

## Chapter 5

# Ethics, open government and fairness: Staying on the right side of the law

Although governing a small city may seem casual and non-bureaucratic, city officials are still responsible for abiding by the same laws as larger cities regarding ethics, open government, elections, and avoiding conflicts of interest. (There is one exception: there are some special provisions about conflicts of interest for small cities.) For many small cities, this means there is a significant amount of legal territory to navigate without a legal department to help you.

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### Ethics in government

We all think we know right from wrong, but humans do make mistakes. Doing a favor for a friend or relative, giving a job to someone who needs a break, or taking the city backhoe home for a weekend project may all seem harmless. But when public tax dollars are involved, each of these simple acts takes on a new meaning. As stewards of the public's tax dollars - and equally important, the public's trust - elected and appointed city officials have to think beyond the usual bounds of our obligations to friends, family, and neighbors.

State law dictates a list of "thou shalt nots" that every city official ought to study carefully. Some cities may enact local codes with additional guidelines.

Here are the specific state laws that all city officials must abide by:

- **No special privileges:** No city elected official or appointed officer may use his or her official position to receive a special privilege or exemption for himself, herself or others. For example, city officers must pay the same fees for permits and services, and they are not allowed to make exceptions to rules or give discounts to their friends or relatives.
- **No gifts or rewards from private sources:** No city elected official or appointed officer may receive any money, gift or reward from any source other than their employing municipality for any matter connected with or related to the officer's services. City officers cannot accept free tickets to events or gifts from private citizens, businesses or corporations for actions arising from their official duties. If the city fixes a sidewalk in front of someone's house, for instance, and that person expresses their appreciation by sending the city employee or the mayor tickets to a Seahawks game, the tickets must be returned.
- **No disclosure of confidential information:** No elected official or appointed officer may disclose any confidential information they learn in the course of their duties, or use such information for his or her personal gain. No city official can accept a job or engage in business that the official might reasonably expect would require him or her to disclose confidential information learned in his or her position with the city.

## **Conflicts of interest**

The laws that govern conflict of interest apply only to city elected officials, not employees. These laws govern contracts created by the city elected officials, including contracts of employment, sales, leases, and purchases. In essence, city officials cannot have a financial interest in any public contracts made with the city they serve. This applies to contracts that are created by the city elected official, or under his or her supervision.

The small city exception to the rule: Avoiding conflicts of interest can be difficult in a small city, because there simply aren't that many people and businesses, so it's harder to keep city matters totally separate. In cities with a population of less than 10,000, a business owned by an elected official can have a contract to perform services for the city as long as it does not exceed \$18,000 in any calendar year. However, this does not apply to the sale or lease of property by the city, so elected city officials cannot rent or lease facilities or land from the city.

Even when the small city exception applies, an elected city official may not vote on the authorization, approval, or ratification of a contract from which he or she will profit. The elected official whose business is involved in the vote must also publicly disclose his or her personal financial interest, and this must be recorded in the official minutes of the city council.

## **Remote interest**

There is a legal definition of a "remote interest" that can affect city elected or appointed officials' judgements about city contracts, and where special efforts may be required to avoid conflict of interest. "Remote interests" are particularly thorny, because they can involve voluntary, nonprofit and charitable activities of city officials where favoritism wouldn't benefit you personally, but would benefit a cause or person you're involved with.

A "remote interest" includes a city contract with an entity when a city official is:

- A non-salaried officer of a nonprofit corporation (for example, on the Board of Directors) of the contracted party;
- Employed with a business (with entirely fixed salary or wages) of the contracted party;
- A landlord or tenant of the contracted party;
- Holding less than one percent of the corporate shares of the contracted party; or
- A member of a cooperative of the contracted party.

In the event of such a remote interest in a contract, the city elected official or appointed officer must disclose the extent of his or her interest prior to making the contract. That person may not authorize, approve, or ratify the contract. Also, he or she can't influence or try to influence those who will be voting on the contract.

## Violation penalties

The penalty for violating any of these prohibitions voids the contract, and anyone who violates these rules has to pay the city a \$500 fine. Violators may also be required to leave an elected office or lose their city jobs. Although this law does not impose criminal penalties for a violation of its provisions, criminal penalties from other laws may apply, and they can be severe.

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## Open Public Meetings Act

The Open Public Meetings Act requires that all city council meetings be open to the public, except as specifically authorized under the Act. Also, all “actions” or votes taken by city councils and other governing bodies must be done at meetings that are open to the public.

The Act applies to all city council meetings, as well as to many commissions and boards, such as the planning commission, park board or library board. A meeting generally includes any situation in which a majority (a quorum) of the council, or other governing body, meets and discusses business. Even if no votes are taken, the meeting must be open to the public if public business is discussed.

### Executive sessions not open to public:

An “executive session” is a meeting or a portion of a meeting during which a governing body may exclude the public. Before the council or other body meets in executive session, both the length and purpose of the executive session must be announced publicly. The following is a nonexclusive list of reasons cities typically hold an executive session:

- To consider a real estate acquisition or sale;
- To receive and evaluate complaints brought against a public employee; (Before meeting in executive session under this exception, the person who is the subject of the complaint must be notified of the complaint and given the option of meeting in open session);
- To evaluate qualifications of a candidate for public employment or review performance of a public employee;
- To discuss with legal counsel matters related to litigation or potential litigation. (Note that under this exception legal counsel must be present at the executive session.)

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**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 may retain control over the instruments they have created.**

*RCW 42.30.010, 1971*

### **Selected proceedings not subject to the Act:**

- The portion of a meeting of a quasi-judicial body relating to a quasi-judicial matter between named parties (such as a request for site-specific rezone permit or conditional use permit.) Read more about quasi-judicial matters later in this chapter;
- Collective bargaining sessions, including contract negotiations, grievance meetings and discussions in which the city council or other body is planning or adopting the strategy to be taken during collective bargaining.

### **Penalties, costs and attorney fees for violations:**

- Individual liability - A civil penalty of \$500 for members of a governing body found to have knowingly violated the Act;
- City liability - The city is liable for all costs, including reasonable attorney fees, if someone successfully challenges a decision to hold a closed meeting. (However, if there is an unsuccessful challenge and the court declares it frivolous, the city may recover reasonable expenses and attorney fees); and
- Actions taken in a closed meeting that was in violation of the Open Meetings Act are null and void.

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## **Public Records Act**

In 1972, Washington adopted Initiative 276, which requires that most records maintained by state, county, and city governments be made available to the public. The public disclosure statutes have been frequently revised over the past three decades, and they are now referred to as the Public Records Act. The purpose of the Act is to provide the public full access to information about the conduct of government, except where doing so would violate individual privacy rights and the efficient administration of government.

### **What is a public record?**

Public records include any writing that contains information about the conduct of government. This includes papers, photos, maps, videos, and electronic records, including emails that relate to public business. It also includes not just information produced by city government, but also information that is produced for city government, such as reports prepared by contractors.

Cities are required to make all public records available for public inspection and copying, unless the record falls within one of the specific exemptions in the Public Records Act, or is exempt from disclosure under another law.

Here is what every city must do:

- **Complete training** on the Public Records Act
- **Appoint a public records officer:** Every city must appoint a public records officer so the public knows who to contact when they want to request public records. This appointment has to be made known to the public. Listing the person's name and title and contact information on the city web site or in city hall are two ways to do this.

- **Create and publish an index of public records:** Cities must create and publish an index of its public records, unless the city council declares by formal order that to do so would be unduly burdensome. This is a difficult task, and many city councils adopt an order indicating that to do this would be unduly burdensome.
- **Provide assistance locating public records:** Every city is required to provide the fullest assistance to the public in locating and accessing public records.
- **Respond to requests promptly:** Response to a request for a public record must be made within five business days of the request. The response can be to provide records, to provide the specific link where the requested records are located on the city website, to deny the request because the requested documents are exempt from disclosure requirements, or to state that additional time is required to:
  - Clarify the intent of the request;
  - Locate and assemble the information requested;
  - Notify third persons or agencies affected by the request; or
  - Determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.
- **Explain exemptions:** If a request is denied or any part of a document is redacted (blacked-out) because it is exempt, the specific exemption must be noted in the city's response to the requester along with sufficient description of how it applies. In most circumstances, once the exempt information has been blacked out, the remainder of the document must be disclosed.

What is not required:

- **Providing copies free of charge:** Cities may charge for making copies, including staff time and use of equipment. However, a city cannot charge for staff time to locate the records and make them available for public inspection. An agency cannot charge more than 15 cents per page unless the actual costs have been calculated and determined to be greater.
- **Creation of new records:** An agency is not required to create a record in response to a request.
- **Access and custody:** An agency is required to make records available for public inspection but an agency is not required to allow access to, for example, employee computers for the public to peruse records, nor is an agency required to allow original records out of its custody.
- **Certain form of request:** A city may not require that people fill out a specific form to request public documents. Although a city can request that its form be used, it cannot deny a request for a public record because someone doesn't use that particular form. Requests do not need to be in writing, they can be in email or even verbal.
- **Disclosure of purpose of request:** Citizens are not required to disclose why they are requesting public documents.

## 7 cardinal virtues for email communications

*Steve DiJulio, Foster Pepper PLLC, Elected Official Essentials workshop*

1. Before sending an email, ask whether you would like to see the email on the front page of the local paper.
2. Limit email chains to those who need to have access to the information; and, do not forward beyond that group.
3. Before generating or transmitting documents that may contain professional opinions, obtain authorization from legal counsel.
4. All reports, memoranda, charts and other documents containing analysis should be marked "draft" prior to final authorization.
5. Remember that all written communication (including casual notes) may become part of litigation. Avoid unnecessary adjectives or personal remarks in emails (or when jotting down information during meetings). What may seem humorous at the moment may later be embarrassing.
6. Adhere to the city's regular document retention policies.
7. If the email is on the city system, it is a public document.

### **Judicial review**

A local government may seek court protection to stop the release of a record that is not exempt under the Public Records Act if the local government can show that:

- The requested information is “clearly not...in the public interest”; and
- That disclosure will “irreparably damage any person, or would substantially and irreparably damage vital governmental functions.”

If a person is denied an opportunity to inspect and copy a public record held by a local government, he or she may bring a motion in the superior court of the county where the record is maintained to require the local agency to explain, or show cause, why it has denied access to the record. The local agency has the burden of proving that the denial is consistent with a law that either exempts or prohibits disclosure. Also, if a person believes that the city is taking too long to fully respond to a disclosure request, he or she may file a motion requiring the city to explain why so much time is needed.

### **Liability**

If city officials release records because they are making a good faith effort to comply with the Public Records Act, they can’t be liable for it, even if the release offends or harms someone.

However, good faith will not absolve a city if public records that are covered by the Public Records Act are withheld. Good faith will be taken into consideration in determining the amount of penalty, but a minimum penalty of five dollars per day is mandatory regardless of good faith. A requesting party that prevails in court “... shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not exceed one hundred dollars for each day that he was denied the right to inspect or copy said public record.” The statute of limitations is one year.

Particular care should be taken in releasing personnel records, medical records, records subject to protection under the Criminal Records Privacy Act (CRPA), and records that could violate an individual’s right to privacy. Certain records specifically exempted from release may lead to liability under laws other than the Public Records Act. For example, the CRPA provides that release of records in violation of the law constitutes a misdemeanor.

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## **Appearance of Fairness Doctrine**

Appearance of fairness is a judicial policy that puts additional restrictions on local officials. It requires that decisions be both fair in fact and free from the appearance of unfairness when a city is acting in a court-like or “quasi-judicial” capacity. This law applies to specific actions that affect a single person or company, such as a specific zoning variance. It doesn’t apply to enacting big-picture policies on zoning or adopting a land use plan.

The Appearance of Fairness doctrine requires that a councilmember not participate in a decision when it’s necessary to prevent the appearance of unfairness, bias, prejudice or other potential conflict of interest.

This doctrine generally applies in land use hearings such as site-specific rezones, preliminary plat approvals, conditional use permits, variances, and shoreline substantial development permits. Failure to follow the procedures can result in invalidation of the land use or other quasi-judicial decision. Application of the procedures and use of the exceptions should be documented on the hearing record.

### **How does the doctrine apply to my city?**

The Appearance of Fairness Act applies when “quasi-judicial” proceedings determine the legal rights, duties or privileges of specific parties in a hearing or other contested case proceeding. The doctrine does not apply to legislative policymaking decisions, such as adopting, amending or revising comprehensive plans or other land use planning documents, plans or zoning decisions of area-wide significance. It also doesn’t apply to statements made while campaigning for elective office.

The gist of the Appearance of Fairness Act is that elected officials should be impartial in hearings that will lead to city decisions that affect specific people or companies. They should not, for instance, announce how they plan to vote on a conditional use permit before the hearing is held.

A commonly used oath is: I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Washington, and all local ordinances, and that I will faithfully and impartially perform and discharge the duties of the office of \_\_\_\_\_, according to law and the best of my ability.

### **Here are the main provisions of the Act**

**It prohibits contact outside the hearing:** “Ex parte” (outside the hearing) communications between a decision maker and a proponent or opponent of the matter being decided during the time the matter is pending is against the law, unless the decision maker:

- Places on the record the substance of any spoken or written communications; and
- Makes a public announcement of the content of the communication, and of a party’s right to rebut the substance of the communication. This announcement must be made at each hearing where action is taken or considered on the subject. (This does not prohibit correspondence between a citizen and his or her elected official if the correspondence is made part of the record of the quasi-judicial proceeding to which it applies.)

### **Challenges to a councilmember’s participation**

A fellow councilmember or a citizen can challenge a councilmember’s right to participate in a decision if they believe there is an appearance of conflict of interest. Challenges must be raised as soon as the basis for disqualification is made known or reasonably should have been known prior to the issuance of the decision. If the challenge is not timely, the doctrine may not be relied on to invalidate the decision.

### **Exception: the rule of necessity**

If more than one member of a decision making body is challenged as being in violation of the doctrine, so that there are not enough members to legally make a decision, the “rule of necessity” allows challenged members to participate and vote. Before voting, however, the challenged officials must publicly state why they would or might have been disqualified.

### **Fair hearings have precedence**

Even though some conduct might not violate the statutory provisions of the appearance of fairness doctrine, a challenge could still be made if an unfair hearing actually results. For instance, certain conduct otherwise permitted by the statutes may be challenged if it would actually result in an unfair hearing (e.g., where a campaign statement reflects an attitude or bias that continues after a candidate’s election and into the hearing process).



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## **Elections**

Elections for city offices are held in odd-numbered years. The first step that needs to be taken when seeking election to local office is to file a Declaration of Candidacy with the county auditor, not more than 60 days nor less than 45 days prior to the primary election at which the initial elected officials are nominated.

The qualifications for office depend somewhat on the classification of the city or town.

### **Qualifications to hold elective office**

#### **Towns**

In towns, no person is eligible to hold an elective office unless he or she is a resident and a registered voter of the town.

#### **Second class cities**

No person is eligible to hold an elective office in a second class city unless the person is a resident and a registered voter in the city.

#### **Code cities**

No person is eligible to hold elective office under either the mayor-council or the council-manager plan unless the person is a registered voter of the city at the time of filing his or her declaration of candidacy and has been a resident of the city for a period of at least one year preceding his or her election.

### **Oath of office**

The oath of office is the last step that must be taken before a candidate who wins election takes office. The new term of office typically begins on the first day of January following the election. The oath of office may be taken up to ten days before taking office, or at the last regular meeting held before an elected person assumes office.

The oath may be given by a variety of persons, including any notary public, mayor or mayor pro tem, clerk, judge or court clerk. The oath should be filed with the county auditor.

### **Improper use of public facilities in campaigns**

It is against the law to use any city facilities to support or oppose a ballot proposition or to assist any campaign for election to any public office. This includes the use of stationery, postage, machines and equipment, use of office employees, office publications, clientele lists and even paper clips. Careful regard for this law is very important to keeping - and deserving - the public's trust.

There are, however, exceptions to this prohibition:

- An elected city council may collectively endorse or oppose a ballot proposition if the council meets the procedural requirements of the law. The requirements are that:
  - Any required notice of the meeting includes the title and number of the ballot proposition; and
  - Members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view.
- An elected official may make a statement in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry; and
- Activities which are a part of the normal and regular conduct of the office or agency. For example:
  - A city may prepare and distribute a neutral fact sheet concerning a ballot proposition;
  - A city may conduct research into the likely effects of a ballot proposition; and
  - A city may allow the use of public facilities to host a neutral forum on a ballot issue.

These restrictions do not prevent an elected official or city employee from participating fully in campaigns on their own time when public facilities are not used.

The law also restricts certain use of public service announcements by incumbent candidates in election years.

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## **Salary increase during term of office**

Members of a governing body who set their own compensation may not, during the terms of office for which they are elected, receive any pay increase enacted by that body. However, this doesn't apply to a mayor's compensation in cities operating under the mayor-council form of government if the vote of the mayor is not necessary to enact the increase. A city may establish a citizen's salary commission and salaries established by that commission are not subject to this prohibition. Note also that these provisions prohibit a salary decrease for elected officials during their term of office.

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## Resources

### **The Elected Officials' Road Map, AWC**

[awcnet.org/Portals/0/Documents/Publications/EORoadMap.pdf](http://awcnet.org/Portals/0/Documents/Publications/EORoadMap.pdf)

### **Knowing the Territory: Basic Legal Guidelines for Washington City, County and Special Purpose District Officials, MRSC**

[mrsc.org/getmedia/1e641718-94a0-408b-b9d9-42b2e1d8180d/ktt15.pdf.aspx?ext=.pdf](http://mrsc.org/getmedia/1e641718-94a0-408b-b9d9-42b2e1d8180d/ktt15.pdf.aspx?ext=.pdf)

### **Open Public Meetings Act**

#### **Open Public Meetings Act topic page, MRSC**

[mrsc.org/Home/Explore-Topics/Legal/Open-Government/Open-Public-Meetings-Act.aspx](http://mrsc.org/Home/Explore-Topics/Legal/Open-Government/Open-Public-Meetings-Act.aspx)

#### **OPMA and PRA Practice Tips and Checklists, MRSC & State Auditor's Office**

[mrsc.org/getdoc/228ecccb-6f1e-4f01-a1d9-179b9f58adf3/OPMA-and-PRA-Practice-Tips-and-Checklists.aspx](http://mrsc.org/getdoc/228ecccb-6f1e-4f01-a1d9-179b9f58adf3/OPMA-and-PRA-Practice-Tips-and-Checklists.aspx)

#### **Washington Association of Public Records Officers (WAPRO)**

[wa-pro.org/](http://wa-pro.org/)

#### ***Washington State Sunshine Laws 2015: An Open Government Resource Manual*, Washington State Office of the Attorney General**

[agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About\\_the\\_Office/Open\\_Government/Open\\_Government\\_Internet\\_Manual/Open%20Government%20Resource%20Manual%20-%20October%202015.pdf](http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Open_Government_Internet_Manual/Open%20Government%20Resource%20Manual%20-%20October%202015.pdf)

### **Public Records Act**

#### **Electronic Records - PRA and Records Retention, MRSC**

[mrsc.org/getmedia/bc0449ee-00f8-42da-b010-c26204191c5c/electronic%20records\\_pra%20and%20records%20retention\\_practice%20tips.aspx](http://mrsc.org/getmedia/bc0449ee-00f8-42da-b010-c26204191c5c/electronic%20records_pra%20and%20records%20retention_practice%20tips.aspx)

#### **PRA: Electronic Records - PRA and Records Retention Do's and Don'ts, MRSC**

[mrsc.org/getmedia/28c40d3c-32f4-4f46-a12f-77c9566688b3/electronic%20records\\_pra%20and%20records%20retention\\_do's%20and%20don'ts.aspx](http://mrsc.org/getmedia/28c40d3c-32f4-4f46-a12f-77c9566688b3/electronic%20records_pra%20and%20records%20retention_do's%20and%20don'ts.aspx)

#### **PRA - Agency Obligations: A Starting Point, MRSC**

[mrsc.org/getmedia/2c155517-eddf-4a02-bdeb-6aefc90cd0c8/pra\\_agency%20obligations\\_checklist.aspx](http://mrsc.org/getmedia/2c155517-eddf-4a02-bdeb-6aefc90cd0c8/pra_agency%20obligations_checklist.aspx)

#### **PRA - How to Perform an Adequate Search for Records, MRSC**

[mrsc.org/getmedia/87504e46-4a94-44e1-9a26-ed56936127f8/pra\\_searchforrecords\\_practictips.aspx](http://mrsc.org/getmedia/87504e46-4a94-44e1-9a26-ed56936127f8/pra_searchforrecords_practictips.aspx)

#### **Public Records Act Court Decisions - topic page, MRSC**

[mrsc.org/Home/Explore-Topics/Legal/Open-Government/Public-Records-Act-Court-Decisions.aspx](http://mrsc.org/Home/Explore-Topics/Legal/Open-Government/Public-Records-Act-Court-Decisions.aspx)

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## Know the law

- RCW 42.23 - Code of Ethics for Municipal Officers (contract interests)
- RCW 42.23.070 - Prohibited acts
- RCW 42.30 - The Open Public Meetings Act
- RCW 42.30.110 - Executive session
- RCW 42.30.120 - Violations of the Open Public Meetings Act
- RCW 42.30.140 - Meetings not subject to the Open Public Meetings Act
- RCW 10.97 - Criminal Records Privacy Act
- RCW 42.56 - Public Records Act
- RCW 42.56.060 - Immunity from liability
- RCW 42.56.230-480 - Exemptions to public records
- RCW 42.56.540 - Local government-initiated court action to prevent disclosure
- RCW 42.56.550 - Judicial review of agency actions
- WAC 44-14 - Public Records Act - Model rules
- RCW 42.36 - Appearance of Fairness Doctrine (Limitations)
- RCW 42.17A.555 - Use of public office or facilities in campaigns
- RCW 42.17A.575 - Public service announcements
- RCW 35.21.015 - Citizen's salary commissions

## Appearance of Fairness Doctrine

**The Appearance of Fairness Doctrine in Washington State**, MRSC

[mrsc.org/getmedia/04AE5092-48DF-4964-91D7-2A9D87CB2B7C/afd11.aspx](http://mrsc.org/getmedia/04AE5092-48DF-4964-91D7-2A9D87CB2B7C/afd11.aspx)

**Ethics and Conflicts of Interest topic page**, MRSC

[mrsc.org/Home/Explore-Topics/Legal/General-Government/Conflicts-of-Interest.aspx](http://mrsc.org/Home/Explore-Topics/Legal/General-Government/Conflicts-of-Interest.aspx)

**Public Hearings topic page**, MRSC

[mrsc.org/Home/Explore-Topics/Governance/Legislative-Organization,-Meetings-and-Process/Public-Hearings-When-and-How-to-Hold-Them.aspx](http://mrsc.org/Home/Explore-Topics/Governance/Legislative-Organization,-Meetings-and-Process/Public-Hearings-When-and-How-to-Hold-Them.aspx)

**Short Course on Local Planning**, Department of Commerce

[awcnet.org/DataResources/Resourcesbytopic/TabId/941/ArtMID/2423/ArticleID/1168/Short-Course-on-Local-Planning.aspx](http://awcnet.org/DataResources/Resourcesbytopic/TabId/941/ArtMID/2423/ArticleID/1168/Short-Course-on-Local-Planning.aspx)

## Elections

**Getting into Office: Being Elected or Appointed into Office in Washington Counties, Cities, Towns and Special Districts**, MRSC

[mrsc.org/Home/Stay-Informed/MRSC-Insight/February-2013/Announcing-our-Newly-Revised-Publication-Getting-i.aspx](http://mrsc.org/Home/Stay-Informed/MRSC-Insight/February-2013/Announcing-our-Newly-Revised-Publication-Getting-i.aspx)

**Guidelines for Local Government Agencies in Election Campaigns (Public Disclosure Law Re: Use of Public Facilities in Campaigns)**, Washington Public Disclosure Commission (PDC)

[pdc.wa.gov/learn/guidelines-local-government](http://pdc.wa.gov/learn/guidelines-local-government)