

# OPEN GOVERNMENT TRAINING

OPEN PUBLIC MEETINGS ACT

PUBLIC RECORDS ACT



# NEO

**NEWLY ELECTED OFFICIALS CONFERENCE**

**Networking | Education | Opportunity**

**DECEMBER 5, 2022**

# LOCAL GOVERNMENT PUBLIC RECORDS CONSULTATION PROGRAM



*Assisting local  
governments with  
PRA best practices.*

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*Technical Assistance – Training – Risk Mitigation*

# OVERVIEW

Significance of Open Government & Transparency

Open Public Meetings Act

Public Records Act

# DISCLAIMER

This presentation is educational only and is not legal advice or a legal opinion. The PRA and OPMA change over time. Court decisions or changes in statutes, can impact agency's and individuals obligations.

# STARTING POINT

Today's training is designed to augment the recorded open government trainings on the Washington Association of County Officials' or the AGO's Open Government web pages. You can view the required training by viewing the recordings.

## REQUIRED TRAININGS

Public Records Act – chapter 42.56

Open Public Meetings Act – chapter 42.30 RCW

Records management and retention basics – chapter 40.14 RCW

Required within 90 days of oath or assuming office and refresher training within 4 years.

Washington Association of County Officials

<https://countyofficials.org/189/Open-Government>

Office of the Attorney General

<https://www.atg.wa.gov/open-government-training>



# FOUNDATION

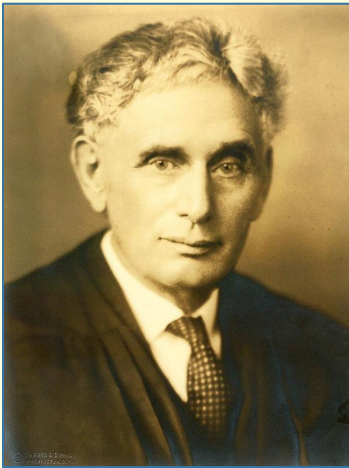
“The people do not yield their sovereignty to the agencies which serve them.”

“The people, in delegating authority, do not give public servants the right to decide what is good for the people to know and what is not good for them to know.”



# WHY YOU SHOULD CARE ABOUT TRANSPARENCY LAWS

*"Sunlight is the best disinfectant."*



U.S. Supreme Court Justice  
Louis Brandeis

## **The Leader** PTSD settles lawsuit over public records

School district is latest hit by legal action from chronically litigious Whidbey resident



Judge fines Tacoma Police Department for withholding public records about invasive surveillance device

## **THE SPOKESMAN-REVIEW**

**Justices uphold \$502,000 public records fine against state**

## **PRA Penalties & Judgments**

\$2.6 M – City of Tacoma



\$14.00 – Office of the Governor



# OPEN PUBLIC MEETINGS ACT

## CHAPTER 42.30 RCW





# OPMA POLICY

It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people insist on remaining informed and informing the people's public servants of their views so that they may retain control over the instruments they have created.

The OPMA, ch. 42.30 RCW, is our comprehensive transparency statute. The act seeks “to ensure public bodies make decisions openly.”



# BASIC REQUIREMENTS

All meetings of the **GOVERNING BODY** of a **PUBLIC AGENCY** shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in RCW 42.30.

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

# WHAT IS A GOVERNING BODY?

Multimember boards, commissions, councils, or other policy or rule-making bodies of a public agency.

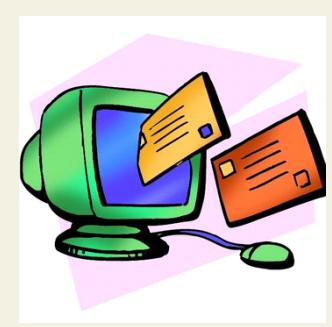
## Includes

– Committees and Subcommittees –  
Acting on behalf of governing body, taking testimony or public comment, or conducting hearings.

– Advisory Bodies –  
If the body's advice is necessary for another governing body to act, and the body was created by the legislative body.



# MEETING



- Meeting means meetings at which the public agency takes “action.”
- Requires a majority of its members (quorum).
  - No quorum → No meeting
  - Physical presence not required – a meeting can occur by phone or email.
- Does not need to be titled “meeting” – may be a “retreat,” “workshop,” “study session,” etc.
- Must be a collective intent to meet.
- Simply receiving information without comment is not a meeting.



# ACTION

- “Action” means the transaction of the official business of the public agency and includes but is not limited to:

- Public testimony
- All deliberations
- Discussions
- Considerations
- Reviews
- Evaluations
- Final action\*



\* **Final action**” is a collective positive or negative decision, or an actual vote, by a majority of the governing body, or by the “committee thereof.” Must be taken in public, even if deliberations were in closed session. Secret ballots are not allowed The requirements of the OPMA are triggered whether or not “final” action is taken.



# PUBLIC ATTENDANCE

- A public agency can't place restrictions on public to **attend** meetings subject to OPMA.
- Reasonable rules of conduct can be set.
- Governing body may adopt generally applicable conditions determined to be reasonably necessary to protect public health or safety, or to protect against interruptions.
- Agencies encouraged to provide remote access that does not require an additional cost to access the meeting.

**New!**

**New!**

# REMOTE OBSERVATION AND PARTICIPATION

**New!**

Agencies are encouraged to:

- Provide remote access that does not require an additional cost to access the meeting.
- Provide an online streaming option for, all regular meetings.
- Make audio or video recordings.
- Make recordings available online for a minimum of six months.
- This does not alter recordkeeping requirements under chapter 42.56 RCW.
- OPMA meetings are “public” meaning attendees may record a session.



# PUBLIC COMMENT

Oral or written public comment required prior to taking final action at a regular meeting.

**New!**

## Oral Comment

- If oral comment accepted, the governing body shall, when reasonable, provide people with a disability, limited mobility or any other reason that makes physical attendance difficult, the opportunity to make oral comment.
- May limit comment on items not on agenda.
- May put guidelines in place for public comment i.e. time limits.

## Written Comment

- Written testimony must be distributed to the governing body.
- May have reasonable deadlines for submission of written testimony.
- May limit comment on items not on agenda.

# MEETING TYPES

## Regular Meeting

- Recurring meetings held in accordance with a periodic schedule by ordinance, resolution, bylaws or other rule.
- Must have an agenda available online at least 24 hours in advance.
  - You can modifying an agenda.
  - Invalidate otherwise legal actions taken at a regular meeting where agenda was not posted 24 hours in advance.
- Very small agencies may be exempt. **New!**

## Special Meeting

Called by presiding officer OR majority of the members.

- 24 hour written notice of the time, place, and business to be transacted.
- Exception: not required when the notice cannot be posted with reasonable safety. **New!**

How:

- To each member of the governing body (unless waived).
- To each local newspaper of general circulation, radio, and TV station which has a notice request on file.
- Posted on the agency's website
- Prominently displayed at the main entrance of the agency's principal location and the meeting site (if not at the same location, or not remote).

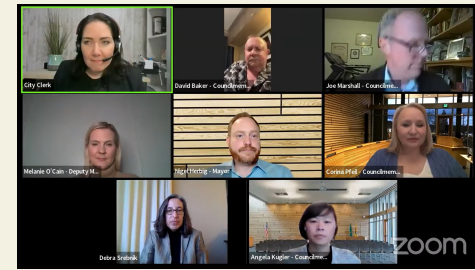
## Emergency Meeting

- Notice is not required when special meeting called to deal with an emergency.
- Emergency involves injury or damage to persons or property or the likelihood of such injury or damage.
- Where time requirements of notice make notice impractical and increase likelihood of such injury or damage.



# REMOTE MEETINGS

# New!



In the event of an emergency, an agency may:

- *Option 1: Hold an all remote meeting without a physical location.*
- *Option 2: Hold a meeting with governing body present but some or all of the public excluded.*

Requirements for a remote meeting:

- Declared emergency at the local, state or federal level.
- Agency determines it cannot hold a meeting in person with reasonable safety where members or public are in attendance.
- Public must be able to listen, if not, meeting prohibited except executive session.
- Notice of meeting must include remote participation instructions.

Individual governing body members may participate remotely during non-emergency times.

# EXECUTIVE SESSION



- Part of a regular or special meeting that is closed to the public.
- Limited to specific purposes set out in the OPMA, RCW 42.30.110.
- Purpose of the executive session and the time it will end must be announced by the presiding officer before it begins.
- Time may be extended by further announcement.
- Purpose of executive session must be entered into the minutes.
- If going into executive session, have a plan for ensuring only invited people are allowed access.
  - Unique “meeting” for this part of the meeting.
  - Utilize waiting room feature and admit participants.

**New!**



# MINUTES

- Minutes of public meetings must be promptly recorded and open to public inspection.
- Minutes of an executive session are not required.
- No format specified in law.
- Executive session's purpose must be recorded in the minutes.
- If meeting provides remote option, add relevant information to the minutes.
  - Links & phone numbers.
  - Number of remote participants.

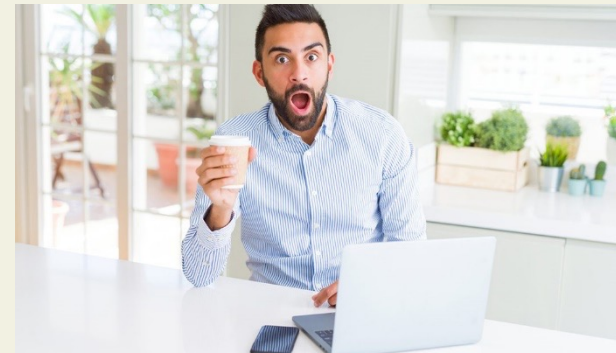
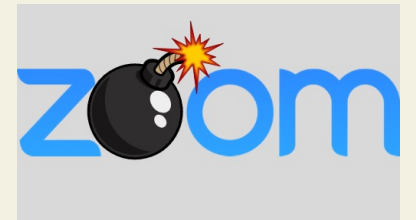
**New!**



# INTERRUPTIONS AND DISRUPTIONS

- May stop individuals from speaking when not recognized to speak.
- The OPMA provides a procedure for dealing with situations where a meeting is being interrupted, the orderly conduct of the meeting is unfeasible, and order cannot be restored by removal of the disruptive persons.
- Meeting room can be cleared and meeting can continue, or meeting can be moved to another location, but final disposition can occur only on matters appearing on the agenda. More details set out in the OPMA.

**New!**



# OPMA PENALTIES

- Individual penalty.
  - **\$500** fine for the first violation.
  - **\$1,000** for subsequent violation.
  - **Costs and attorney fees.**
- Final action at illegal meetings may be declared void.





# PUBLIC RECORDS ACT

## CHAPTER 42.56 RCW





# THE PRA'S PURPOSE:

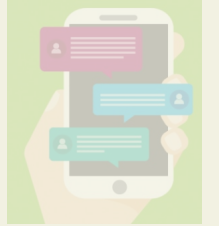
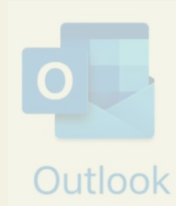
**“The purpose of the PRA is to increase governmental transparency and accountability by making public records accessible to Washington residents.”**

# UNDER THE PRA, AGENCIES MUST:

- ✓ Appoint a public records officer.
- ✓ Publish procedures describing agency organization, operations, rules of procedure, and adopt/enforce rules/regulations.
- ✓ Publish fee schedule. No fee to inspect records.
- ✓ Maintain a list of laws the agency believes exempts or prohibits disclosure.
- ✓ Provide indexes of records.
- ✓ Make non-exempt records available for inspection and copying during customary business hours for a minimum of 30 hours per week, excluding holidays.
- ✓ Post customary business hours on the agency's website.
- ✓ Maintain a Public Records Request Tracking Log.

# PUBLIC RECORDS DEFINED

Private Devices  
Scope of Employment



Writing

+

Relating to  
Conduct of  
Government  
or

+

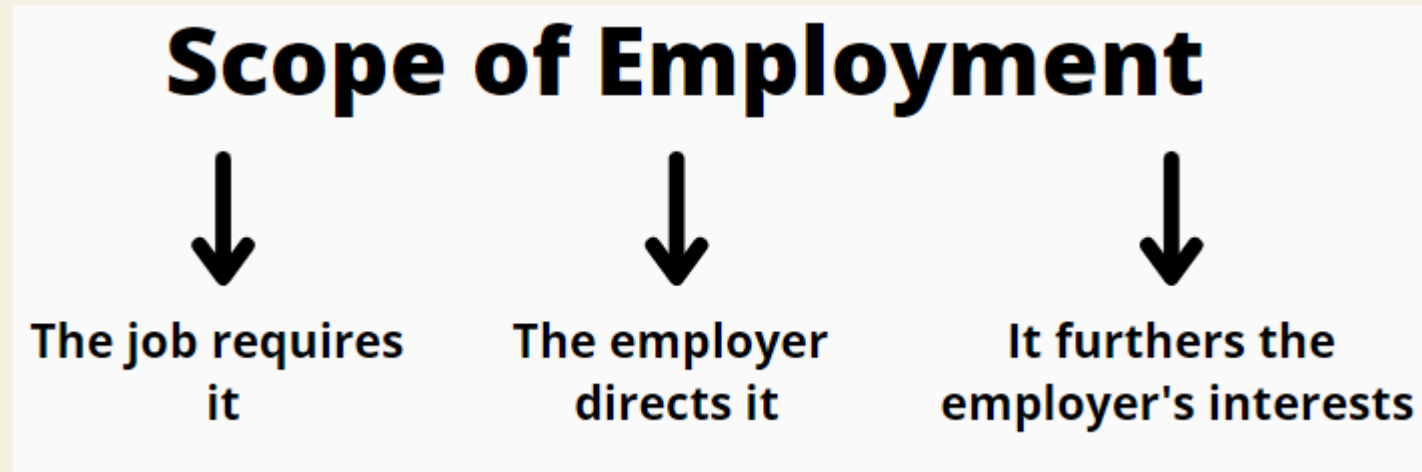
Prepared,  
Owned,  
Used,  
or  
Retained



Regardless of physical form or characteristics.

# PERSONAL DEVICES & ACCOUNTS

Includes - text messages, email accounts, and social media accounts.



The public employee must obtain, segregate and produce to the employer those public records that are responsive to a PRA request from the employee's personal accounts, files, and devices.

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Bottom Line

Records belong to the agency. They are not personal records.



# RECORDS RETENTION

KEEP PUBLIC RECORDS FOR  
MINIMUM RETENTION

*then*

INTENTIONAL  
RETENTION

DESTROY

TRANSFER



# WHAT DOES A PRA REQUEST LOOK LIKE?

- Did you receive one? Test: “FAIR NOTICE”

Says “I am making a **public records request** for...”

On the agency’s **Public Records Request form**

Says it is a “**Public Records Act**” or “**PRA**” request

Cites PRA - **RCW 42.56**, “**Freedom of Information Act**” or “**FOIA**”

Says “Attention: **Public Records Officer**”

- No specific format or form required. Must accept in person requests made during normal office hours.
- Must request identifiable public records. A request for “information” is not a request for “records” under the PRA.



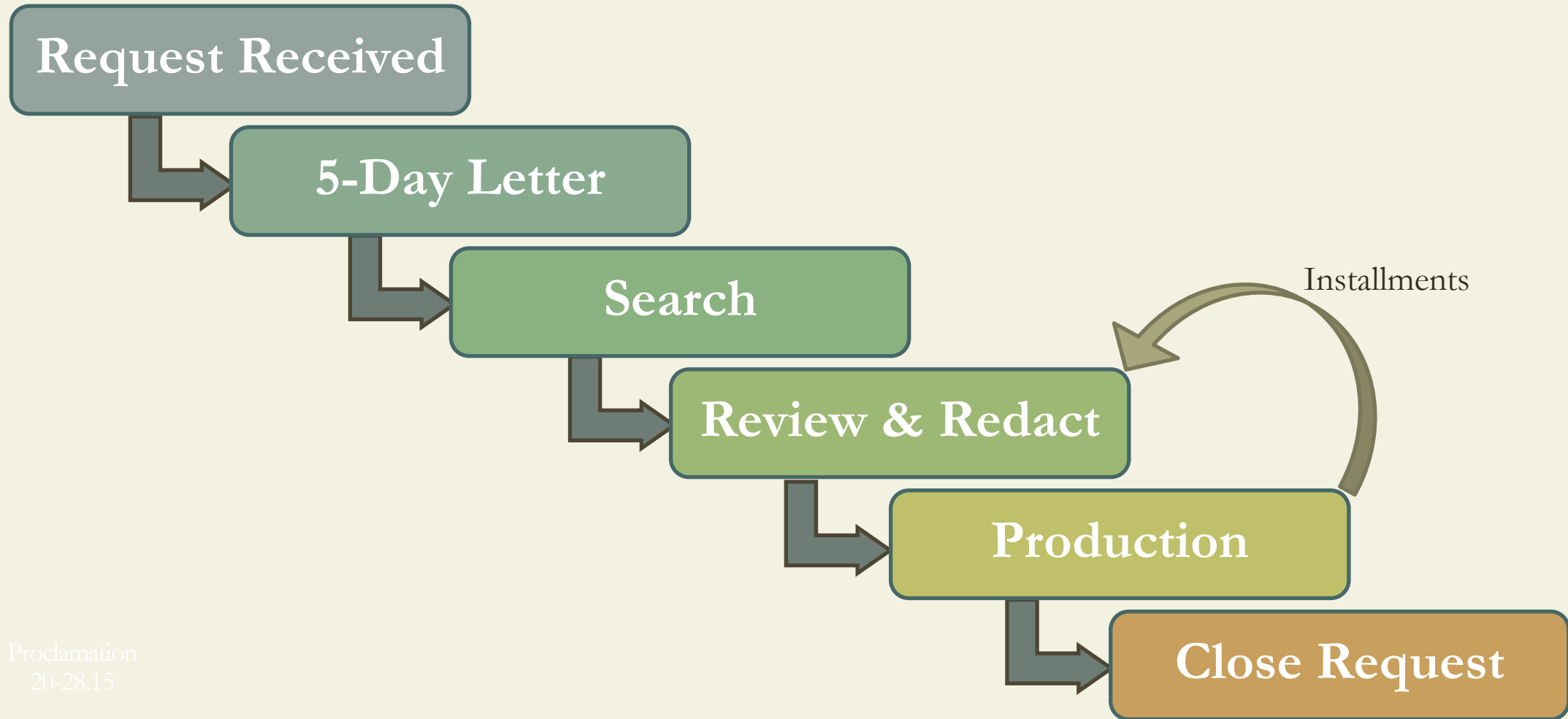
## ***BEST PRACTICE***

**REFER PERSONS TO PUBLIC RECORDS OFFICER.**



**IF YOU RECEIVE A COMMUNICATION SUCH AS THOSE ABOVE, GET IT TO PUBLIC RECORDS OFFICER ASAP.**

# THE PUBLIC RECORDS PRODUCTION PROCESS



# RECORDS SEARCH RESPONSIBILITIES

*“The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.”*

Plan searches:

- Understand your agency. Who holds what records. What are the records storage locations and systems.
- “Easy” vs Complex searches.
- Assign responsibility: Central ↔ Division Representatives ↔ Individual Employees
- Talk with staff about potential search terms.
- Be aware of acronyms, misspellings, or alternative spellings.
- Follow the breadcrumbs. Additional Searches may be needed.

Cast a wide net and document all of your search efforts including:

- Search terms used.
- Locations searched.
- Description of records produced & how.
- Description of records not produced.





# SOME BASICS ABOUT EXEMPTIONS

- Records are presumed open.
- An exemption must exist in law (state or federal; PRA or other laws).
- The agency bears the burden of proof to justify the exemption.
- Exemptions are narrowly construed.
- There is no PRA general exemption for a “draft.”
- An agency must, in writing, cite the exemption for the requester and provide a brief explanation. Typically agencies provide an “Exemption Log.”
- No “silent withholding.”

# PRIVACY AS AN EXEMPTION

There is **no general “privacy”** exemption.

If privacy is an express element of another exemption, privacy is invaded only if disclosure would be:

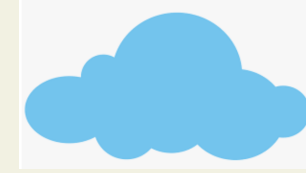
**Highly offensive to the reasonable person, and  
Not of legitimate concern to the public.**

This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes. RCW 42.56.050

Example: RCW 42.56.230(3)

Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their **right to privacy** (information regarding misconduct is not exempt).

# PRODUCTION OF RECORDS



- If requestor asks to inspect records:
  - Notify requestor of records availability and how long they will be available. (30 days per WAC 44-14-040.)
  - The PRA prohibits any charge for inspection of records.
- If records are to be produced:
  - Inform requestor of fee (if any) and provide timeline for requestor to pay.
  - Provide records to requestor.
  - Agencies can produce records in installments, particularly for larger requests.
  - Agencies can provide an installment by providing links to records on its website.



# ENFORCEMENT & PENALTIES



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties: \$0.00 to \$100 per day per document**. No proof of “damages” required.
- Penalties imposed to encourage PRA compliance.
- Plus, a court will award the prevailing requester’s **attorneys fees and costs**.
- Requester motives for making requests is irrelevant.
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.



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