

Municipal Research News

LOCAL GOVERNMENT
SUCCESS

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About MRSC

Municipal Research and Services Center (MRSC) is a nonprofit organization dedicated to proactively supporting the success of local governments through one-on-one consultation, research tools, online and in-person training, and timely, unbiased information on issues impacting all aspects of local governments.

For 90 years, local governments in Washington State have turned to MRSC for assistance. Our trusted staff attorneys, policy consultants, and finance experts have decades of experience and provide personalized guidance through Ask MRSC and our extensive online resources. Every year we help thousands of staff and elected officials research policies, comply with state and federal laws, and improve day-to-day operations through best practices.

Municipal Research News is published biannually to inform, engage, and educate readers about ongoing and emerging issues. In print and online at the MRSC Insight blog, we cover such major topics as the Growth Management Act and the ever-evolving complexities of the Public Records Act, to name a few. When the legal landscape changes, we are here to clarify the issues and help local government leaders access the information they need to better serve their communities.



Washington Trivia Question

Which city, located in the heart of the nation's largest hop producing area, is also home to The American Hop Museum?

Photo: IanDewarPhotography

Answer on page 10

Your ideas and comments are appreciated. If you have news you would like to share, please contact the editor, Leah LaCivita, at llacivita@mrsc.org

Municipal Research News

LOCAL GOVERNMENT
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Published by MRSC | mrsc.org

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MRSC HIGHLIGHTS

This year promises to be an exciting one for MRSC, and we wanted to give you a few highlights of what is coming.

MRSC ROSTERS: SOON TO BE THE STATEWIDE SMALL WORKS ROSTER

The Washington State Legislature passed SB 5268 in 2023, modifying small works contracting requirements for state agencies and local governments. As part of these changes, MRSC Rosters was designated as the official statewide roster for public works beginning July 1, 2024, and public agency fees will be waived. Alternatively, public agencies may still create their own independent small works roster or join another agency's independent roster.

MRSC Rosters—which already serves almost 700 public agencies across the state—also offers vendor rosters and consultant rosters for purchases and services (these rosters were not impacted by 2023 legislation). The MRSC Rosters website offers online assistance (including a sample resolution to help your agency discontinue use of previous rosters), contracting resources, legal notice affidavits, a robust network of business members, and—for an additional fee—an electronic bidding program that can be used with informal or roster-based procurements and formal sealed bids.

WE'VE MOVED

After years of making a home base in Seattle, our office has moved to Tacoma, but you can reach out the same way you have in the past, either online via our website or by phone at (206) 625-1300 or toll free at (800) 933-6772, or by email to mrsc@mrsc.org.

TARGETED TRAINING FOR NEW FINANCE STAFF

Are you new to local government finance and looking to develop the skills and knowledge to do your job more successfully? MRSC is now offering an intensive five-day Municipal Finance Bootcamp that will review the common financial duties of clerk/treasurers and finance directors. Initially, we will be holding three separate sessions across the state. Our first, hosted in partnership with the Association of Washington Cities (AWC), will be in Olympia (April). The other two will be in Yakima (June) and Spokane (July/August).

MRSC TURNS 90!

This year marks MRSC's 90th anniversary and we are planning to celebrate it with a bang! Formally established in 1934 as the Bureau of Government Research and Services, our office received 293 inquiries in its first year. Fast forward to today, MRSC provides a variety of services to Washington's 281 cities and towns, 39 counties, hundreds of special purpose districts, state agencies, and other government partners, from Ask MRSC to remote and in-person training, e-newsletters, web-based tools and resources, publications, MRSC Rosters, and more!



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🤯 EMOJIS IN PUBLIC AGENCY COMMUNICATION

Miscommunications and Records Ramifications

What does a 👍 emoji indicate? That's what a Saskatchewan court wanted to figure out in a 2022 case that cost a Canadian farmer more than \$60,000. In 2021, the farmer, Chris Achter, sent a thumbs-up emoji as a response to a photograph of a contract from a flax buyer he had worked with for years. From his perspective, he was using the emoji to indicate he had received the contract.

The buyer, South West Terminal, took the thumbs-up to mean Achter's acceptance of the contract. When months passed, and they didn't receive a product, they took Achter to court — and won.

After reviewing the meaning of the thumbs-up emoji in cases around the world, Judge T.J. Keene said, "I am satisfied on the balance of probabilities that Chris okayed or approved the contract just like he had done before except this time he used a thumbs-up emoji."

In 2023, more than 200 legal cases included emojis and emoticons as evidence, in contrast to just 25 in 2016.

In our digital world, we rely on the written word in email, chat, and other correspondence, removing contextual clues we would otherwise convey through vocal inflections and body language. Emojis,

then, add a layer of meaning to this decontextualized speech by serving as "socio-emotional suppliers." For example, you may include the "rolling on the floor laughing" emoji 🤣 to indicate your previous sentence in an email was a joke. But emojis in professional context can be misinterpreted because they don't have a standardized meaning. The same emoji may be perceived differently by different readers, based on their generation, Internet history, and other factors.

Complicating things for local government employees and officials, the use of emojis — especially as "reactions" to other communications — have significant public records and open public meeting ramifications. This article will talk about some of the pitfalls of using emojis in your public agency communications so you can decide if you want to make them part of your office culture.

WAIT...WAS THAT RUDE? 🙄

Since 2020, professional communication has become more casual. During the COVID-19 pandemic, Statista found 54% of companies either started using or increased their use of live chat channels, like Slack or Microsoft Teams, where emoji use is common and encouraged. Outlook

started giving users the option of responding to emails with emojis in 2021, with Gmail adopting emoji replies in 2023.

Most professionals, regardless of generation, use emojis in workplace communications. A 2022 Adobe survey found that more than half of Boomers used emojis in professional settings, along with

69% of Gen X, 78% of millennials, and 78% of Gen Z. With the ubiquity of emojis, why do they remain so ambiguous?

For one, the Unicode Consortium introduces many new emojis each year but doesn't indicate what these emojis mean. In turn, sarcasm or insincerity can be particularly difficult to interpret or stay abreast of, as emoji connotations change. One of the most misunderstood emojis in the Adobe survey was the "upside-down face" 🙄, often, but not always, used to convey an "oh well" or a shrug.

As workplaces become more multigenerational, too, the contextual implications of emojis become even more muddled. Gen Z, born between 1997 and 2012, regards the use of the once-innocent smiley face 😊, according to *The Washington Post*, "as passive aggressive or cold." One "Zoomer" even says she is confused when her older

colleagues use the thumbs-up emoji.

"It can be disheartening and sometimes annoying," she said. "Are they following up? When should I?" the 25-year-old told *The Atlantic*.

Emoji users also tend to overestimate that readers will understand the meaning of the emojis. A 2017 study by researchers from the University of Minnesota and Northwestern University found that context surrounding the emoji didn't make its meaning any less ambiguous. In the case of the "relieved face" 😌, the context of the written message made the emoji even more inscrutable.

In exploring this concept, Roger Kreuz, Ph.D., wrote in *Psychology Today*:

Our deep-seated belief that our thoughts and intentions are relatively transparent to others is simply not supported by the large body of research on this topic. In some situations, emojis may help us to communicate more clearly — but they are rarely as helpful as we think they are or would like them to be.

WAIT...ARE EMOJIS RECORDS? 🤖

Without question, emojis that are embedded in the body of a public record are a part of that record. But can an emoji be a separate record entirely?

Possibly, yes. The definition of "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. See RCW 42.56.010(3).

Further, "writing" includes "every other means of recording any form of communication ... including pictures, sounds, or symbols, or combination thereof" (RCW 42.56.010(4)).

So, when someone uses an emoji to communicate in the course of their public business, as either a unique communication or in "reaction" to a communication, that response is either a unique public record or

is incorporated into the digital version of the original communication.

What does this mean for public records officers and custodians?

First, it is important to get a handle on where folks may be using such emojis. There are the usual places and platforms — like text messages, emails, and social media — but there are other places you might not realize.

For public agencies using the Microsoft Office suite of products, in particular, there is an increasing availability of “reactions.” Instead of replying to an email or a Teams chat with a new email or text message, you can “react” by simply marking one of a preselection of emojis that will appear with the original message. Both the sender’s and the recipient’s version of the email will now reflect the reaction. It was in drafting this article that one of the authors realized they now have the option to mark a comment on the draft with a “thumbs up” 👍!

Working with IT professionals, it is important to be sure these communications are being retained for the relevant retention periods.

Next, working with IT professionals, it is important to be sure these communications are being retained for the relevant retention periods. Many software servers and platforms retain data for periods that are much shorter than the ones established in the Local Government Common Records Retention Schedule (CORE) and other schedules. You will need to explore other software solutions that capture this information.

Finally, when responding to records requests, be sure you are considering whether emojis and/or reactions are being gathered in your search for responsive records. When the emoji is part of a reaction, it will likely be embedded in the data of the original electronic record. However, if the emoji is in the body of a communication,

like an email or text message, it may not be captured in traditional keyword searches. It may be necessary to view communications in context or threaded together to see if any emoji communications are included in the chain.

Keep in mind that a reasonable search is limited to identifiable records. If you must literally view every single record in a particular category instead of running a keyword search to see if it is responsive to a narrower request, it is arguably not a request for an identifiable record. However, as technology and search capabilities evolve, what may not be feasible today may be easily done in the future. You will need to consult with your IT professionals to determine what your system is capable of.

WAIT...DID WE JUST HAVE A MEETING? 🤔

We at MRSC have written extensively on serial meetings as a violation of the Open Public Meetings Act (OPMA). A serial meeting occurs when a majority of members of a governing body have a series of smaller gatherings or communications that results in a majority of the body intentionally and collectively taking action even if a majority is never part of any one communication — and “taking action” includes “discussions.” See RCW 42.30.020(3).

We have previously advised against use of the dreaded “reply all” email response, when information is sent out to a governing body, but many folks might not realize that if they use the Outlook reaction feature everyone else in the conversation will see the reaction, not just the original sender — and some may wonder if that



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“thumbs up” 👍 sent in response was merely an acknowledgment of receipt or a vote in favor of the subject matter.

The same concern arises in the context of social media. On a three-member board, if one member posts on their personal Facebook page how they intend to vote on an upcoming issue and one other member reacts with a “heart” ❤️, does this mean a majority has “discussed” the topic?

We do not yet know how a court will interpret such communications, and given the high risks involved with OPMA violations, it might be best for members of a governing body to refrain from using reactions when engaging with other members to avoid any risk of creating a serial meeting.

CONCLUSION 🤖

Emojis are essentially visual slang that have entered the workplace through an increasing “social media-fication” of office communication software. They lack precision and agreed-on definitions and connotations. They can also lead to misunderstandings, encourage immediate responses when thoughtfulness might be needed, and pose unique challenges for open government.

And yet, at times emojis can provide the emotional context that is often missing in a dry text, and they offer quick responses without cluttering up communication channels. So, we would encourage using emojis in a thoughtful and cautious manner but remember that these are public records and your “eye roll” 🙄 may end up being the pivotal piece of evidence in a lawsuit.



Alicia Bones, Research Analyst and Writer, writes about a variety of issues that impact local governments in Washington State. abones@mrsc.org

ASK MRSC about overpayments

When a parks & recreation program is cancelled, our city allows customers to apply refunded registration fees back to their accounts as credit, which can be used to pay for new programs within the same calendar year. Could the city establish a program where, instead of using the credit on a new activity, a customer could ‘donate’ it towards the parks & rec department’s scholarship fund?

MRSC sees this question in the context of closed utility accounts. Although it’s a different issue, the same general themes apply when there has been an overpayment (or a cancelled registration, in your case). Generally, here are the steps a public agency should take when an overpayment happens:

- The agency needs to refund the customer or provide a credit to the customer.
- If the agency cannot find the customer, then funds are treated as unclaimed property regulated by the Washington State Department of Revenue (DOR).

As to the question of whether the city could offer customers the option of donating the credit/funds to support a parks program in lieu of a refund or credit, the city could establish a policy that allows for such a donation so long as:

- The city makes clear it is an option to donate, not a requirement.
- If the customer doesn’t respond or declines to donate, then the city should issue a refund.
- If the customer opts to donate the funds, then the donation is tax deductible for federal tax purposes. Documentation the city would need to give the donor can be found in IRS Publication No. 1771, Charitable Contributions – Substantiation and Disclosure Requirements.

My public hospital district (PHD) issued a refund check for an overpayment, but the party has not cashed or lost the check. We asked for an affidavit to be signed per RCW 39.72.010 to reissue the check, but the party refused. What is the district’s next step?

RCW 39.72.010(1)(a) is for local governments (including PHDs) and uses the word “shall require” regarding the requirement of a signed affidavit “[i]n case of the loss or destruction of a warrant for the payment of money, or any bond or other instrument or evidence of indebtedness” before an agency issues a “duplicate instrument,” or in your case, a new check.

MRSC interprets this to mean the signed affidavit is required. If the party is refusing to cooperate by signing an affidavit, the district should not issue a duplicate check. To close this matter, the district could file the refund as unclaimed property with DOR.

Have a Question? Ask MRSC. Call us at (206) 625-1300 or (800) 933-6772 or submit your question online at mrsc.org

Ask MRSC

HIRING STAFF

Roles of Mayor/Manager Versus the City/Town Council

BY JILL DVORKIN, MRSC LEGAL CONSULTANT

A city or town government does not run on its own; it requires employees to perform the work the public expects and depends on. How and by whom are its employees hired? While the easy answer is that it's the city or town's chief executive officer — either the mayor or the city or town manager — who makes the hiring decision, the answer is more complicated than that.

COUNCIL RESPONSIBILITY: CREATING AND BUDGETING FOR STAFF POSITIONS

Although the mayor or manager may make the ultimate hiring decision, the council plays an important role in the process. The first issue to address is whether there even is a position into which a person can be hired, and the role of creating positions is given exclusively to the city or town council. For example, for code cities, RCW 35A.11.020 provides that the council has “the power to organize and regulate its internal affairs...and to define the functions, powers, and duties of its officers and employees.”

The council can create a new position when it prepares the agency's annual budget or it can do so later, if a need arises, by creating the position and amending the budget. In creating the position, the council will also need to set the wage and benefits (insurance, vacation and sick leave, retirement benefits, etc.) attached to this position. While salary and benefit decisions rest with the council, the mayor or manager may offer recommendations for the council to consider.

COUNCIL RESPONSIBILITY: HIRING PROCEDURES

The council's role does not necessarily end with the creation of a position and that position's salary and benefits. The council can — but is not required to — establish a hiring process that a mayor or manager must use when filling a new or vacant position.

If the council does not set up a process, the mayor or manager need not advertise the position nor do anything else other than select someone to fill it. However, a council may wish to establish a hiring process, which might include mandatory advertising of job openings, the setting of minimum qualifications, and a requirement for job applications and interviews, to help ensure the position receives a larger pool of qualified applicants. If the council does create a hiring process, that process will need to be followed by the mayor or manager in making their selection.

Ultimately the hiring decision belongs to the chief executive.

MAYOR/MANAGER RESPONSIBILITY: HIRING DECISIONS AND APPOINTMENTS

As previously indicated, the decision to hire a person into an open position belongs to the mayor or manager, although sometimes this person will delegate that authority to a department head or other management official. Whether hiring authority has been delegated or not, ultimately the hiring decision belongs to the chief executive. For example, for towns, RCW 35.27.070 provides:

[a]ll appointive officers and employees shall hold office at the pleasure of the mayor, subject to any applicable law, rule, or regulation relating to civil service, and shall not be subject to confirmation by the town council.

COUNCIL RESPONSIBILITY: CONFIRMATION AUTHORITY IN SOME CIRCUMSTANCES

While the mayor or manager selects a person to fill an open position, sometimes the council will have the ability to review the selection and decide whether to confirm the appointment or not. Not all city or town councils are authorized to confirm appointments, however, and not all positions are eligible for confirmation.

- Town and code city council-manager councils do not have the authority to confirm appointments, with limited exceptions in council-manager cities for municipal judges and advisory committees. See RCW 35.27.070 and RCW 35A.13.080(2).
- Second-class city councils may only confirm appointments of the city attorney, city clerk, or city treasurer (RCW 35.23.021).
- In a mayor-council code city, the council may confirm mayoral appointments if the council has provided by ordinance for confirmation and “qualifications for the office or position have not been established by ordinance or charter provision.” See RCW 35A.12.090.

If a position is subject to council confirmation, the mayor/manager's appointment is not final unless and until the council confirms the appointee; if the council does not confirm, the mayor or manager must make a new appointment.

BE AWARE OF CIVIL SERVICE REQUIREMENTS AND COLLECTIVE BARGAINING AGREEMENTS

While the mayor or manager generally has authority to appoint officers and hire employees, that authority may be restricted or made more complicated if a position is covered by civil service or by a collective bargaining agreement. Required civil service rules and collective bargaining agreement procedures must be followed under those circumstances.

CONCLUSION

Creating and filling employment positions is a fundamental task for city and town governments, essential to the provision of governmental services, and both the chief executive and the council have important roles in that process.



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HANDLING PAYROLL OVERPAYMENTS

Back in my days of doing payroll, one of my least favorite things was making an error with an employee's pay or not catching such a mistake. In most instances, the error was small and could be easily corrected during the next payroll cycle. But what happens when an employee is accidentally paid a higher salary for several months or even several years? Recently at MRSC, we received several inquiries asking how overpayments to employees should be handled.

THE GIFT OF PUBLIC FUNDS DOCTRINE

Article 8, section 7 of the Washington State Constitution prohibits any local government entity from bestowing a gift or lending money, property, or the entity's credit to a private party, including local government staffmembers. If a staffmember was paid more than their salary provided for, the extra pay would be considered a gift of public funds if the wages were not recovered.

One of the common questions we get regarding payroll overpayments is whether there is a statute of limitations for how far back a local government may go in order to recover overpayments. Under Article 8, section 7 any overpayment of employee wages would be considered a gift of public funds if not recovered. As such, MRSC has long advised that the entire amount of any overpayment of wages should be recovered from the employee.

THE STATUTORY PROCESS

Once an overpayment has been discovered, local governments must follow the process outlined in RCW 49.48.210. This process requires an employer to provide written notice to the employee, with the notice addressing: the amount of overpayment, the basis for the claim, and a demand for payment within 20 calendar days from when the employee receives the notice.

The statute also outlines the procedures available to employees to contest the overpayment claim. If the employee is covered by a collective bargaining agreement, the employer must provide written notice that includes the amount of overpayment, basis for the claim, and the rights of the employee under the collective bargaining agreement. Any disputes by employees covered by a collective bargaining agreement must be resolved following the grievance procedures outlined in the agreement.

OPTIONS FOR RECOVERING OVERPAYMENTS

RCW 49.48.200 allows local governments to recover overpayments of wages to employees through deductions from future payroll payments. Deductions may not exceed 5% of the employee's disposable earnings in a pay period, although the statute also allows an employee to voluntarily choose to make payments that exceed that percentage.

If an employee is leaving employment and still has a balance outstanding, the amount still outstanding may be deducted from the employee's disposable earnings of their final paycheck. Agencies may also recover overpayments of wages through civil action, or the agency and the employee could agree to a different amount for deductions (e.g., more than 5%) or could use a method of repayment other than deduction from wages.

CONCLUSION

When I was new to payroll and made a mistake, I would add reminders in my payroll processing checklist to avoid making the same mistake in the future. To avoid overpayment of wages, especially among larger agencies, I recommend sending reports to managers after each payroll for their review, as well as conducting a thorough review of salaries on a quarterly basis.



Eric Lowell, Finance Consultant, writes about local government finance. Eric received a B.A. in Secondary Education from Arizona State University and a B.S. in Accounting from Central Washington University. elowell@mrsc.org



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Washington Trivia Answer

The central Washington town of **Toppenish** in the Yakima Valley boasts a vibrant agricultural sector centered around growing hops.



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