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# ATTORNEY GENERAL OF WASHINGTON

## 2014 Open Government Trainings Act

The Open Government Trainings Act, Chap. 66, 2014 Laws (Engrossed Senate Bill 5964) was enacted by the 2014 Washington State Legislature, effective July 1, 2014. Here is a guide.

**1. Why did the Legislature enact this new law?**

*Answer:* The bill was introduced at the request of the Attorney General, with bipartisan support. A 2012 Auditor's Office report noted more than 250 "open government-related issues" among local governments. These included issues concerning the Open Public Meetings Act (OPMA) at RCW 42.30. In addition, in recent years the courts have imposed some significant monetary penalties against state and local public agencies due to their non-compliance with the Public Records Act (PRA) at RCW 42.56. Most violations are not malicious or intentional; they are often the result of insufficient training and knowledge. The comments to the Attorney General's Office advisory Model Rules on the PRA, and case law, have recognized that PRA training for records officers is a best practice. See, for example, WAC 44-14-00005.

The Legislature passed ESB 5964 in March 2014 and the Governor signed it on March 27, 2014. The Act is designed to foster open government by making open government education a recognized obligation of public service. The Act is also designed to reduce liability by educating agency officials and staff on the laws that govern them, in order to achieve greater compliance with those laws. Thus, the Act is a risk management requirement for public agencies. The Act provides for open public meetings and records trainings. In sum, the Act is intended to improve trust in government and at the same time help prevent costly lawsuits to government agencies. *[Section 1]*

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**2. What is the Act called?**

*Answer:* The Open Government Trainings Act. *[Section 6]*

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**3. When it is the Act effective?**

*Answer:* July 1, 2014. *[Section 7]*

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**4. What is a quick summary of the Act's requirements?**

*Answer:* The Act requires basic open government training for local and statewide officials and records officers. Training covers two subjects: public records and records retention ("records training"), and open public meetings. *[Sections 1-4]* Whether you are

required to take trainings on one or both subjects depends on what governmental position you fill.

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**5. What is the Attorney General's Office role?**

*Answer:* The Attorney General's Office may provide information, technical assistance, and training. *[Section 5]* See also RCW 42.56.570 and RCW 42.30.210. The office maintains and provides a public web page with training videos as well as training resources.

The office is also providing other assistance such as this Q & A guidance. The Assistant Attorney General for Open Government (ombudsman) is also available as a resource. See Q & A Nos. 13 and 22.

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**6. Who is subject to the Act's training requirements?**

*Answer:*

► **Members of governing bodies.**

Members of a governing body of a public agency subject to the OPMA must receive **open public meetings training (OPMA training concerning RCW 42.30)**. "Public agency" and "governing body" are defined in the OPMA. RCW 42.30.020.

They include members of city councils, boards of county commissioners, school boards, fire district boards, state boards and commissions, and other public agency boards, councils and commissions subject to the OPMA. Effective July 1, 2014, those members must receive OPMA training no later than 90 days after they take their oath of office or assume their duties. They can take the training before they are sworn in or assume their duties of office. They must also receive "refresher" training at intervals of no more than four years, so long as they are a member of a governing body. *[Section 2]*

***Note:*** *If a member of a "governing body" is also an elected local or statewide official, he or she must receive both open public meetings and records trainings (see next bullet).*

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► **Elected local and statewide officials.**

Every local elected official, and every statewide elected official, must receive **records training (PRA training concerning RCW 42.56, plus records retention training concerning RCW 40.14)**.

Effective July 1, 2014, they must receive this training no later than 90 days after they take their oath of office or assume their duties. They can take the training before they are sworn in or assume their duties of office. They must also receive "refresher" training at intervals of no more than four years. *[Section 3]*

***Note:*** *If an elected local or statewide official is also a member of a "governing body," the official must receive both open public meetings and records trainings.*

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► **Records officers.**

Public records officers for state and local agencies, and state agency records (retention) officers designated under RCW 40.14.040, must receive **records training** (**PRA training concerning RCW 42.56 and records retention training concerning RCW 40.14**). Effective July 1, 2014, they must receive this training no later than 90 days after they assume their duties. They must also receive "refresher" training at intervals of no more than four years. *[Section 4]*

*Note: While Section 4(2) of the bill refers to "public records officers" in the training schedule, the act's training requirements were intended to apply to both public records officers under the PRA and to state agency records officers designated under RCW 40.14.*

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► **Others.**

Other public agency officials and employees who are not listed in the Act are not required to receive training. However, this Act sets only minimum training. Agencies may wish to provide or arrange for additional or more frequent training, or training for additional staff.

Training is essential because even one unintentional mistake can amount to a violation of the PRA or OPMA. PRA training reduces risks of lawsuits. As the State Supreme Court has explained, "An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If an agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243 (1995). And the Supreme Court has held that PRA training can reduce PRA penalties. *Yousoufian v. Office of Ron Sims,* 168 Wn.2d 244 (2010).

As a consequence, an agency may want persons who are not listed in the Act to receive training. How much training each employee receives may depend on his or her role. For example, an agency may want all employees to be trained on the basics of records management, search requirements, how to identify a request for records, and what is a public record. An agency could include basic records training in all its new employee orientations, covering both PRA and records retention.

Other employees may benefit from additional training. For example, public records officers may have other designated staff to assist them in responding to records requests. Thus, records training would be useful for those staff. And, that records training for those who regularly assist public records officers may be more detailed or frequent than, say, that provided to a board member.

Or, while a local government agency is not required to formally designate a records retention officer under RCW 40.14.040, as a practical matter, the agency may have staff who is key in maintaining records using the local government records schedules. Therefore, those local government agencies may want to provide or arrange for those staff to receive training on RCW 40.14.

Or, a board may have a staff member or clerk who posts meeting notices and agendas, and maintains minutes, so that person may likely benefit from training on the open public meetings requirements under the OPMA.

And, regular refresher training may be appropriate for any of these employees, depending upon the person's governmental position and developments in the law.

In sum, while training is not required for governmental positions not listed in the Act, the Attorney General's Office encourages agencies to consider that persons in other positions are subject to or working with these laws, and would likely benefit from receiving training, if feasible. Training on the laws is a best practice, even if not specifically required by the Act. Education helps support transparency in government and reduces risk to agencies.

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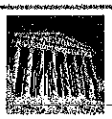

**7. Who is not subject to the Act's training requirements?**

*Answer:* As noted in Q & A No. 6, public agency employees and officials not listed in the Act are not required to receive training. The courts and the State Legislature are also not required to receive training (unless the person also holds another governmental position where training is required, for example, serving on a governing body subject to the OPMA). Even so, the Act does not restrict them from receiving or participating in open government training.

Others not subject to the Act include board members, officials or employees of purely private organizations. Examples are nonprofit boards, homeowners associations, or other private entities that are not a public agency or the functional equivalent of a public agency.

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**8. What if I am in my elected position (an incumbent) on July 1, 2014, and I am <u>not</u> up for re-election in 2014? How does the training schedule work for me? What if I already received training in 2014?**

*Answer:* Even if not specifically required by the Act, we recommend that incumbents in office on July 1, 2014 receive training for each of the required sections of law during 2014, <u>if</u> they have not already received such training. If they have already received training in 2014 for the required sections of law, we suggest they <u>document</u> it. (See Q & A No. 17). Then, calendar refresher trainings at intervals of no later than four years (as long as you are a member of the governing body or public agency). We suggest this approach for several reasons.

- First, the training will help establish a "**culture of compliance**" with open government laws in the agency if officials and others subject to the Act demonstrate they have recently received or are quickly willing to receive the training.

- Second, it will help set a similar "**base year**" for scheduling four-year refresher trainings if several officials in a public agency are required to receive that training.

- Third, it is a **good idea** for an elected official to receiving training in 2014, even if the training covers some of the same topics previously reviewed during an earlier year's orientation or training. Given the public interest in these laws, it is good to keep them in the forefront of the official's or employee's base knowledge. And, there may be new developments in the statutes or court decisions that were not covered in a prior training.

- Finally, the **sooner training is received and documented, the sooner that information will be available** to a court or others if needed. Since 2010, the State Supreme Court has said it will consider PRA training in assessing penalties for public records violations specified in the PRA. (See more discussion under Q & A No. 20 discussing non-compliance with the Act.)

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**9. What if I am in my elected position (an incumbent) on July 1, 2014, and I <u>am</u> seeking re-election in 2014? How does the training schedule work for me?**

*Answer:* Incumbents who are re-elected in November 2014 must receive training no later than 90 days after they take their new oath of office or otherwise assume their duties. However, they can take the training sooner. Therefore, they could either take the training some time by the end of 2014 (perhaps with other officials and staff receiving training in 2014), or they could wait to take the training within 90 days after they take their oath of office or otherwise assume their duties of office if re-elected in November.

Then, refresher training must be taken no later than every four years (as long as you are a member of the governing body or public agency). .

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**10. What if I am in my position as an incumbent public records officer or records officer on July 1, 2014? How does the training schedule work for me?**

*Answer:* If you were in your position prior to July 1, 2014, and you have already received training in 2014, we recommend you document it. However, if you did not receive any records training in 2014, we recommend you receive training this year, given the reasons and approach stated in Q & A No. 8, and document that training. (See Q & A No. 17). Then, 2014 becomes your "base year" from which you schedule the refresher

trainings that are required no more than four years later (as long as you are in the records officer position).

If you are appointed on or after July 1, 2014, you will need to receive training no later than 90 days after assuming your duties, and then receive refresher trainings no more than four years later.

You can receive more frequent trainings, too, if feasible. More frequent trainings are not restricted in the Act.

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**11. What must the training include?**

*Answer:*

- **Open public meetings training** should cover the basics of the OPMA. *[Section 2]*

  The Act does not provide further details. However, for example, the training could cover the purpose of the act, requirements for regular and special meetings, public notice, executive sessions, and penalties. The training may also include the requirement to maintain minutes and have them open for public inspection, as described in another law at RCW 42.32.030.

  The Attorney General's Office online OPMA video and OPMA Power Point cover the basics of the OPMA and satisfy this requirement.

- **Records training – PRA.**
  Training on the Public Records Act should cover the basics of the PRA at RCW 42.56. Training must be consistent with the Attorney General's Office Model Rules. *[Sections 3, 4]* The Act does not provide further details.

  However, for example, the training could cover the purpose of the PRA, what is a "public record," basic public records procedures, how an agency responds to requests, searches, what an agency must do before withholding information in a record from the public, and penalties. The training might also cover an agency's particular PRA procedures set out in its rules or policies.

  The Attorney General's Office online PRA video and PRA Power Point cover the basics of the PRA and satisfy this requirement.

**Records training – records retention.**
Record retention training should cover the basics of RCW 40.14. *[Sections 3, 4]*

The Act does not provide further details. However, for example, the training could cover basic retention requirements, what is a records retention schedule, and a brief description of what schedule(s) apply to the agency. For board members, it may

also specifically cover how to manage emails and other electronic records. For a records officer, the training may be much more detailed, addressing more specifically the agency's records retention schedules and categories of records.

The Washington State Archives records retention training covers the basics of records retention and satisfies this requirement.

- **The four-year "refresher" training** should cover the basic requirements in effect at the time of the training. It is a good idea to cover any recent developments in the law since the last training. Under the Act, the refresher trainings must occur at intervals of no more than four years.

  There may be options an agency wants to consider for giving refresher training. For example, it may be useful to have a refresher training once a year such as at a board meeting or staff workshop. In that way, officials and employees subject to these laws can receive ongoing refreshers as well as updates on the laws, without needing to individually calendar the four-year cycle.

**12. Who will provide the training?**

*Answer:* That choice is up to each agency official and employee, depending on the agency's needs and resources. The Attorney General's Office has provided a web page with training information. That web page includes resources for PRA and OPMA training. Examples include Power Point presentations, videos, manuals, and links to other training resources. The web page also provides links to the Washington State Archives online training materials and other information describing records retention requirements. Other training options are available as well. See Q & A No. 13.

**13. What are the training options for an official or employee?**

*Answer:* There are many options to receive training. To illustrate, an official or employee could take training in any of the following ways:

- **In-House Training at the Agency.**
  - In-house training provided by the agency's legal counsel, assigned Assistant Attorney General, or agency staff familiar with the requirements of the law.
  - Training through videos or Power Points at a board meeting or staff meeting or workshop, perhaps with someone available to answer follow-up questions.
  - Training as part of the orientation for new members and new staff.

- **Internet or Remote-Technology Based Training.** *[Sections 2, 3, 4]*
  - Online or internet-based training, webinar training, or training via Skype.
  - The training resources provided on the Attorney General's Office training web page includes videos and links to training materials. The Attorney General's Office OPMA and PRA videos and two Power Point presentations linked there satisfy the OPMA and PRA training requirements. The State Archives records retention training linked there satisfies the records retention training requirements.

- **Training from Public Agencies or Public Agency Associations.**
  - Training offered by or at other public agencies or associations.
  - For example, training may be provided by a school board association, a fire district association, a public records officer association, and similar entities.
  - The Attorney General's Office is also examining whether its training videos can be made available online on the State of Washington Department of Enterprise Services "Learning Management System" website for state employees.

- **Outside Training.**
  - Training from an outside private trainer.
  - For example, a resource for local governments is the Municipal Research and Services Center.
  - The Washington State Bar Association may also provide Continuing Legal Education (CLE) programs, particularly on the PRA and OPMA. These may be useful for persons who are attorneys who must receive training under the Act and who are also required by the WSBA to obtain CLE credits.

- **Washington State Archives - Records Retention Training.**
  - The Washington State Archives provides guidance and support to state and local government agencies in public records management by offering education and training opportunities.
  - Information about the State Archives training for state agencies and local agencies is available online.
  - Another option is to ask the State Archives staff to provide records retention training or to guide the agency to other useful records retention training resources. An agency can contact the State Archives by email at recordsmanagement@sos.wa.gov or by telephone at (360) 586-4901.

- **Attorney General's Office In-Person Training.** *[Section 5]*
  - Ask the Assistant Attorney General for Open Government to provide PRA or OPMA training.
  - *Note:* There may be minimum audience size, travel and other factors to consider.

- **Other Training.**
    - Consider other training options that cover the open public meetings and records training requirements.

The Act was designed to be flexible so an agency official or employee could select a training option that best fits his/her needs, governmental position, and agency resources.

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**14. What does it mean when the Act says that the PRA training must be consistent with the Attorney General's Office PRA Model Rules?**

*Answer:* The Attorney General has, in chapter 44-14 WAC, adopted "Model Rules" on PRA compliance to provide information to agencies and to requestors about "best practices" for complying with the PRA. While the PRA Model Rules are advisory (RCW 42.56.570), they are also noted as a training tool in the Act. *[Sections 3, 4].* We believe they are used and referenced by many agencies today. As such, they are a good training foundation from which an agency can conduct or design PRA training. The Model Rules are also available on the office's Open Government Training web page.

The Attorney General's Office PRA training video available on our web page is consistent with the Model Rules.

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**15. Does the Act require the Attorney General's Office to approve or certify training?**

*Answer:* No.

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**16. Are there a minimum number of hours required for training?**

*Answer:* No.

However, basic training for the OPMA and PRA should probably last no less than 15 – 20 minutes each, and basic records retention training should probably last 10-15 minutes. More detailed and longer training may be appropriate for some positions. For example, records officers may want to receive more detailed training on the PRA and records retention schedules, and/or receive training more often than once every four years.

**17. Should an official or employee document the training? If so, how?**

*Answer:* The Act does not require training to be documented. Even so, we recommend officials and employees subject to the Act document this training, and we recommend that their agencies assist them. An agency will want to have training information available to a court or to others if needed. (See Q & A No. 20 regarding possible consequences of non-compliance.)

The Act also contains no requirements describing how to document training. Every agency may be different in how it maintains its employees' or officials' training records. Or, if the training is conducted at a board meeting, the minutes can reflect that the training was provided and who attended. The minutes would also qualify as documentation.

The AGO has prepared sample documentation forms (a sample certificate and a sample training roster) which are available on the open government training web page. Other forms or methods of documenting training are fine as well.

If an incumbent official or staff member has already received training during 2014, we recommend the official or staff member, or agency, document that training, too, if they have not already done so.

**18. Is an official, employee or agency required under the Act to report completed trainings or provide training documentation or data to the Attorney General's Office?**

*Answer:* No.

**19. What is the training cost to the official, employee or agency?**

*Answer:* The cost depends on what trainings the officials or employees take. They may incur travel costs on behalf of their agency, but if they take online training, the "cost" is primarily only their time. There is no cost to take the online trainings available on the Attorney General's Office website; they are free. There is no cost to take the State Archives online trainings on records retention; they are also free.

Many agencies that currently arrange for training on these open government laws, or other topics, already either use their own staff to conduct the trainings (such as their attorneys) or seek out other trainings from other organizations/associations. Thus, those are the types of costs currently taken into account by agencies.

**20. What is the penalty for an official's or employee's non-compliance with the Act?**

*Answer:* The Act does not provide any new penalties for an official or staff member not receiving required training. The Act does not provide any new penalties for an agency

not providing training. The Act does not create a new cause of action in court regarding training under the OPMA, PRA, or records retention laws. Remember, the Act is intended to reduce liability, not create new lawsuits. *[See, e.g., Section 1]*

However, under current case law, a court can consider whether agency staff received training when it is determining whether to assess a penalty for violations of other sections of the PRA (as specified in the PRA). That is, under current case law, evidence of training can mitigate an agency's exposure to penalties; absence of training can aggravate penalties.

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**21. What is the bottom line?**

*Answer:* In sum, training is required by the new Act effective July 1, 2014. And, under current law and guidance, training is also in the agency's and the public's best interests. That is, it is already a best practice for officials and other employees who work with those open government laws to receive training, so they can better comply. The new Act simply takes that best practice one step further, by requiring training for many officials and records officers.

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**22. Who can we contact for more information?**

*Answer:* You may contact the Attorney General's Office:

Nancy Krier
Assistant Attorney General for Open Government
(360) 586-7842
Nancyk1@atg.wa.gov

Attorney General's Office Open Government Training Page:
http://www.atg.wa.gov/OpenGovernmentTraining.aspx

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Information about State Archives records management and retention training
for state and local agencies is available at:
http://www.sos.wa.gov/archives/RecordsManagement/

Agencies can contact the State Archives by email at recordsmanagement@sos.wa.gov
or by telephone at (360) 586-4901.