing settlement provisions by the city council’s attorney during a closed-door city council executive session under RCW 42.30.110(1)(i) (discussed below), the council’s approval of that settlement by way of a “collective positive decision” done by informal consensus during the closed session violated the OPMA because that action was beyond the scope of the exception. 331 F.3d at 1090-91. The court in *Feature Realty* further emphasized that, “[t]he statutory procedures at issue here are essential to protect the interests of the public.” *Id.* at 1091.

The 13 executive session exceptions are:

1. To consider matters affecting national security, RCW 42.30.110(1)(a);
2. To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would likely increase the price, RCW 42.30.110(1)(b);
3. To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding the consideration would likely lower the price, though final action selling or leasing public property must be conducted during an open meeting, RCW 42.30.110(1)(c);¹⁶

¹⁶ The state auditor held that the Benton County Board of Commissioners and Franklin County Board of Commissioners violated the OPMA in 1998 when they held a joint executive session to discuss turning over the management of the Benton-Franklin County fairgrounds to a private firm. The auditor held that the discussion did

4. To review negotiations on the performance of publicly held contracts when public knowledge would likely increase costs, RCW 42.30.110(1)(d);
5. In the case of a commercial export trading company, to consider financial and commercial information supplied by private persons to the export trading company, RCW 42.30.110(1)(e);
6. To receive and evaluate complaints or charges brought against a public officer or employee, unless the officer or employee requests that the meeting be open, RCW 42.30.110(1)(f), though the discharging or disciplining of any employee or officer must occur in a public meeting, RCW 42.30.110(f)-(g);
7. To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee, though discussions of salaries, wages and other conditions of employment to be generally applied within an agency as well as final actions, including hiring, setting salaries of an individual or class of employees, or discharging or disciplining an employee must occur in public meeting, RCW 42.30.110(1)(g);^{17 18 19}
8. To evaluate the qualifications of a candidate for appointment to elective office, though interview of the candidate and final action appointing a candidate must be performed in an open meeting, RCW 42.30.110(1)(h);
9. To discuss with a lawyer or lawyers representing the agency in matters relating to agency enforcement actions or litigation or potential litigation to which the agency, the governing body or a member is, or is likely to become, a party, when public knowledge of the discussion is likely to result in adverse legal or financial consequences to the agency. RCW 42.30.110(1)(i); *see Washington Public Trust Advocates*, 120 Wn. App. at 902-03 (concluding that a meeting of a mayor and special counsel falls within this exception). The mere presence of the agency's attorney does not trigger this

not fall within .110(1)(c) as argued by the Franklin County Board and did not meet the criteria of any other executive session exception. Washington State Auditor Audit Report Nos. 60805 (Dec. 3, 1999), 60585 at 5 (Sept. 30, 1999).

¹⁷ In *Miller v. City of Tacoma*, the Washington Supreme Court held that informal balloting during an executive session regarding city council members' preferences among candidates for an unpaid position was beyond the evaluation of the candidates' qualifications and thus action performed in an executive session was in violation of the OPMA. 138 Wn.2d at 326-28. In her concurrence, Justice Madsen also found the action outside of the exemption because the candidate was unpaid and thus not a candidate for "public employment." *Id.* at 332 (Madsen, J. concurring/dissenting).

¹⁸ *See also*, Op. Atty. Gen. 1992, No. 21 (purchase of life insurance for public utility district's commissioners and managers is compensation and so must be discussed in open meeting and voted on in open meeting. "Reviewing an employees' performance does not include fixing his or her compensation; however, that must be done in public.")

¹⁹ The state auditor held that the City of Monroe violated the OPMA in 1999 when it entered into a contract for legal services with one of its council members outside of an open meeting. The decision, in addition to violating the OPMA, led to the council member holding incompatible offices. Washington State Audit Report No. 61046 at 4 (Feb. 4, 2000).

exception. “Potential litigation” involves litigation that has been specifically threatened to which the agency, governing body or member is, or is likely to become, a party; litigation that the agency reasonably believes may be commenced by or against the agency, governing body or member; or litigation or legal risks of a proposed or current action when public discussion of the litigation or legal risks is likely to result in adverse legal or financial consequences to the agency. RCW 42.30.110(1)(i). Officials are not required to determine before meeting with counsel whether the discussion fits within this exception. Rather, the exception is unavailable only when an agency objectively should have known beforehand that an open discussion would be unlikely to have adverse consequences. *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 586-87, 30 P.3d 474 (2001);

10. In the case of the state library commission or advisory bodies, to consider western library network prices, products, equipment and services, when public discussion would reduce the network’s competitiveness, though final action must be taken in public, RCW 42.30.110(1)(j);

11. In the case of the State Investment Board, to consider financial and commercial information when the information relates to the investment of public trust or retirement funds and when public knowledge regarding the discussion would result in loss to the funds or in private loss to the providers of this information, RCW 42.30.110(1)(k);

12. In considering proprietary or confidential nonpublished information related to the development, acquisition, or implementation of state purchased health care services as provided in RCW 41.05.026, RCW 42.30.110(1)(l); and

13. In the case of the life sciences discovery fund authority, to consider the substance of grant applications and grant awards when public knowledge regarding the discussion would reasonably be expected to result in private loss to the providers of this information, RCW 42.30.110(1)(m).

As can be seen, although these justifications for holding non-public meetings are narrowly construed, courts have been willing to apply them. For instance in *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 86 P.3d 835 (2004), Division III of the Court of Appeals dealt with the issue of whether only a city council, rather than the mayor and special counsel, had the authority to prosecute litigation related to public parking improvements. An advocacy group brought an action alleging that the city charter precluded an attorney who had donated to the mayor's campaign committee, from executing special counsel contract with city and that the mayor’s private conferences with the special counsel violated the OPMA. *Id.* at 895. The court concluded that meetings between the mayor and special counsel do not constitute “meetings” under the OPMA—thus the OPMA does not apply at all. The court, however, elaborated by adding that even if the OPMA did apply, “the act permits executive sessions for governing bodies when discussing litigation or potential litigation if public knowledge regarding the discussion is likely to result in adverse legal or financial consequences.” *Id.* at 902-03 (citing RCW 42.30.110(1)(i)).

In the public contract context, the most likely executive session that a governing body would use to meet outside of the public would be RCW 42.30.110(d), which applies to meetings “[t]o review negotiations on the performance of publicly bid contracts.” As of yet, there does not appear to be any case law dealing with this exception to the OPMA. The MRSC likewise indicates that it “not aware of an executive session being held under this provision. It is not clear what circumstances would result in a governing body meeting in executive session under this provision. MRSC OPMA Report, at 18. The Attorney General’s Open Government Internet Manual adds,

This subsection indicates that when a public agency and a contractor performing a publicly bid contract are negotiating concerning how the contract is being performed, the governing body may “review” those negotiations in executive session if public knowledge of the review would likely cause an increase in contract costs. Presumably, difficulties or disputes concerning contract performance have arisen in some contexts that require confidentiality to avoid increased costs where the nature of the difficulties or disputes would become public knowledge.

Att’y Gen. Manual, Ch. 4, § 4.3(d). Again, as shown above, while a governing body may hold a meeting for the “public contract” justification in executive session, and away from the public’s view, it cannot take any “final action” or reach a consensus at the session. Such actions must be taken in meetings open to the public.

VIII. OPEN MEETING LAWS IN OTHER JURISDICTIONS

A. State

All fifty states and the District of Columbia have enacted some form of open public meetings law. Those statutory provisions providing that government meetings be held in public have been enacted to serve common goals, and as such, have similar requirements. Essentially, open public meetings laws are united by a unifying principle: that keeping the meetings of local and state governments open to the public will reinforce the underlying values of a democratic society by allowing the public to watch over how its affairs are decided and keep its elected leaders accountable. As with Washington’s OPMA, these statutes have provisions that require adequate notice to the public prior to various categories of meetings, minutes and agendas for those meetings to be kept and provided, a meaningful opportunity for the public to attend and have its voice heard, and specific protocols and requirements for when a governing body wants to hold meetings away from the public eye. *See generally* Jay M. Zitter, “Pending or Prospective Litigation Exception Under State Law Making Proceedings by Public Bodies Open to the Public”, 35 A.L.R.5th 113 (2009); *see also* Kenneth W. Biedzynski, et. al., “Open Meetings Law—Generally”, 56 Am. Jur. 2d Municipal Corporations, Etc. § 142 (2009); “Meetings of Council—Public Meeting Laws”, 4 McQuillin Mun. Corp. § 13.07.10 (3rd ed. 2009).

However, there are substantial deviations in the specific provisions amongst the various statutory schemes within each state. As with the various state public records laws, a complete analysis of every state’s open public meeting law for purposes of this presentation is inappropriate. As a helpful resource, please see the provided attachment to these materials

labeled **Attachment B**, which provides the relevant statutory citations for the open public meetings laws of 15 of the most populous states.²⁰

B. Federal

The federal government has its own open public meetings act as well, passed by Congress in 1977. The Sunshine Act, located at 5 U.S.C. § 552(b) provides that

Members [of a collegial body heading an agency] shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), *every portion of every meeting of an agency shall be open to public observation.*

The Act applies only to agencies that are headed by a collegial body of two or more members where a majority of the members of that body were appointed by the President of the United States and were subject to confirmation by the Senate. As of 2005, this encompassed some 67 federal agencies, many of which are large and well-known to the general public. This includes the Securities and Exchange Commission, Equal Employment Opportunity Commission, Federal Communications Commission, and Federal Trade Commission.

The Sunshine Act is in many ways more limited in scope compared to the more expansive state open public meetings statutory schemes, but generally provides the public the right to attend meetings covered within the Act, and provides that notice of the meetings (including time, place, subject matter, contact information of an official) must be provided to the public at least one week in advance. However, the Act does not provide the right to record, televise or photograph a meeting, and does not provide a right for the public to actively participate in meetings. Moreover, as with all state open public meetings laws, the Sunshine Act provides for a number of justifications for an agency to close all or portions of what would ordinarily be an open public meetings, which almost mirror the exemptions within the federal Freedom of Information Act. *See* Eunice A. Eichelberger, “Construction and Application of Exemptions, Under 5 U.S.C.A. § 552b(c), to Open Meeting Requirement of Sunshine Act”, 82 A.L.R. Fed. 465 (2009).²¹

²⁰ *See also* The Citizen Media Law Project’s helpful summary of each of these jurisdictions’ open public meetings laws, available at <http://www.citmedialaw.org/legal-guide/access-state-and-local-government-meetings> (last accessed March 24, 2010).

²¹ For helpful general summaries of the various provisions, requirements and descriptions of the protocols for seeking judicial review of agencies’ conduct under The Sunshine Act, please see Joseph Z. Fleming & José I. León, “The Federal Government in the Sunshine Act: A Federal Mandate for Open Meetings”, The Florida Bar’s Reporter’s Handbook (2008), *available at* http://www.floridabar.org/DIVCOM/PI/RHandbook01.nsf/1119bd38ae090a748525676f0053b606/33db31567bc6b028852569cb004c8736!OpenDocument#Untitled%20Section_4 (last accessed March 24, 2010). *See also* The Citizen Media Law Project’s summary of the federal Sunshine Act, *available at* <http://www.citmedialaw.org/legal-guide/access-federal-agency-meetings> (last accessed March 24, 2010).

ATTACHMENT A

SELECTED PUBLIC RECORDS LAWS WITH CITATIONS

- California:** Public Records Act (Cal Govt. Code §§ 6250 & 6253)¹
- Florida:** Public Records Act (Flo. Stat. Chapter 119 §1)
- Georgia:** Open Records Act (Title 50, Ch. 18, Art. 4, § 70(b) of Ga. Annot. Code)
- Illinois:** Freedom of Information Act (Chapter 5, Act 140 of Ill. Comp. Stat.)
- Indiana:** Access to Public Records Act (Title 4, Art. 14, § 3 of Ind. Code)
- Massachusetts:** Public Records Law (Ch. 66, § 10(a) of Mass Gen. Laws)
- Michigan:** Freedom of Information Act (Mich. Comp. Laws § 15.231)
- New Jersey:** Open Public Records Act (N.J. Stat. Ann. § 47:1A-1)
- New York:** Freedom of Information Law (N.Y. Pub. Off. Law §§ 84-90)
- North Carolina:** Public Records Law (N.C. Gen. Stat. Ch. 132, § 1(b))
- Ohio:** Public Records Law (Ohio Rev. Code Ch. 149, § 43)
- Pennsylvania:** Right-to-Know Law (Act 24 of 2001, P.L. 374, 53 P.S. § 6927.1)
- Texas:** Public Information Act (Texas Gov't. Code Ch. 552, § 21)
- District of Columbia:** Freedom of Information Act (D.C. Code Ann. Title 2, Ch. 5, Sub. II)
- Virginia:** Freedom of Information Act (Va. Code Title 2.2, Ch. 37)

¹ For a concise general summary of the listed states' (and the District of Columbia's) public records laws, please see The Citizen Media Law Project at <http://www.citmedialaw.org/legal-guide/access-records-from-state-governments> (last accessed March 24, 2010).

ATTACHMENT B

SELECTED OPEN MEETING LAWS WITH CITATIONS

California: Bagley-Keene Act (Cal. Govt. Code §§ 11120-11132) and The Brown Act (Cal. Govt. Code §§ 54950-54963).¹

Florida: Florida Sunshine Law (Flo. Stat. Annot. Title 19, Ch. 286)

Georgia: Open Meetings Act (Ga. Code Annot. Title 50, Ch. 14)

Illinois: Open Meetings Act (5 Ill. Comp. Stat. 120/1)

Indiana: Open Door Law (Ind. Code Title 5, Art. 14, Ch. 1.5)

Massachusetts: Open Meeting Law (Mass Gen. Laws Ch. 39, §§ 17, 23A, 23B, 23C & Mass Gen. Laws Ch. 30A, §§ 11A, 11A 1/2, 11B, 11C)

Michigan: Open Meetings Act (Mich. Stat. Title 15, § 261)

New Jersey: Open Public Meetings Act (N.J. Stat. Annot. § 10:4-6)

New York: Open Meetings Law (N.Y. Pub. Off. Law Article 7, § 101).

North Carolina: Open Meetings Law (N.C. Stat. Art. 33-C, §143-318)

Ohio: Open Public Meetings Act (Ohio Rev. Code Title 1, Ch. 121, § 22)

Pennsylvania: The Sunshine Act (Pa. Cons. Stat. Title 65, § 704)

Texas: Open Meetings Act (Tex. Gov't Code Ann. § 551.001)

District of Columbia: Sunshine Act (D.C. Code Title 1, Ch. 2, Sub. VII, Part D)

Virginia: Freedom of Information Act (Va. Code Ann. § 3700)

¹ For a concise general summary of the listed states' (and the District of Columbia's) open meetings law, please see The Citizen Media Law Project at <http://www.citmedialaw.org/legal-guide/access-state-and-local-government-meetings> (last accessed March 24, 2010).