REPORT NUMBER 61

Public Records Act

for Washington Cities, Counties, and Special Purpose Districts

Municipal Research and Services Center

Foreword

Because the legislature routinely updates the Public Records Act statutes, and because the courts issue many decisions each year interpreting the statutes, MRSC has chosen to update this publication as needed. The electronic version available here is our latest version. If you like to use a printed copy, we recommend that you print a new copy periodically, so that you have the benefit of the most recent updates.

Washington's public disclosure laws apply to all Washington governments, including counties, cities, towns, and special purpose districts. We first produced this publication in 1996 due to the large volume of inquiries that the Municipal Research and Services Center (MRSC) received over the years concerning public disclosure. Since that time, numerous exemptions have been added to the public disclosure statutes and the courts have issued many decisions which affect the application of the statutes. We updated this publication in 2004 to reflect those changes.

Effective July 1, 2006 almost all of the public records disclosure statutes, now called the Public Records Act, were recodified, necessitating another revision of this publication in 2006. The disclosure statutes used to be codified in chapter 42.17 RCW, but were recodified to a new chapter 42.56 RCW. Conversion tables for the statutes are in Appendix E of this publication and will help you understand references to the statutory numbering you might come across in earlier court decisions and other documents discussing the public records laws. Also included in the conversion tables, and in the main text of this publication, are citations to the Public Records Act Model Rules (which now include rules specifically related to electronic records). Those Model Rules are located in the Washington Administrative Code. The full text of the Model Rules is also provided, as Appendix D.

This material is intended for use by local government employees and officials, and we have presented it in a format that we hope will be easy to use and understand. For further research, we have provided the reader with footnotes and appendices.

Special acknowledgment is given to Jim Doherty, Legal Consultant, who prepared the original publication and oversaw this revision.

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Introduction

In 1972 the voters in state of Washington adopted Initiative 276, which required that most records maintained by state, county, and city governments be made available to members of the public. The public disclosure statutes have been frequently revised over the past three decades. The latest revision of the disclosure statutes are found in chapter 42.56 RCW, and are referred to as the **Public Records Act**.[1] Although the public records disclosure statutes do not apply to judicial records (case files),[2] the legislature has specifically extended their coverage to state legislative records.[3] In addition, the public records disclosure statutes apply equally to "every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district" or "any office, department, division, bureau, board, commission, or agency thereof, or other local public agency."[4] This publication will refer to these units of government collectively as "local government" or "local agency."

This publication discusses all of the statutory disclosure exemptions which are relevant to local governments, as well as the mandatory procedures for responding to a public records disclosure request. Throughout the text are questions and answers relating to diverse public disclosure issues; they reflect the broad range of public disclosure questions answered by MRSC over the years. Because this publication is directed toward a wide audience of local government officials and employees, many of the citations to legal authority are located in the footnotes, rather than in the body of the text.

Appendix A contains selected case law and research references which are intended to provide assistance when more detailed information or research is needed. Appendix B has sample local government policies, ordinances, and forms related to public disclosure. Appendix C is a list of state laws, other than those in chapter 42.56 RCW, affecting confidentiality and disclosure of public records. Appendix D is the full text of the Public Records Act Model Rules. Appendix E has the RCW conversion tables that will assist with the

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[1]*See* RCW 42.56.020.

[2]*See Nast v. Michels*, 107 Wn.2d 300 (1986) (holding that the Public Disclosure Act did not provide access to court case files, instead, the public disclosure of court case files is governed by other Washington statutes and past court decisions, i.e., common law); *accord Beuhler v. Small*, 115 Wn. App. 914, 918 (2003) (finding that the trial court properly concluded that the PDA did not grant the plaintiff a right to access a judge's computer files); *see also, In re Personal Restraint of Gentry*, 137 Wn.2d 378, 389–90 (1999) (holding that under GR 15(c)(2)(B), case records would not be sealed from the public, because the defendant's right to a fair trial was not imperiled nor was sealing the motions necessary to prevent a serious and imminent threat to any compelling interest). Also see *Dreiling v. Jain*, 151 Wn.2d 900 (2004) and WAC 44-14-01001 and *Spokane & E. Lawyer v. Tompkins*, 136 Wn. App. 616 (2007) and WAC 44-14-01001. On 10/15/2009 the Washington Supreme Court upheld the Nast decision in *City of Federal Way v. Koenig*.

[3]RCW 42.56.010(2).

[4]*Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 152 (1999), *review denied* 138 Wn.2d 1015 (1999). In determining whether an organization is a public agency under the PDA, the appeals court has adopted a four factor balancing test: "The factors are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government." *See also* Michael R. Kenyon and Stephen R. King, "Government Contractors and the Washington Public Disclosure Act: When Private Documents Become Public Records," *Legal Notes* Information Bulletin No. 509 (2001) (analysis of public agency determinations). See also WAC 44-14-01001.

2006 statutory renumbering (included with the conversion tables are citations to the corresponding sections of the Public Records Act Model Rules).

Do not be surprised if you have a public disclosure question which is not discussed in this publication. Disclosure issues are almost as numerous as the public records in your custody. If you need additional assistance when analyzing disclosure questions, please contact your legal counsel or MRSC.

Question: Does the federal Freedom of Information Act govern public access to any local government records?

Answer: No. The federal Freedom of Information Act applies only to federal agencies and the records maintained by those agencies. However, state courts will, in appropriate situations, look to the federal Freedom of Information Act and case law interpreting that act when interpreting similar provisions in the state public disclosure statutes.[5]

Concerning the Public Records Act Model Rules

In 2005, the state legislature directed the Attorney General to adopt advisory "model rules" for state and local agencies.[6] These Model Rules are now published in the Washington Administrative Code at chapter 44-14. Though the current version of the Model Rules deals mostly with disclosure procedures, there are instructive comments regarding some specific disclosure exemptions, such as the right to privacy, the attorney-client privilege, and the deliberative process exemption. The legislature granted the Attorney General the discretion to periodically revise the Model Rules.

Cities and counties should review the Model Rules and determine whether they wish to incorporate some or all of the Model Rules into their own local disclosure procedures or policies.

The WAC sections quoted below are taken from the "Introductory Comments" to the Model Rules, and provide some explanation for their purpose and role.

> **WAC 44-14-00001 - Statutory Authority and purpose.**
>
> . . . The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.
>
> **WAC 44-14-00002 - Format of model rules.**
>
> We are publishing the model rules with comments. The comments have five-digit WAC numbers such as WAS 44-14-04001. The model rules themselves have three-digit WAC numbers such as 44-14-040.
>
> The comments are designed to explain the basis and rationale for the rules themselves as well as to provide broader context and legal guidance. . . .

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[5] *Servais v. Port of Bellingham*, 127 Wn.2d 820, 835 (1995); *see also PAWS v. UW*, 125 Wn.2d 243, 265 (1994).

[6] RCW 42.56.570.

WAC 44-14-00003 - Model rules and comments are nonbinding.

The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

Public Records Exemption Accountability Committee

In 2007 the legislature created a public records exemption accountability committee.[7] This broad-based group is charged with reviewing the existing exemptions and annually submitting their recommendations to the governor, attorney general, and to the appropriate committees of the house of representatives and the senate.

[7] RCW 42.56.140.

2

Government Records – Local Government's Duty to Provide Access

Local government agencies are required, within five days of receiving a public disclosure request, to respond by (1) providing the requested record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requestor notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requestor to view copies using an agency computer; (3) acknowledging receipt of the request and providing a reasonable estimate of the time required to fill the request; or (4) denying the request.[8] Given limited budgets and staff, local agencies tend to have all available resources invested in day-to-day running of the agency. Requests for disclosure of public records often occur at inconveniently busy times. Despite the extra burden that disclosure requests place on busy agency staff, every government official and employee should be reminded of the strongly-worded language that was incorporated into the public disclosure act:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.[9]

When passed in 1972, Initiative 276 contained a similar public policy statement:

> It is hereby declared by the sovereign people to be the public policy of the state of Washington: . . . (11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.[10]

Both the state legislature and the voters of Washington are clear about their position on public disclosure: the citizens of this state have a right to know almost all of the details of how local and state governments are run. The courts have enforced this policy by liberally construing the Act's disclosure provisions and narrowly construing its exemptions.[11]

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[8]RCW 42.56.520

[9]RCW 42.56.030. The first three sentences of this statute also appear in the legislative declaration at the beginning of the open public meetings act - see RCW 42.30.010. See also WAC 44-14-01003.

[10]RCW 42.17.010.

[11]*Limstrom v. Ladenburg*, 136 Wn.2d 595, 604 (1998) (citing RCW 42.17.251).

Working for local government is like working inside a goldfish bowl. Almost everything is open to public scrutiny. It is the duty of agency staff to respond to public disclosure requests efficiently and graciously since the public is not only your client, but also your employer. Although agency staff may become annoyed at a disclosure request because of the time it takes to locate records, or because the records may disclose a mistake or improper action, the following statutory provision should serve as a reminder of the importance of open government:

> Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials and others.[12]

From a practical standpoint, dealing with requests in a responsive and courteous manner minimizes public distrust of government, thus preventing a public disclosure request from escalating into an expensive and time consuming legal event.

Question: Must the city disclose a letter of resignation from a disgruntled employee when the letter consists of a rambling tirade in which the employee criticizes his supervisor, the mayor and the council for a number of decisions?

Answer: The letter must be disclosed. The city may redoct from the letter only information which is covered by a specific statutory exemption.

Acting in Good Faith – Disclosing a Record in Error

All requests for public records must be examined carefully, and all requested records must be provided except for those records which are clearly exempt from disclosure. A court will look favorably on a good faith attempt to comply with the public disclosure act if an employee discloses a public record, and later analysis or court decision shows it should not have been disclosed. In such a circumstance, a local government may be immune from liability:

> No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in *good faith* in attempting to comply with the provisions of this chapter.[13]

In order to act *in good faith,* local government employees and officials making disclosure decisions must be familiar with the public disclosure requirements and the many exemptions contained in the statutes.

Acting in Good Faith – Penalties, Attorney's Fees, and Costs

Acting in "good faith" will not absolve an agency from the imposition of court costs, attorney fees, and potential penalties for erroneously withholding public records, but can be taken into consideration by a judge when determining the amount of penalties. RCW 42.56.550(4) provides:

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[12]RCW 42.56.550(3).

[13]RCW 42.56.060.

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time 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 to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

Note that prior to July of 2011 the above statute required that the minimum penalty for wrongfully withholding a record was $5 per day. Many of the court decisions dealing with penalties stressed that mandatory provision. Keep that statutory amendment in mind if you review prior court decisions or articles dealing with PRA penalties.

Legal advice should be sought in situations where statutory requirements seem unclear. Fortunately, court decisions and attorney general opinions are available for guidance in this complex field. The Public Records Act statutes, along with the Open Public Meetings Act,18 provide the foundation for open government. Such openness encourages public participation and awareness, and helps dispel fears that local governments are not responsible or responsive to the people.

Question: Must local government agencies disclose copies of their bank records?

Answer: Yes. Bank records concern public funds and should be disclosed upon request. There is one exception: If the agency's bank accounts are kept in such a way that disclosure of a particular account record would reveal exempt tax information, then that data should not be disclosed. For instance, if a jurisdiction has only two or three motels, disclosure of hotel/motel tax revenue could enable a person to estimate the income of a particular taxpayer.

3

What Are Public Records?

A "public record" is defined to include,

> . . . 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.[14]

"Writing" is also defined in the disclosure statutes:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.[15]

Whether private business records can relate to "conduct of government" has not been addressed by Washington courts.[16] However, the Washington Supreme Court has held that where "records relate to the conduct of . . . [a public agency] . . . and to its governmental function. . . . [T]he records are 'public records' within the scope of the public records act."[17]

Local governments are not required to *create* documents in order to comply with a request for specific information.[18] Rather, they must produce existing records for review and copying. Also, local governments are not obligated to compile information from various records so that information is in a form that is more useful to the requestor. For example, if someone wants records concerning the time it took the city fire department to respond to residential fires occurring between midnight and 6:00 a.m. over a two-year period, the city only needs to provide copies of existing records.[19] City employees are not required to do research

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[14]RCW 42.56.010(2).

[15]RCW 42.56.010(3).

[16]*See* Kenyon, *supra,* note 4 (discussing private records that may become subject to the PDA through use by a public agency).

[17]*Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748 (1998) (holding that records showing amount of community contributions paid by tribes under the terms of tribal-state gaming compacts are within the scope of the PDA).

[18]*Citizens for Fair Share*, 117 Wn. App. at 435 (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13–14 (2000)). See also WAC 44-14-04003(5).

[19]*Smith*, 100 Wn. App. at 18.

for private individuals.[20]

> **Question:** Is the city clerk required to provide information over the phone to a newspaper reporter who is asking "what occurred at the council meeting last night?"
>
> **Answer:** This is not a public disclosure request, because the caller is not asking to review or copy a public record. There is no legal obligation to provide oral information concerning what occurred at the meeting. However, the reporter may request a copy of the minutes of the meeting after they are prepared. It is an administrative decision whether city staff should answer oral requests for non-record information. See also WAC 44-14-04002(2).

Electronic Data and Records

Increasing amounts of public information are now contained in electronic format, rather than on paper. Public disclosure laws apply to electronic data.[21] The state legislature formed a Public Information Access Policy Task Force in 1994 to examine the issue of providing broad public access to government records by electronic means. After reviewing the recommendations of the task force, the legislature passed legislation strongly encouraging expansion of electronic access to public records:

> Broad public access to state and local government records and information has potential for expanding citizen access to that information and for improving government services. Electronic methods for locating and transferring information can improve linkages between and among citizens, organizations, businesses, and governments. Information must be managed with great care to meet the objectives of citizens and their governments.
>
> It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.[22]

E-mail in particular has been the topic of many questions regarding public records. According to the State Archivist, who is responsible for creating public record retention guidelines,

> Individual E-mail messages may be public records with legally mandated retention requirements, or may be information with no retention value. E-mail messages are public records when they are created or received in the transaction of public business and retained as evidence of official policies, actions, decisions, or transactions. Such messages must be identified, filed, and retained just like records in other formats.[23]

For guidance, the State Archivist lists the following e-mail messages that are usually public records and must be retained:

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[20] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409 (1993).

[21] *See* Isabel R. Safora, "Municipal Policies on Internet Usage & E-mail Document Retention," *Legal Notes* Information Bulletin No. 497, §§ VI–VII (1997) (discussing application of the PDA to e-mail and retention).

[22] RCW 43.105.250.

[23] Wash. Secretary of State, *Local Government Agencies of Washington State: Records Management Guidelines*, p. S-62, updated 1/05, *available at* http://www.secstate.wa.gov/archives/gs.aspx.

- Policy and procedure directives.
- Correspondence or memoranda related to official public business.
- Agendas and minutes of meetings.
- Documents relating to legal or audit issues.
- Messages which document agency actions, decisions, operations and responsibilities.
- Documents that initiate, authorize or complete a business transaction.
- Drafts of documents that are circulated for comment or approval.
- Final reports or recommendations.
- Appointment calendars.
- E-mail distribution lists.
- Routine information requests.
- Other messages sent or received that relate to the transaction of local government business.[24]

Conversely, the State Archivist lists the following e-mail messages which are usually administrative materials with no retention value:

- Information-only copies, or extracts of documents distributed for reference or convenience, such as announcements or bulletins.
- Phone message slips that do not contain information that may constitute a public record.
- Copies of published materials.
- Informational copies.
- Preliminary drafts.
- Routing slips.[25]

Additional information and guidance for determining whether e-mail is a public record can be found in *Records Management Guidelines for All Local Government Agencies*, a publication by the State Archives Division of the Washington Secretary of State, and available online at *http://www.secstate.wa.gov/archives/gs.aspx*.

The Model Rules have been amended to include a section on electronic records. See WAC 44-14-050, and the comments to that provision found at WAC 44-14-05001 through C 44-14-05005. The full text of the Model Rules is included in appendix D of this publication. We recommend that you read those provisions carefully. The same basic requirements for responding to paper records also apply to electronic records.

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[24] *Id.*

[25] *Id.*

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Determining What Must Be Disclosed Under the Public Records Act

There are three questions a local agency must consider when responding to a request for disclosure. First, are the requested records exempt from disclosure or prohibited from being disclosed? Second, if they are exempt, can information be deleted from the record so it might still be released? Third, if the records are not exempt, should information be deleted that would constitute an unreasonable invasion of privacy if disclosed?

Specific Exemptions and Prohibitions

All agency records are available for review by the public unless they are specifically exempted[26] or prohibited from disclosure by the statutes. If no statutory exemption or prohibition covers the requested record, it must be disclosed.[27] This section discusses exemptions listed in RCW 42.56.230 through 42.56.480. However, there are numerous other exemptions and disclosure prohibitions located elsewhere in the statutes that are relevant for local governments. Appendix C of this publication contains a listing of the many disclosure exemptions and prohibitions that are not located in the Public Records Act (chapter 42.56 RCW). Some of those additional exemptions and prohibitions are discussed in chapter 5 of this publication.

The public disclosure act provides that exemptions are to be narrowly construed; consequently, the courts have consistently ruled that only information specifically exempted can be withheld from public disclosure.[28]

> **Note:** If, after reviewing the statutes, you are unsure whether a document meets the exemption criteria, consult with your department head or legal counsel.

The italicized statutory sections below are taken directly from the statutes and pertain to local governments. The records designated below are exempt from disclosure.

RCW 42.56.230 Personal information.

The following personal information is exempt from public inspection and copying under this chapter:

> *(1) Personal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients.*

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[26]Exemptions are permissive, not mandatory. WAC 44-14-06002(1) and AGO 1980 No. 1.

[27]RCW 42.56.070; *see also PAWS*, 125 Wn.2d at 257-61.

[28]RCW 42.56.030; *Brouillet v. Cowles Pub.*, 114 Wn.2d 788, 793 (1990) ("The public disclosure act mandates disclosure of all public records not falling under specific exemptions delineated in the act. In keeping with the act's policy, we construe exemptions from mandatory disclosure narrowly.").

(2) Personal information, including but not limited to, addresses, telephone numbers, personal electronic mail addresses, social security numbers, emergency contact and date of birth information for a participant in a public or nonprofit program serving or pertaining to children, adolescents, or students, including but not limited to early learning or child care services, parks and recreation programs, youth development programs, and after-school programs. Emergency contact information may be provided to appropriate authorities and medical personnel for the purpose of treating the individual during an emergency situation;

This exemption, which became effective in January 2012, applies to contact information for minors who may be participating in programs offered by local government agencies. In the past such information (except for social security numbers) had to be disclosed.

(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.

This "personal information" exemption concerns personnel files. Since some of the information in employee personnel files may be protected by the employee's right to privacy, careful scrutiny should precede any decision to disclose those records. Files of retired employees are also covered by this provision.[29] Additional analysis of personnel records disclosure and right to privacy issues are found later in this chapter and in chapter 7.

Question: Must a local agency disclose, upon request, copies of phone bills, which contain unlisted phone numbers placed on the bills as a result of personal calls made by local agency employees?

Answer: Yes. No exemption applies. The phone calls may be personal or private, but because billing records of the calls are not part of the employees' personnel files, neither RCW 42.56.230 or 42.56.250(3) apply. This is the case even if the phone bills include unlisted phone numbers of local agency employees. Many cities and counties allow employees to make personal calls from their work phones, but there is no exemption which allows the local governments to delete unlisted numbers from their phone bills. If a city or county employee wishes to maintain confidentiality of an unlisted phone number, calls to that number should not be made from their work phone phone.

(4) Information required of any taxpayer in connection with the assessment or collection of any tax if the disclosure of the information to other persons would (i) be prohibited to such persons by RCW 84.08.210, 82.32.330, 84.40.020, or 84.40.340 or (ii) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer.

Agencies should be very cautious about the release of any *taxpayer* information. This exemption does not prohibit disclosure of basic tax information such as the totals of various tax revenues; it only prohibits disclosure of information which can be identified with a particular taxpayer.

(5) Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial account numbers, except when disclosure is expressly required by government or other law.

[29] *Seattle Fire Fighters v. Hollister*, 48 Wn. App. 129, at 134 (1987).

RCW 42.56.240 Investigative, law enforcement, and crime victims.

The following investigative, law enforcement, and crime victim information is exempt from public disclosure and copying under this chapter:

> *(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;*

The Washington Supreme Court has held that an active police investigation file, in its entirety, is exempt from disclosure under the Act's "effective law enforcement" exemption, unless the law enforcement agency decides that specific information is not essential to solving the case.[30] The court will not second guess a law enforcement agency's decision not to disclose information contained in an open investigation file. This effectively bars challenges to law enforcement agency disclosure determinations with respect to such materials. Some factors the prosecutor should consider include whether disclosure might inadvertently compromise apprehension of a suspect, divulge sophisticated police investigative techniques, or disrupt the sharing of information between law enforcement agencies.[31]

However, if a suspect has already been arrested and the matter referred to the prosecutor for a charging decision, information contained in the investigative file is disclosable unless disclosure would impede effective law enforcement. Under these circumstances, the court is more willing to look at what should be disclosed to the public.

As with any disclosable record, information concerning sexual offenses, some health matters, and certain other private details can be deleted when disclosing police investigation reports in order to protect a person's right to privacy. See the information concerning redaction later in this chapter.

> *(2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the public disclosure commission, if disclosure would endanger any person's life, physical safety, or property. If at the time a complaint is filed the complainant, victim or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the public disclosure commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;*

The exemption listed here, allows agencies to delete details from police investigation reports which identify witnesses or victims of crimes, but only if disclosure would endanger any person's life, physical safety, or property.

> *(3) Any records of investigative reports prepared by any state, county, municipal, or other law enforcement agency pertaining to sex offenses contained in chapter 9A.44 RCW or sexually violent offenses as defined in RCW 71.09.020, which have been transferred to the Washington association of sheriffs and police chiefs for permanent electronic retention and retrieval pursuant to RCW 40.14.070(2)(b);*
>
> *(4) License applications under RCW 9.41.070; copies of license applications or information on the applications may be released to law enforcement or corrections agencies, and*

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[30] *Newman v. King County*, 133 Wn.2d 565, 574 (1997).

[31] *Cowles Pub. Co. v. Spokane Police Dept., City of Spokane*, 139 Wn.2d 472, 478 (1999).

The above exemption refers to concealed pistol licenses.

> *(5) Information revealing the identity of child victims of sexual assault who are under the age of eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.*[32]

The intent of this exemption is to allow witnesses and victims of crimes to make statements to police officers without fear that their identity will be made available to the public. A related statute, RCW 10.97.130, prohibits the release of the names of juveniles who are victims of sex crimes.

RCW 42.56.250 Employment and licensing.

The following employment and licensing information is exempt from public inspection and copying under this chapter:

> *(1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;*

This exemption enables local governments to keep private their employment testing materials, questions and answers. This is crucial for local governments which use standardized tests for civil service or other city recruitment.

> *(2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;*

This exemption enables individuals to apply for local government employment without worrying about disclosure of their application, or of the fact that they are seeking employment. This exemption applies to all non-elective local government positions, including administrative positions, such as city manager, or professional positions, such as city attorney or city engineer.

The broad wording of this exemption appears to cover not only resumes or application materials of current job applicants, but also such materials submitted to the local government in connection with *current* or *past* local government employees. There is no case law confirming whether the exemption should be interpreted so expansively. If the resume and other materials are in a current employee's personnel file, RCW 42.56.230(2) would also apply. However, it would be rare that the "right to privacy" protection of that subsection would apply to the types of information typically contained in resumes and related documents.

This statutory section also protects from disclosure employment application records which contain information submitted to a local government by prior employers in response to requests for information about an applicant.[33]

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[32]See *Koenig v. Des Moines* ___ Wn.2d. ___ (decided 8/31/06).

[33]See RCW 4.24.730, enacted in 2005, regarding an employee's or former employee's right to inspect written records of their employer or former employer indicating to which prospective employers they have provided employment information.

Question: If requested, must a local government disclose a record containing the names of those who have notified the local government that they would like to be considered for appointment to a vacant council position?

Answer: The names should probably be disclosed. The individuals are not applying for "local government employment" as that would normally be understood.

(3) The residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency that are held by any public agency in personnel records, public employment related records, or volunteer rosters, or are included in any mailing list of employees or volunteers of any public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW 74.39A.240;

This is the only disclosure exemption specifically referring to individuals who are working with the local government in a *volunteer* capacity. It is conceivable that a court interpreting other disclosure statutes, that are applicable to records relating to employees, might apply those statutes to volunteers.

(4) Information which identifies a person who, while an agency employee: (i) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (ii) requests his or her identity or any identifying information not be disclosed;

(5) Investigative records compiled by an employing agency conducting a current investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment; and

(6) [This subsection is not relevant for local government agencies.]

RCW 42.56.260 Real estate appraisals.

Except as is provided by chapter 8.26 RCW, the contents of real estate appraisals, made for or by any agency relative to the acquisition or sale of property, until the project or prospective sale is abandoned or until such time as all of the property has been acquired or the property to which the sale relates is sold, are exempt from disclosure under this chapter. In no event shall disclosure be denied for more than three years after the appraisal.

This exemption allows local governments to keep appraisal information away from public scrutiny while negotiating a potential purchase or sale. Local government legislative bodies may review and discuss confidential appraisal information in an executive session,[34] and the councilmembers or commissioners are prohibited from disclosing that information.[35]

[34] RCW 42.30.110(1)(b), (c).

[35] RCW 42.23.070(4).

RCW 42.56.270 Financial, commercial, and proprietary information.

The following financial, commercial, and proprietary information is exempt from disclosure under this chapter:

> *(1) Valuable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss;*

Several cases have interpreted this exemption. In one, the Washington Supreme Court found that the cash flow analysis of port properties prepared for a port's sole use in negotiations with prospective joint venture partners was within the research data exemption.[36] In another case, the court found that a university's research data relating to intellectual property was exempt from disclosure.[37] In both decisions, the requesting party was denied his public disclosure request, because he would have profited and the government would have incurred a loss.

By contrast, in a court of appeals decision the court found that documents used by professors and accountants hired by the city, to perform credit and financial analysis for the city's loan guarantee for private shopping center development, were not exempt.[38] The city was unable to show a public loss resulting from the disclosure of the requested research.

MRSC has been asked whether this exemption applies to blueprints or other architectural drawings submitted to a city's building department for review. It is doubtful that the exemption would often apply, because disclosure would not necessarily cause both "private gain and public loss." Also, even though the person who submitted the materials has a copyright interest in the documents, disclosure is not automatically prohibited. A court has held that an individual with a copyright interest in public records is not an indispensable party in an action to compel disclosure, and those requesting copies of the materials may be entitled to the records if the facts meet the "fair use doctrine."[39] Consequently, MRSC has recommended that when there is a disclosure request for these types of materials, the agency should immediately notify the person who submitted the documents or architectural drawings to allow the person with a copyright interest the option of seeking a court order prohibiting disclosure.[40]

In connection with the public bidding process, local governments often obtain information which bidders would not voluntarily divulge to their competitors. Such information may be exempt, if the "public loss" factor can be met.[41] In any event, it would be wise to promptly notify a bidder if the city receives a request for such records.

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[36] *Servais v. Port of Bellingham*, 127 Wn.2d 820 (1995).

[37] *PAWS*, 125 Wn.2d at 243.

[38] *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 575-77 (1999), *rev. denied*, 140 Wn.2d 1001 (2000).

[39] *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 745 (1997) (holding that "[a] copyright interest in the documents does not of itself make the owner an indispensable party to a lawsuit demanding under a public disclosure statute the right to have copies or to make copies of them").

[40] The procedure for such court review is outlined in RCW 42.17.540.

[41] *See generally,* Rocco N. Treppiedi, "Disclosing Proprietary Information Obtained in Competitive Bidding," *Legal Notes* Information Bulletin No. 432 (1985); Kyle J. Crews, "Second Update on Public Disclosure, Public Bidding Documents," *Legal Notes* Information Bulletin No. 491 (1995).

[The exemptions listed in subsections 2 through 11 of RCW 42.56.270 have limited applicability to local government records.]

RCW 42.56.280 Preliminary drafts, notes, recommendations, intra-agency memorandums.[42]

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

This exemption applies to records connected with the deliberative process. Only records containing opinions or recommendations are exempt. Factual materials which are being considered as background material on a particular issue or problem are not exempt. For example, if a city treasurer or finance officer prepares a financial report for the mayor detailing the status of the city's expenditures for the current budget year, that document is not exempt from disclosure. Conversely, if that report contains recommendations for fiscal policy changes, any portions containing the recommendations would be exempt from disclosure. Also, memos concerning possible fiscal policy changes written between a mayor, finance officer, or department heads are exempt. This exemption does not apply after the policies or recommendations set forth in the requested document(s) have been implemented.[43]

The Washington Supreme Court has determined that before an agency is entitled to rely on this exemption, it must show (1) that the records contain pre-decisional opinions or recommendations of subordinates expressed as part of a deliberative process; (2) that disclosure would be injurious to the deliberative or consultative function of the process; (3) that disclosure would inhibit the flow of recommendations, observations, and opinions; and (4) that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[44]

A subsequently decided case has discussed how this "deliberative process" exemption would apply to a preliminary list of issues to be addressed in collective bargaining negotiations.[45]

Question: Are a clerk's handwritten notes, which are used to prepare the formal council minutes, exempt from disclosure? How about unapproved drafts of the minutes?

Answer: Neither are exempt. The clerk is merely making notes of what is said and done by the council at an open, public meeting. We recommend that any preliminary drafts of council minutes which are provided to the public be clearly labeled as preliminary drafts.

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[42]See WAC 44-14-06002(4) in the Model Rules for comments on this "deliberative process" exemption.

[43]*Dawson*, 120 Wn.2d at 793.

[44]*PAWS*, 125 Wn.2d at 256.

[45]*ACLU v. City of Seattle*, 121 Wn. App. 544 (2004), and the subsequent unreported decision with the same name, decided by the Court of Appeals on 7/20/2009.

RCW 42.56.290 Agency party to controversy.[46]

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

This exemption concerns attorney work product. The term "controversy" refers to pending litigation, threatened litigation, and completed litigation.[47] Whenever a local government is involved in a current or potential legal controversy, disclosure of any related documents should be discussed and reviewed carefully with the local government attorney.

Some attorneys provide detailed billing statements that may include entries that show an attorney's "work product" or litigation strategy. The legislature adopted an "intent" statute providing guidance on billing statements sent to public agencies by their legal counsel, whether in-house or not – see RCW 42.56.904.[48]

The Attorney General has posted a "guidance document" concerning the attorney-client privilege and the work product doctrine on the Attorney General's web page dealing with the Model Rules – see *www.atg.wa.gov/records/modelrules.*

Question: Must a local government disclose a "separation agreement" entered into with an employee in order to settle a claim and avoid litigation? (The terms of the agreement were worked out by the council in an executive session, with the assistance of the local government attorney.)

Answer: The agreement must be disclosed. The relevant controversy exemption does not apply in this situation, because this document would be available to a party under the rules of pretrial discovery. Furthermore, the public has a legitimate interest in the details of a settlement agreement involving the government's conduct of its affairs and the expenditure of public funds.[49]

RCW 42.56.300 Archeological sites.

Records, maps or other information identifying the location of archaeological sites in order to avoid the looting or depredation of such sites are exempt from disclosure under this chapter.

RCW 42.56.310 Library records.

Any library record, the primary purpose of which is to maintain control of library materials, or to gain access to information, that discloses or could be used to disclose the identity of a library user is exempt from disclosure under this chapter.

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[46]See WAC 44-14-06002(3) in the Model Rules for comments on the attorney-client privilege.

[47]*Dawson*, 120 Wn.2d at 791; *see also O'Connor v. Wash. State Dept. of Social & Health Services*, 143 Wn.2d 895, 912 (2001) (holding that records relevant to a controversy to which an agency is a party are exempt if those records would not be available to another party under superior court rules of pretrial discovery).

[48]See also, West v. Thurston County, 144 Wn. App. 573 (2008) and Yakima County v. Herald-Republic, 170 Wn.2d 775 (2011).

[49]*See Yakima Newspapers v. Yakima*, 77 Wn. App. 319 (1995).

RCW 42.56.320 Educational information. [Not relevant for cities and counties.]

RCW 42.56.330 Public utilities and transportation.

The following information relating to public utilities and transportation is exempt from disclosure under this chapter: [Subsection (1) is not relevant for local government agencies.]

(2) The residential addresses and residential telephone numbers of the customers of a public utility contained in the records or lists held by the public utility of which they are customers, except that this information may be released to the division of child support or the agency or firm providing child support enforcement for another state under Title IV-D of the federal social security act, for the establishment, enforcement, or modification of a support order.

Question: Must the city disclose the amount owed by a utility customer, and whether the account is delinquent or not?

Answer: Yes. The financial information in utility records must be disclosed because no exemption applies. RCW 42.56.330 only exempts from disclosure the residential addresses and telephone numbers of public utility customers.

Question: Would the RCW 42.56.330 exemption prohibit a city from providing a mailing list of its utility customers to the directly adjacent city? (The neighboring city is going to be undertaking some major utility construction which will temporarily impact utility customers in the other city. It wants to mail out notices to the impacted residents of that city.)

Answer: This is not a request for *public* disclosure, but disclosure to another municipality. Consequently, there is no statutory reason to prevent one city from providing this information to another city.

(3) The names, residential addresses, residential telephone numbers, and other individually identifiable records held by an agency in relation to a vanpool, carpool, or other ride-sharing program or services; however, these records may be disclosed to other persons who apply for ride-matching services and who need that information in order to identify potential riders or drivers with whom to share rides;

(4) The personally identifying information or current or former participants or applicants in a paratransit or other transit service operated for the benefit of persons with disabilities or elderly persons;

(5) The personally identifying information of persons who acquire and use transit passes ….;

(6) [Deals with motor carrier intelligent transportation system information - not relevant for local government agencies.]

(7) The personally identifying information of persons who acquire and use transponders or other technology to facilitate payment of tolls ....

RCW 42.56.335 Public utility districts and municipally owned utilities – Restrictions on access by law enforcement authorities.

The above subsection concerns police agencies' inspection of electrical consumption records that might indicate a drug growing operation in a particular residence or structure.

RCW 42.56.340 Timeshare, condominium, etc. owner lists.

This exemption relates to information held by the state department of licensing.

RCW 42.56.350 Health professionals.

This exemption deals with information about health care professionals held by the state department of health.

RCW 42.56.360 Health care.

(1) The following health care information is exempt from disclosure under this chapter:

[Subsections (a) through (e) and (g) deal with information held by the state board of health or state board of pharmacy, and are not relevant for local governments.]

(f) Except for published statistical compilations and reports relating to infant mortality review studies that do not identify individual cases and sources of information, any records or documents obtained, prepared, or maintained by the local health department for the purposes of an infant mortality review conducted by the department of health under RCW 70.05.170. . . .

(2) Chapter 70.02 RCW applies to public inspection and copying of health care information of patients.

RCW 42.56.370 Domestic Violence Program, rape crisis center clients.

Client records maintained by an agency that is a domestic violence program as defined in RCW 70.123.020 or 70.123.075 or a rape crisis center as defined in RCW 70.125.030 are exempt from disclosure under this chapter.

RCW 42.56.380 Agriculture and livestock.

This exemption deals with information held by state agencies, not local governments.

RCW 42.56.390 Emergency or transitional housing.

Names of individuals residing in emergency or transitional housing that are furnished to the department of revenue or a county assessor to substantiate a claim for property tax exemption under RCW 84.36.043 are exempt from disclosure under this chapter.

RCW 42.56.400 Insurance and financial institutions.

This exemption concerns records held by state agencies, not local governments.

RCW 42.56.410 Employment security department records.

Records maintained by the employment security department and subject to chapter 50.13 RCW if provided to another individual or organization for operational, research, or evaluation purposes are exempt from disclosure under this chapter.

RCW 42.56.420 Security.

The following information relating to security is exempt from disclosure under this chapter:

(1) Those portions of records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal terrorist acts, which are acts that significantly disrupt the conduct of government or of the general civilian population of the state or the United States and that manifest an extreme indifference to human life, the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of:

(a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans; and

(b) Records not subject to public disclosure under federal law that are shared by federal or international agencies, and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for acts of terrorism.

(2) Those portions of records containing specific and unique vulnerability assessments or specific and unique emergency and escape response plans at a city, county, or state adult or juvenile correctional facility, the public disclosure of which would have a substantial likelihood of threatening the security of a city, county, or state adult or juvenile correctional facility or any individual's safety;

(3) Information compiled by school districts or schools in the development of their comprehensive safe school plans pursuant to RCW 28A.320.125, to the extent that they identify specific vulnerabilities of school districts and each individual school;

(4) Information regarding the infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities; and

(5) The security section of transportation system safety and security program plans required under RCW 35.21.228, 35A.21.300, 36.01.210, 36.57.120, 36.57A.170, and 81.112.180.

RCW 42.56.430 Fish and wildlife.

This exemption mostly concerns records held by state agencies and is not relevant for local governments, except for subsection (2), dealing with information regarding sensitive wildlife data, such as data concerning the nesting sites of endangered species, or information concerning species that are threatened but have a commercial or black market value.

RCW 42.56.440 Veterans' discharge papers – Exceptions.

County auditors dealing with veterans' discharge papers need to read this statue carefully.

RCW 42.56.450 Check cashers and sellers licensing applications.

This exemption deals with records held by the state director of financial institutions and is not relevant for local governments.

RCW 42.56.460 Fireworks.

All records obtained and all reports produced as required by state fireworks law, chapter 70.77 RCW, are

exempt from disclosure under this chapter.

RCW 42.56.470 Correctional industries workers.

This exemption is not relevant for local governments.

RCW 42.56.480 Inactive programs.

This exemption is not relevant for local governments.

Exempt Records and Redaction

The preceding section looked at specific records that are exempt from disclosure. Once a record is found to be exempt, the local agency must determine whether personal information can be deleted from the exempt record so that it might still be released.

The requirement that exempt material be deleted and the rest of the record disclosed, is sometimes referred to as *redaction*.[50] This section deals only with redaction pertaining to the exemptions listed in the Public Records Act.

Having determined that a record is exempt from disclosure under the Public Records Act, RCW 42.56.210(1) provides that "the exemptions of this section are inapplicable to the extent that information, the disclosure of which would violate *personal privacy* or *vital government interests*, can be deleted from the specific record sought (emphasis added)." Therefore, exemptions will not bar disclosure of records, where the local agency can delete information that would violate (1) personal privacy or (2) vital government interests.

1. Redacting Information, Disclosure of Which Would Violate Personal Privacy

The terms "right to privacy," "right of privacy," "privacy," or "personal privacy," are found throughout the Public Records Act.[51] In 1978 the state supreme court defined the right to privacy in Washington to be coincident with the common law:

> One who gives publicity to a matter concerning the private life of another is subject to liability if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[52]

The court cited the following explanation as illustrative of the type of facts protected by the right to privacy:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of

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[50]The Model Rules discuss redaction at WAC 44-14-04004(b)(i).

[51]There is no general "privacy" exemption. See WAC 44-14-06002(2).

[52]*Hearst v. Hoppe*, 90 Wn.2d 123, 135-36 (1978) (adopting Restatement (Second) of Torts § 652D, at 383 (1977)).

legitimate public interest.[53]

In 1987 the legislature adopted this statement of the law, and it is now codified as RCW 42.56.050:

> A person's "right to privacy" . . . is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.

Both the "offensiveness" and "legitimate concern" elements must be met before information may be redacted from a record.

The Washington courts have applied this rule on several occasions. In one case the court held that "under Washington's public records act, the names of police officers, without simultaneous release of other identifying information such as home addresses, residential telephone numbers, and social security numbers cannot be considered "highly offensive." . . . "[54] Additionally, a legitimate public concern existed because ". . . police officers are public employees, paid with public tax dollars. They are granted a great deal of power, authority, and discretion in the performance of their duties."[55]

In 2005 the court of appeals provided a wide-ranging analysis of the right to privacy in regard to public employee personnel records when it examined disclosure issues involving teachers and records of allegations of misconduct of a sexual nature.[56]

In another appeals case regarding employee identification numbers, the appeals court held that the ". . . release of employees' identification numbers would be *highly offensive*, because disclosure could lead to public scrutiny of individuals concerning *information unrelated to any governmental operation* and impermissible invasions of privacy. . . ."[57] However, the release of employee names would not be similarly offensive or lead to such invasions of privacy; rather, disclosure of employee names would "allow public scrutiny of government."[58]

In general, performance evaluations of public employees that do not contain particular incidents of misconduct are presumed to be highly offensive and of small public concern.[59] However, this does not apply to the position of city manager, because the ". . . performance of the City Manager's job is a legitimate subject of public interest . . . [he or she] . . . cannot reasonably expect that evaluations of the performance of his or her public duties will not be subject to public disclosure."[60] Therefore, while the courts generally view non-particularized evaluations as highly offensive, there is an overriding legitimate public concern in the case of city managers.

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[53]*Hearst*, 90 Wn.2d at 136.

[54]*King County v. Sheehan*, 114 Wn. App. 325, 346 (2002).

[55]*Id.* at 347.

[56]*Bellevue John Does v. Bellevue School District*, ____ Wn. App. ____ (2005).

[57]*Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 221-22 (1998) (emphasis added).

[58]*Id.*

[59]*Dawson*, 120 Wn.2d at 797; *accord Spokane Research & Defense Fund v. City of Spokane*, 99 Wn. App. 452, 456 (2000).

[60]*Spokane Research & Defense Fund*, 99 Wn. App. at 457.

Question: Are public employee time sheets (time cards) public records which must be disclosed?

Answer: Yes, but any personal information such as social security numbers, addresses, or phone numbers should be deleted before release.[61]

Question: Are the salaries of local government employees a public record which must be disclosed?

Answer: Yes, there is no exemption which applies to such information. The public has a right to know how its monies are spent.[62] Data regarding tax deductions or other voluntary deductions should be deleted before disclosure.

Comment: This provision is not a general privacy exemption. The private information protected under RCW 42.56.050 is limited to "the right to privacy in certain public records" and the provision does not "create any right of privacy beyond those rights that are specified in this chapter [the Public Records Act] as express exemptions."

2. Redacting Information, Disclosure of Which Would Violate a Vital Government Interest

The term "vital government interest" is not defined in the Public Records Act. A helpful discussion of that term is contained in a 1976 attorney general letter opinion,[63] which opined that the descriptive term "vital" gives a more restrictive meaning to the phrase than if the legislature had used the term "important."

A similar term "vital government functions" is used in RCW 42.56.540, and it may be useful by analogy. That statute authorizes a superior court to prohibit disclosure of public records if the court finds

> ". . . that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions."

Comment: A local agency may be exposed to liability for violating an individual's privacy rights if it makes the wrong determination about whether private information should be redacted. As a precaution, an agency should contact the individual who is the subject of the records request. This notification will provide an opportunity for that individual to seek a court order prohibiting the disclosure. See the article and cases cited in Appendix A under RCW 42.56.050 for further research concerning right to privacy issues.[64]

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[61] *See* RCW 42.56.230(3) and 42.56.250(3); *Woessner*, 90 Wn. App. at 224 (holding that it was permissible to redact employee identification numbers from a report but employee names should not have been redacted).

[62] See AGO 1973 No. 4. For a discussion of an opposing view, see pp. 12-8 through 12-10 in the article by Kyle J. Crews cited in Appendix A.

[63] AGLO 1976 No. 47, at p. 6.

[64] See also WAC 44-14-06002(2).

Redacting Information in Records Made Available to the Public

When a public record is not exempt under the specific provisions in the Public Records Act, a local agency must still examine the document to see if any portions are exempt or prohibited from disclosure.

Though there is no general privacy exemption, a few specific exemptions incorporate privacy as one of the elements, such as personal information in employee files.[65] If some information is clearly exempt or prohibited from disclosure, that information must be redacted from the record.

This redaction provision is similar to that provided in RCW 42.56.210(1) except that it applies to all public documents. If a record contains both information which should be disclosed, and some which is exempt from disclosure, a local government is generally required to delete the exempt information from the record and disclose the rest. For example, if there is a request for records concerning the hours worked during a certain month by a particular local government employee, the local government should redact all exempt, personal information which might also be contained in the records, such as the home phone number or home address, personal e-mail address, personal wireless phone number, and social security number – the rest of the record must be disclosed.[66]

The redaction requirement applies to all but a few specifically excepted public records. The state supreme court has held that if another statute "(1) does not conflict with the Act [Public Records Act], and (2) either exempts or prohibits disclosure of specific records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement."[67] As an example, an agency may refuse to disclose employee medical records which it has on file, in its entirety.[68] No redaction requirement applies here because of the specific statutory prohibition provided for medical records.

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[65]See WAC 44-14-06002(2) and AGO 1998 No. 12.

[66]RCW 42.56.250.

[67]*PAWS*, 125 Wn.2d at 262.

[68]*See* ch. 70.02 RCW.

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Exemptions and Prohibitions Outside the Public Records Act

In addition to the many exemptions provided in the Public Records Act, chapter 42.56 RCW, the legislature has enacted numerous laws which prohibit or exempt the disclosure of other classes of information. The prohibitions and exemptions relevant to local governments include:

- Addresses of victims of domestic violence. Chapter 40.24 RCW.
- Medical records. Chapter 70.02 RCW.[69] This exemption applies to medical records in an employee's personnel file,[70] and also to medical records prepared by fire department ambulance EMTs, who are health care providers under chapter 18.73 RCW.
- Information regarding organized crime. RCW 43.43.856.
- Traffic accident reports. RCW 46.52.080.[71]
- Industrial insurance (workers' compensation) claim files and records. RCW 51.28.070.
- Information identifying child victims under eighteen who are victims of sexual assault. RCW 10.97.130[72] (This is similar to the RCW 42.56.240(5) exemption.)
- Tax return records and other tax information. RCW 82.32.330.[73] Note, however, that RCW 84.40.020 provides that *property tax assessments* and all supporting documents are specifically *open to public inspection* during the regular office hours of the county assessor's office.

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[69]See Model Rules WAC 44-14-06002(1).

[70]"It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers." RCW 70.02.005(4). In *Seattle Fire Fighters v. Hollister*, 48 Wn. App. 129, *review denied*, 108 Wn.2d 1033 (1987), the court ordered disclosure of disability records of retired fire fighters and police officers, but the case was decided prior to passage of ch. 70.02 RCW. Medical records which are part of the disability files are probably prohibited from disclosure.

[71]The traffic accident reports exempted by this statute are primarily those prepared by drivers or passengers in the vehicles - see RCW 46.52.030. Traffic accident reports prepared by law enforcement officers are generally not exempt. See *Guillen v. Pierce County*, 144 Wn.2d 696 (2001); AGO 2001 No.8; *Pierce County v. Guillen*, 537 U.S. 129 (2003); and "*Pierce County v. Guillen*: Practical Answers to Privileged Questions", Gonzaga Law Review, Vol. 39, No. 2, p. 219.

[72]Such information is not subject to release to the press or public without the permission of the child victim or the child's legal guardian. RCW 10.97.130.

[73]This confidentiality statute is incorporated into the public disclosure statutes by direct reference. *See* RCW 42.56.230(3).

- Uniform Trade Secrets Act. Chapter 19.108 RCW and RCW 4.24.601.[74]

- Records obtained and reports produced pursuant to the state fireworks law. Chapter 70.77 RCW (also see RCW 42.56.460).

- Driving license records of individuals which show traffic violations, convictions and accidents. RCW 46.52.120 and RCW 46.52.130.[75]

- Records of mental illness and treatment. RCW 71.05.390.

- Records concerning issuance of confidential license plates for undercover law enforcement work. RCW 46.08.066.[76]

- Court files are not covered by the Act, but such files are available through common law right of access.[77]

- Disclosure of names and addresses of individual vehicle owners by the county auditor or agency authorized by the state department of licensing must follow the requirements of RCW 46.12.380.

- A private electronic authentication key in the possession of a local agency is exempt from public inspection and copying.[78]

- Autopsy and post mortem report and records may be inspected only by the personal representative of the decedent, any family member, the attending physician, the prosecuting attorney or law enforcement agencies having jurisdiction, public health officials, or the department of labor and industries in certain cases.[79]

- Records of a person confined in jail shall be held in confidence and shall be made available only to criminal justice agencies, except that (1) law enforcement may use booking photographs to assist them in conducting investigations of crimes, and (2) photographs and information concerning a person convicted of a sex offense as defined in RCW 9.94A.030 may be disseminated.[80]

- When a city or county sends a report concerning the termination of a police officer to the Criminal Justice Training Commission, the personnel action report in the commission's files is prohibited from disclosure, but that same record when in the custody of the jurisdiction that employed the officer is

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[74]See WAC 44-14-06002(7) for a discussion on the disclosure process.

[75]Records concerning traffic violations and most minor traffic offenses are not covered by the disclosure prohibitions of ch. 10.97 RCW, the Criminal Records Privacy Act. *See* RCW 10.97.030(1)(d), (e) (defining the term criminal history records information).

[76]Though this statute is not written as a disclosure exemption, the use of the word "confidential" in the statute would be meaningless if records concerning the issuance of the license plates were available for public inspection and copying.

[77]*See Nast*, 107 Wn.2d at 304.

[78]RCW 19.34.240(3).

[79]RCW 68.50.105.

[80]RCW 70.48.100.

not exempt or prohibited from disclosure.[81]

- Information and data collected and processed by the organized crime advisory board and all such information related to the proceedings of a special inquiry judge.[82]

- Counties administering the state's public assistance programs are prohibited from disclosing the contents of any records, files, papers and communications, except for purposes directly connected with the administration of the program.[83]

There are also specific statutory exemptions and prohibitions regarding records available to, or maintained by, law enforcement agencies. These are discussed in Chapter 6. A more complete listing of exemptions and prohibitions, other than the exemptions included in chapter 42.56 RCW, is provided in Appendix C.

Question: Can a record become confidential because a public employee promises someone that the information will be kept confidential?

Answer: No. Public employees and officials do not have the authority to promise confidentiality for records unless a specific statute authorizes confidentiality.[84]

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[81]RCW 43.101.135 and 43.101.400(1).

[82]See Chapter 10.29 RCW.

[83]RCW 74.04.060.

[84]RCW 42.56.070(1); *see also* AGO 1983 No. 9; AGO 1986 No. 7; *Van Buren v. Miller*, 22 Wn. App. 836 (1979); *Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30 (1989).

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Criminal History, Juvenile, Sexual Offense, Jail and Inmate, and Law Enforcement Records

Criminal History Records – Chapter 10.97 RCW

There are numerous statutes governing disclosure of specific records maintained by or available to law enforcement agencies. The Criminal Records Privacy Act, ch. 10.97 RCW, provides the rules concerning disclosure of *criminal history record information*.[85] These records include computerized information of the type typically included in a "rap sheet." Data concerning adult *convictions* must be disclosed upon request, but data concerning *arrests* may be prohibited from disclosure, depending upon the factors outlined in several sections of ch.10.97 RCW.[86] Note that the policy behind the Criminal Records Privacy Act is not at all like the policy statement in the public disclosure statutes:

> The legislature declares that it is the policy of the state of Washington to provide for the completeness, accuracy, *confidentiality*, and *security* of criminal history record information and victim, witness, and complainant record information as defined in this chapter.[87]

Juvenile Records – Chapter 13.50 RCW

Disclosure of data concerning juvenile offenses and dispositions, and juvenile data not related to offenses, is governed by ch.13.50 RCW.[88] Before release of any juvenile data, the statutes should be reviewed. Note that parents or guardians do not have an automatic right to all of the records concerning a juvenile who is in their charge.[89]

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[85]RCW 10.97.030(1) defines *criminal history record information* in fairly broad terms, but the word "notations" in the definition supports the view that the chapter deals only with the types of information collected in computerized criminal history systems; *see also* Heidi Ann Horst, "Defensive Driving Through the Intersection of the Public Disclosure Act and the Criminal Records Act," *Legal Notes* Information Bulletin No. 512 (2002) (a detailed analysis of the Criminal Records Privacy Act).

[86]*See Hudgens v. Renton*, 49 Wn. App. 842 (1987); James Pidduck, "Confidentiality of Police Personnel and Other Police Records,"*Legal Notes* Information Bulletin No. 458 (1989).

[87]RCW 10.97.010 (emphasis added).

[88]*See Deer v. DSHS*, 122 Wn. App. 84 (2004).

[89]*See Id.* and RCW 13.50.050 and 13.50.100.

Sexual Offender Information – Chapter 4.24 RCW

Special statutes governing disclosure of data concerning sexual offenders were enacted in 1990, and amended several times since then.[90] Local governments are authorized to release *relevant and necessary information* regarding sex offenders to the public when the release of the information is *necessary for public protection*. A local government is protected from suit by a sexual offender when such information is released, as long as the disclosure is done properly:

> An elected public official, public employee, or public agency . . . is immune from civil liability for damages for any discretionary decision to release relevant and necessary information, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith.[91]

Whenever a local government is considering release of such information to the public, legal counsel should be consulted to make sure that the disclosure is done properly.[92]

Jail and Inmate Records – Chapter 70.48 RCW

RCW 70.48.100 governs disclosure of jail records and inmate records.

Law Enforcement Records

Records in a police department or sheriff's office that are not prohibited from disclosure by the Criminal Records Privacy Act,[93] or records that are not covered by other specific disclosure exemption statutes, must be made available for inspection and copying. Though there is an exemption at RCW 42.56.240(1) which protects many *police investigative records* from disclosure, law enforcement personnel files and administrative files are subject to the same disclosure rules as apply to other local agencies. Personnel files are discussed in more detail in chapter 7.

Issues relating to disclosure of law enforcement records are often complex and require careful analysis. Legal counsel should not hesitate to consult colleagues and review relevant presentations from WAPA or WSAMA training sessions.

Police and emergency responders have special provisions allowing them to make visual and or audio recordings, in some circumstances without the approval of the person being recorded – see RCW 9.73.090. The video and sound recordings made by police officers are not exempted or prohibited from disclosure, but subsection (1)(c) of the statute provides that they may not be disclosed ". . . until final disposition of any criminal or civil litigation which arises from the event or events which were recorded."

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[90] *See* RCW 4.24.550 and RCW 4.24.555.

[91] RCW 4.24.550(7).

[92] *See State v. Ward*, 123 Wn.2d 488 (1994) (providing some guidance on appropriate disclosure).

[93] *See* ch. 10.97 RCW.

Question: Can a city release to the local newspaper a weekly list providing the names of all those arrested in the city during the past week, along with the reason for the arrest, and the actual charges which have been filed?

Answer: Yes, release of basic information concerning pending criminal matters is specifically allowed.[94]

Question: Is the tape of a 911 telephone call a public record which must be disclosed upon request?

Answer: Yes. However, certain portions may be deleted if they fall under one of the specific exemptions, such as the name of a child victim of assault. RCW 9.73.070 provides that 911 calls are not covered by the general privacy rights which apply to other telephonic communications.[95]

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[94]RCW 10.97.050(2).

[95]*See also* AGO 1988 No. 11.

7

Personnel Records

There are numerous disclosure issues concerning personnel records. A fair number of these issues have been addressed by the state appellate courts. Newspapers and private individuals frequently seek access to records of misconduct by local government employees or local government officials, and the limits concerning disclosure of personnel records have been challenged on numerous occasions. Local governments often have a difficult time with these requests since failure to disclose may be contested in the courts.

If a local government does decide to disclose certain personnel records, the subject employee may feel that his or her privacy rights have been violated. Having decided that information will be disclosed, it is good practice to notify the employee that there has been a request for disclosure of information in the employee's personnel file. The employee may then seek to block disclosure by using the procedure provided in RCW 42.56.540. These are the types of difficult disclosure issues which should be carefully reviewed with legal counsel.

Personnel files frequently contain information which is exempt or prohibited from disclosure, these include:

- Applications for public employment;[96]
- Residential addresses and telephone numbers; personal wireless phone numbers; personal e-mail addresses; and social security numbers;[97]
- Performance evaluations which do not discuss specific instances of misconduct;[98]
- Medical information;[99]
- Industrial insurance (workers' compensation) claim files and records;[100]
- Employee identification numbers;[101] and

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[96]RCW 42.56.250(2).

[97]RCW 42.56.250(3).

[98]*Dawson*, 120 Wn.2d at 797.

[99]All employment entrance medical examination records and all medical examination records of current employees should be collected and maintained in separate medical files. This is either required, or strongly encouraged, by federal regulations promulgated pursuant to the EEOC and ADA.; *see also* ch. 70.02 RCW (regarding disclosure of medical records).

[100]RCW 51.28.070.

[101]*Woessner*, 90 Wn App. at 221.

- Taxpayer information, such as tax withholding data.[102]

Question: The local newspaper heard that one of the city shop employees was disciplined for repairing his personal vehicle in the city shop. The newspaper has requested a copy of the investigation report prepared by the employee's supervisor, and a copy of the letter of discipline which was placed in the employee's personnel file. Should the records be disclosed?

Answer: Yes. The state supreme court has determined that the public has a legitimate interest in records concerning acts of misconduct by city employees which have been investigated and sustained.[103]

Question: The local newspaper has requested a list of all city employees terminated last year due to failing the random drug testing program required by federal law for employees whose jobs require a commercial driver's license. Must a city turn over a list of those employees?

Answer: Yes, if the city already has a record, in list form, containing the names of the terminated employees. If the city does not have a record in list form it is not required to create a list. However, the newspaper has the right to inspect records containing the names of terminated employees and records concerning serious on-the-job misconduct by city employees. Since drug usage by employees in certain safety-sensitive positions is clearly prohibited by city policy and federal law, and because the public has a legitimate interest in serious on-the-job misconduct, the city may release the names of the terminated employees. The city should not release records of any individual drug test or drug treatment obtained by a city employee, but must disclose records revealing that an employee in a safety-sensitive position was terminated for drug usage. A city can contact the terminated employees (and also the city employees' labor union) to notify them of the city's intent to disclose the information, and of their right to seek a court order blocking disclosure.

Question: Must civil service eligibility lists be disclosed upon request?

Answer: Yes, there is no statute which exempts eligibility lists from disclosure.

Inspection by Local government Officials and Local Government Employees

Inspection of personnel files by agency officials or employees is not, strictly speaking, a *public* disclosure issue. But, because of the recognized privacy rights concerning such information, access to personnel files by agency officials or employees should be scrutinized in a manner similar to public disclosure law.

To the extent possible, personnel records should be maintained as private records. Access to personnel files should be limited to only those local government employees who are needed to maintain the files and those who have a legitimate need for access. A city council or a board of county commissioners may adopt a policy specifying which officials and employees have general access to personnel files. In a small city or town, this would be the city clerk. In the personnel office of larger jurisdictions, this would be handled by a designated employee or human resources department staff.

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[102] RCW 82.32.330 and RCW 42.56.230(3).

[103] *See Dawson*, 120 Wn.2d at 797 (specific instances of misconduct must be disclosed); *Spokane Police Guild*, 112 Wn.2d at 38-39.

Councilmembers, commissioners, and other local government officials do not have the right to randomly access local government personnel files. Access should be limited to only those personnel records which they need in order to perform their official functions. Public officials and other local government employees have no special right to access employee personnel records if the access is not necessary for the performance of their public duties.

Employee Inspection of Personnel File

Local government employees have the right to inspect their own personnel files at least once each year, and they have the right to challenge the accuracy of information in their files.[104]

[104]RCW 49.12.240 and RCW 49.12.250.

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Identity and Motivation of Persons Requesting Records or Lists – Does it Matter?

The identity and motivation of a person seeking to obtain a copy of a public record is generally not relevant to the determination of whether the record must be disclosed. This is true whether the individual seeking the record is doing so for private purposes, or for "public" purposes. RCW 42.56.080 stresses this point:

> . . . Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons.

A 2002 Washington Court of Appeals decision has held that an agency is prohibited from inquiring into the proposed use of the information requested for disclosure.[105] Except in the relatively rare situations where a statute distinguishes among persons entitled to have access to records, identity and motivation are not to be considered in the disclosure process.

Prisoner Injunction Provision – 2009 Legislation

A local government agency may file a court action in superior court to obtain a court order (injunction) prohibiting a prisoner from filing public records disclosure requests if the intent of the disclosure requests is to harass or intimidate an agency or its employees. There are clear standards for the types of evidence the agency must present to obtain the injunction. If you encounter a situation that you think might qualify, read the statute carefully.[106] More detail regarding the prisoner injunction bill can be read at: www.mrsc.org/focus/opengovadvisor/opengov0509.aspx

Lists of Individuals Requested for Commercial Purposes

Private entities (e.g., commercial firms) may copy and inspect public records that are not exempt. However, an agency is prohibited from disclosing lists of individuals if the requester intends to make commercial use of the list. RCW 42.56.070(9) provides:

> This chapter shall not be construed as giving authority to any agency . . . to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies . . . shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional

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[105] *Sheehan*, 114 Wn. App. at 341 (holding that the Act prohibits inquiry into the purpose for the request; therefore, it also prohibits balancing the intended use against interests in effective law enforcement).

[106] RCW 42.56.565.

> associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor (sic): PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under . . . the Administrative Procedure Act.

This provision prohibits disclosure ". . . if the requester has a commercial purpose and intends to directly contact or personally affect the individuals named in the list."[107]

RCW 42.56.070 does not prohibit access to raw data from which a person could construct his own list of individuals for commercial purposes.[108] In addition, this provision does not prohibit disclosure of lists of businesses, corporations, or partnerships; the statute only prohibits disclosure of lists of *natural persons*.[109] Therefore, lists of private companies which have commercial value for targeted advertising must be disclosed upon request.

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[107]AGO 1998 No. 2, 4. Also see WAC 44-14-06002(6).

[108]AGO 1975 No. 15, 7.

[109]*See generally* AGO 1975 No. 15 (analyzing access to lists of individuals under RCW 42.56.070).

Question: Must the city disclose copies of all the current business licenses issued by the city, if requested for commercial purposes? (The business license forms contain, among other data, the names and addresses of the businesses and individuals to whom the licenses were issued.)

Answer: Yes. This is a request for the raw data. A requestor could use the forms to compile a list of individuals and addresses, but that does not prohibit disclosure of the raw data. A list of the names and addresses of all the *businesses* licensed by the city would also have to be disclosed. If the city maintains a separate list of the names and addresses of all the individuals (*natural persons*) to whom business licenses were issued, or all the individuals who applied for business licenses, that list should not be disclosed.

Question: Must a city or county disclose a list of the companies which have requested bid packets for a public works project? (The requestor is an employee of another company considering bidding on the project.)

Answer: Yes. No exemption applies. Even though the requestor is asking for a list, and has a commercial purpose, the request is not for a list of *natural persons.* The identity of the requestor is not relevant.

Question: Must the city disclose the address list which the city uses for mailing the city newsletter to city residents? (The list does not have the names of the occupants at the addresses; instead, the mailing list just indicates "resident.") Does it make any difference if the request is from the local chamber of commerce, a retail business, or a person campaigning for public office?

Answer: The list must be disclosed to anyone requesting it. Motivation is not relevant, and RCW 42.56.070(9) does not apply, because the list is not a list of *natural persons*. If the list contained the *names* of the residents, as well as their addresses, it could be provided to a political candidate to be used for a campaign mailing, since an election campaign would not be considered to be a commercial purpose.[110] The list with names cannot be provided to a retail business.

Question: Must the city disclose a list containing the names and addresses of all city residents who are delinquent in their LID payments? (The person requesting the list is from a company which provides home equity loans.)

Answer: Because RCW 42.17.260(9) exempts from disclosure a list containing the names of natural persons when the list is requested for commercial purposes, the city should disclose the list, deleting the names, and providing only the addresses.

Electrical Utility Records Sought by Police

If police are seeking evidence of criminal conduct in records of electrical use, they must provide the utility with a written statement indicating that they suspect a specific person of a crime, and that the records could

[110] *See* Graham E. Johnson, "The Prohibition On Using Public Facilities To Assist Election Campaigns," *Legal Notes* Information Bulletin No. 458, p. 211 (1989).

help to determine whether this suspicion is true.[111] No fishing expeditions are allowed.[112]

In a state supreme court case, the court held that though a private individual may request and obtain a copy of the electric bill for a specific residence, a policeman seeking evidence of a marijuana growing operation can only obtain that same record if he first provides a written statement concerning his reasonable belief that the information is relevant to the investigation of a possible crime.[113]

Geographic Information Systems (GIS) Data Requested for Commercial or Non-commercial Purposes[114]

Many cities and counties in Washington have spent considerable time and effort compiling GIS data in order to facilitate planning and managing their jurisdictions. GIS data often includes maps of sewer and water lines, hazardous liquid transmission pipelines, natural gas pipelines (both transmission and distribution lines), federal census data, property values, wetlands and other critical areas, locations of power distribution lines, zoning data, and other geographically related information.

Utilizing special computer software, it is possible to make maps and compile information from selected parts of the database. Because GIS data is costly to assemble and has commercial value for those working in land development and related businesses, cities have required payment for disclosure of GIS data, particularly when specialized skills and time are involved in manipulating the data to provide the specific information of interest to the requestor.

Even if the requestor of GIS data intends to market the data to others for a profit, such motivation is not statutorily recognized as a basis for denying disclosure. GIS data may be considered "research data," but it would not be exempt under RCW 42.56.270(1) because disclosure would not result in any "public loss."

Remember that some GIS data may be exempted or prohibited from disclosure by state law; for example, maps or other information identifying the location of archaeological sites (to avoid looting or depredation of such site).[115]

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[111]RCW 42.56.335.

[112]*State v. Cole*, 128 Wn.2d 262, 290 (1995).

[113]*Matter of Maxfield*, 133 Wn.2d 332, 341-42 (1997).

[114]*See* Laurie Flinn Connelly, "Update on Public Disclosure after PAWS, GIS Data, Litigation Disclosure; Trade Secrets Act," *Legal Notes* Information Bulletin No. 489 (1995); Kyle J. Crews, "A Second Update on Public Disclosure, Public Bidding Documents: E-Mail, GIS Data, Public Employment Records," *Legal Notes* Information Bulletin No. 491 (1995), *available at* http://www.mrsc.org/subjects/planning/gis/update2.aspx.

[115]RCW 42.56.300.

9

Procedures for Making Records Available for Public Inspection

Public Records Officer – RCW 42.56.580

"Each state and local government agency shall appoint and publicly identify a public records officer whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of this chapter."[116]

Index of Records – RCW 42.56.070

Local governments are required to maintain and make available a current index of local government records listed in RCW 42.56.070(3).[117] If maintaining an index would be unduly burdensome, a local government must issue and publish a formal order specifying the reasons why and the extent to which compliance would be unduly burdensome. All indexes maintained by local government must be made available. Appendix B contains sample local government policies and ordinances which require department heads to prepare and maintain an index of public records maintained by their respective departments.

List of Exemption and Prohibition Statutes Not Contained in Chapter 42.56 RCW

RCW 42.56.070(2) provides:

> For informational purposes each agency shall publish and maintain a current list containing every law, other than those listed in this chapter [ch. 42.56 RCW] that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

Appendix C of this publication contains a list of the statutory exemptions and prohibitions not contained in ch. 42.56 RCW. MRSC will keep updating this appendix on our web site. If you become aware of additions or corrections that should be made to the list, please notify one of the staff attorneys at MRSC. Some of the exemptions and prohibitions on the list concern public record information that may not be relevant for your jurisdiction. For instance, cities would not normally have records regarding marriage license applications or adoption records.

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[116] Also see WAC 44-14-020 and comments.

[117] WAC 44-14-030 and 44-14-03003 contain additional guidance.

Model Rule WAC 44-14-040 and the comments to that provision, WAC 44-14-04001 through 44-14-04007, provide an excellent overview of the process for responding to public records disclosure requests. Those provisions should be the basis for staff training on the disclosure process.

Form of Request – RCW 42.56.100

Although the public disclosure statutes do not require that requests for inspection or copying of records be in writing, local governments may adopt reasonable rules concerning disclosure requests. RCW 42.56.100 specifically provides that requests received by mail for copies of identifiable public records must be honored. Telephonic requests are not specifically discussed in the statute, but they should be processed in the same manner as any other type of request for public documents.[118] Because an agency is given latitude to devise public records request procedures, it is not unreasonable to ask that a requesting party fill out a standard request form.

Protection of Public Records and Agency Functions – RCW 42.56.100

Agencies are to adopt reasonable rules to assure:

- Full public access to public records;
- Protection of public records from damage or disorganization; and
- Prevention of interference with essential functions of local governments.

In addition to RCW 42.56.100, WAC 434-615-010 provides that public records shall be ". . . delivered by outgoing officials and employees to their successors and shall be preserved, stored, transferred, destroyed, and otherwise managed . . ." as expressly provided for by state law and regulation.

Question: Should a local government agency allow a member of the public to take records out of the building, to review them overnight, or to copy them somewhere else?

Answer: The potential for loss or damage to the records exists, and for that reason all records should remain in the agency's custody. Members of the public must be allowed to examine records at the agency, but they cannot take the actual records from the building. Adopting a policy on this matter makes it easier for a local agency to inform members of the public of this quite reasonable rule.

Times for Inspection and Copying – RCW 42.56.090

Records must be available for inspection during a local agency's regular business hours. If an agency does not have regular business hours of at least thirty hours each week, hours for inspection and copying must be set between 9 a.m. and noon, and 1 p.m. and 4 p.m. during the weekday, unless the person making the request agrees on a different time.

[118]See WAC 44-14-03006 for lengthy comments regarding issues involving the form of a disclosure request.

Charges for Copying – RCW 42.56.070(7), (8) and RCW 42.56.120[119]

Local governments are not allowed to charge for the staff time spent in *locating* a public record, or for making a record available for inspection.[120] A local government may, however, charge for the actual costs connected with copying public records, *including the staff time spent making the copies.*[121] A local government cannot charge more than fifteen cents a page for photocopying unless it has calculated its actual costs per page and determined that it is greater than fifteen cents.[122] Actual costs for postage and delivery can be included, as well as the cost of any envelopes.[123] If a local government has to pay an outside source for making duplicates of records such as photographs, blueprints or tape recordings, those costs must be charged to the requestor.

Note that there are statutes outside ch. 42.56 RCW that authorize local agencies to set fees for providing information, or for photocopying specific public records. These statutes are not part of the public disclosure act and are not subject to the cost limitations imposed by RCW 42.56.120.[124] Here are some examples[125]:

- RCW 46.52.085 authorizes cities, counties and state agencies to set a fee to cover the costs of furnishing copies of traffic accident reports. This statute allows a local government to set a standard fee for providing copies of those reports, regardless of the number of pages involved in any particular request. For instance, the Washington State Patrol charges a set fee for copies of traffic accident reports.

- RCW 10.97.100 authorizes police departments to collect reasonable fees for the dissemination of criminal history record information.

- RCW 3.62.060 and RCW 3.62.065 authorize municipal courts, and municipal departments of district courts, to charge specific fees for various services, including duplication of part or all of the electronic tape or tapes of a court proceeding.

- RCW 36.18.040(1)(t) authorizes sheriffs to collect fees "[f]or the reproduction of audio, visual, or photographic material, to include magnetic microfilming, the actual cost including personnel time."

- RCW 70.58.107 authorizes local registrars to collect fees for birth certificates and death certificates.

- RCW 41.08.040 and RCW 41.12.040 require cities to provide free copies of their police and fire civil service rules.

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[119]See WAC 44-14-070 and 44-14-07001 for a concise description of allowed charges.

[120]RCW 42.56.120.

[121]RCW 42.56.070(7)(b).

[122]*See* RCW 42.56.070(8)and RCW 42.56.120.

[123]RCW 42.56.070(7)(a).

[124]RCW 42.56.130.

[125]These same examples are listed in WAC 44-14-07004.

Deposits and Responding in Installments – RCW 42.56.120[126]

Legislation in 2005 now specifically authorizes deposits and authorizes responding in installments:

> An agency may require a deposit in an amount not to exceed ten percent of the estimated cost of providing copies for a request. If an agency makes a request available on a partial or installment basis, the agency may charge for each part of the request as it is provided. If an installment of a records request is not claimed or reviewed, the agency is not obligated to fulfill the balance of the request.

Question: How should a local government handle a request for a duplicate copy of a tape recording of a council meeting or a public hearing?

Answer: Because there is a possibility that the original tape will be mishandled or lost, the local government should not provide the original of the tape to the requestor and allow that individual to make a copy. Instead, the local government should make the duplicate tape, or contract with a reputable company to make a duplicate, and charge the requestor the actual cost of duplication.

Question: Should sales tax be charged and collected when a local government charges a fee for making copies of records pursuant to a public records disclosure request?

Answer: No, such charges are exempt from the imposition of sales tax. See RCW 82.12.02525.[127] Note that this sales tax exemption only applies to copies provided pursuant to a PRA disclosure request, so the sales tax exemption does not apply to courts when they make copies pursuant to a request for records under the common law – see footnote #2 of this publication for the legal citations to cases that have determined that courts are not "agencies" under the PRA.

Prompt Responses Required – RCW 42.56.520

Within five business days of receiving a request for a public record, a local agency must respond by either:

- Providing for inspection and/or copying of the record;
- Providing an internet address and link on the agency's web site to the specific records requested (if the individual does not have internet access, then the agency must provide copies or allow the requestor to view the records using an agency computer);
- Acknowledging receipt of the request and providing a reasonable estimate of the time necessary to respond; or
- Denying the request. If a request is denied, a written statement must accompany the denial setting out the specific reasons therefore.

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[126]See WAC 44-14-07006 for comments on this process.

[127]Sales tax can be passed on to a records requestor when the copying is done by an outside vendor. WAC 44-14-07001(6).

Note that although responses must be made within five days, another statute requires local governments to "provide for the fullest assistance to inquirers and *the most timely possible action* on requests for information."[128] Failure to provide a written response within the five day period can result in a civil award of statutory penalties.[129]

Additional Time for Response – RCW 42.56.520

Additional time to respond to a request may be based upon the need to:

- Clarify the intent of the request;
- Locate and assemble the information requested;
- Notify third parties or agencies affected by the request; or
- Determine whether any of the information is exempt and whether a denial should be made as to all, or part, of the request.

Question: If a local agency has copies of public records of another public agency in its possession, does the local agency or the other agency make the disclosure decision?

Answer: The agency which possesses the records makes the disclosure decision by following the regular disclosure statutes.[130] The other agency can be consulted and, if they object to a local agency's intent to disclose, can seek a court order blocking disclosure, as allowed by RCW 42.56.540.

Unclear Request for Information – RCW 42.56.520

If a local government receives an unclear request for records, it may seek clarification from the requestor. If clarification is not received, the records request should be denied, with the reason clearly stated.[131]

Denial of Request for Records Disclosure – RCW 42.56.520

A written statement of the reasons for denying a request for disclosure must be provided to the requestor, regardless of the reason for the denial. The denial:

> . . . shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.[132]

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[128]RCW 42.56.100 (emphasis added).

[129]*See* RCW 42.56.550(4); *Doe I v. Washington State Patrol*, 80 Wn. App. 296 (1996).

[130]*See Spokane Police Guild*, 112 Wn.2d at 37-38.

[131]See *Bonamy v. City of Seattle*, 92 Wn. App. 403, 411 (1998); Hangartner v. City of Seattle, 151 Wn.2d 439 (2004).

[132]RCW 42.56.210(3); *see also* RCW 42.56.520; *PAWS*, 125 Wn.2d at 257-61.

The state Supreme Court has stressed the need for all local governments to provide a clear exemption log providing the following information: (1) a description of the document that the local government is claiming to be exempt; (2) the date of the document; (3) the author or sender of the document; (4) the recipient(s) of the document; (5) the number of pages claimed as exempt; and (6) the specific exemption relied upon, with an explanation of how the exemption applies to the withheld document.[133]

In a 2000 court of appeals case, the court held that an agency does not need to provide requested information within five days, rather, it must respond to a request within five days and provide a reasonable time at which the requested information will be disclosed.[134] The court also held that an agency is not required to provide the requested records in a piecemeal fashion; consequently, the agency may wait until all the information is gathered before disclosing the requested record.[135]

Local governments are required to adopt procedures for prompt review of decisions denying inspection. Depending upon the size of a local government, review might be by a department legal counsel. Because denials can result in litigation, a local government should make sure that denial is based on a good faith interpretation of the statutes. A denial decision is final at the end of the second business day following the denial of inspection. After that date, an individual can file a lawsuit in superior court to challenge the denial.[136]

Local Government-Initiated Court Action to Prevent Disclosure – RCW 42.56.540

A local government may take the offensive when dealing with a request for inspection. Under RCW 42.56.540, a local government may seek court protection to enjoin the release of a record that is not exempt under the Act, if the local government can show that (1) the requested information is "clearly not . . . in the public interest" and (2) that disclosure will "irreparably damage any person, or would substantially and irreparably damage vital governmental functions."

Like the right to privacy under RCW 42.56.050, this provision is not a general exemption to the Act – the Act provides only for specific statutory exemptions. Instead, RCW 42.56.540 is a procedural provision creating an injunctive remedy. Therefore, whether a record should be protected from inspection under RCW 42.56.540 can only be argued in a superior court injunction proceeding; this reasoning cannot be used as the basis for an agency to deny disclosure outside of an injunction proceeding.

A local government may also notify the person who is named in the record or the person to whom the record specifically pertains, that a request for disclosure has been made and the local government intends to disclose the record(s). The purpose of notification is to allow the named individual the option of seeking a superior court injunction blocking disclosure.[137] An individual has the option of filing in either their county of residence, or in the county where the record is maintained.

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[133] *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009).

[134] *Ockerman v. King County Dept. of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 218 (2000).

[135] *Id.* at 218-19. See also WAC 44-14-040(8).

[136] One option suggested in the Model Rules is to consider alternative dispute resolution – see WAC 44-14-08003.

[137] *See generally, Doe I*, 80 Wn. App. at 301 (applying RCW 42.56.540).

Judicial Review of Local Agency Action – RCW 42.56.550

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 inspection. The local agency has the burden of proving that the denial is in accordance with a statute which either exempts or prohibits disclosure in whole or in part.

Also, if a person believes that a local government has not made a reasonable estimate of the time needed to respond to a disclosure request, he or she may file a motion requiring a local government to explain the reasonableness of its estimate.

When a court reviews a local government disclosure action:

- Review will be de novo, i.e., the court will review the facts anew and is not bound to accept any factual determination made by the agency, nor is the court required to give any deference to the agency's decision;

- The court is required to take into account the broad public policy favoring disclosure, even though disclosure might cause inconvenience or embarrassment to public officials or others.[138]

Penalties, Attorney's Fees, and Costs If Local Government Loses in Court – RCW 42.56.550(4)

The wording of RCW 42.56.550(4) is mandatory in regard to costs, including attorney fees (note the phrase "shall be awarded" in the first sentence below), but discretionary in regard to penalties.

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time 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 to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

Prior to July of 2011, monetary penalties were also mandatory. Because the statutory amendment now enables judges to use their discretion in regard to penalties, local governments should carefully document their efforts to comply with the requirements of the PRA. Conversely, do not expect leniency from the court if there is evidence that a local government agency willfully tried to delay or avoid disclosing records when no exemption or prohibition applied.

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[138]Even extreme inconvenience does not excuse a city from the requirement of strict compliance with the PDA. *Zink v. City of Mesa*, 140 Wn. App. 328 (2007).

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Retention and Destruction of Public Records

Although detailed requirements for retention and destruction are not covered in this publication, general information about that process is provided below.

Local government agencies own the records in their possession, subject to the right of the public to inspect and obtain copies of those records.[139] The public record retention and destruction process is governed by chapter 40.14 RCW and several chapters in title 434 WAC, notably chapters 434-630, 464-635, 464-640, 464-660, and 464-662.

The State Archivist is the head of the Division of Archives and Records Management in the Office of the Secretary of State. The Archivist's office, along with a state records committee, is responsible for developing retention schedules for all public records.[140] The Archivist's office publishes a local government records retention schedule which can be obtained from its web site at *http://www.secstate.wa.gov/archives/gs.aspx* or by calling (360) 753-5485. Copies of the current retention schedule may also be borrowed from the MRSC library our downloaded from the MRSC web site *http://www.secstate.wa.gov/archives/gs.aspx*.

In addition to the information provided by the State Archivist's office, counties and municipalities will find the following publication useful, "Deleting Criminal History Record Information in Washington a.k.a. Expungements," by Cheryl Carlson, Assistant City Attorney for the City of Tacoma.[141]

The Model Rules contain comments regarding records retention at WAC 44-14-03005.

> **Note:** Under RCW 42.56.100, if a public records request is made at a time when the record exists but is scheduled for destruction in the near future, the local government cannot destroy or erase the record until the disclosure request is resolved.
>
> Criminal penalties including fines and imprisonment will be assessed for the intentional destruction of public records.[142]

Preservation of Electronic Public Records

Progress brings complexity, and that is nowhere more evident than in the numerous issues starting to arise in regard to electronic public records. Chapter 434-662 WAC deals with the preservation of electronic public

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[139]RCW 40.14.020; also see WAC 44-14-03004 see also WAC 434-615-020.

[140]RCW 40.14.050.

[141]*Legal Notes* Information Bulletin No. 503 (1999).

[142]*See* RCW 40.16.010; RCW 40.16.020.

records, including such troubling issues as e-mails, maintaining metadata,[143] and the application of the public records act to websites maintained by public agencies. Those responsible for managing public records should read that chapter carefully and discuss the details with the supervisor or person who manages the computer systems for the jurisdiction. A copy of chapter 434-662 WAC is included as Appendix F to this publication.

Note that the administrative rules referenced above were adopted by the state archivist through the Secretary of State's office. The rules are mandatory, unlike the "Model Rules" drafted by the attorney general and published in chapter 44-14 WAC. The Model Rules deal with the recommended procedures for public records disclosure, whether the records are paper, electronic, or in any other form. See WAC 44-14-050 regarding the recommended procedures for disclosing electronic records. Appendix D is a copy of the Model Rules, including those dealing with electronic records.

[143]See *O'Neill v. Shoreline*, 145 Wn. App. 913 (2008) for an example of how the loss of metadata can have serious consequences.

Appendix A

Selected Cases and Research References

General Articles

"Public Records Act Update and Web 2.0 Issues", Fall 2009 WSAMA conference presentation, by Ramsey Ramerman, Assistant City Attorney, Everett

"Preservation of Electronic Public Records: What is Required and How to Comply?" Fall 2009 WSAMA conference presentation, by Matt Segal, K & L Preston Gates Ellis

"Discovery vs. Public Disclosure Requests", Spring 2009 WSAMA conference presentation, by Kim Gerhardt, Assistant City Attorney, Tacoma

"Public Records Act Update", Fall 2008 WSAMA conference presentation, by Ramsey Ramerman, Foster Pepper

Office of the Attorney General, *Open Records & Open Meetings Deskbook – A Citizen's Guide to Open Government*, available on the web: *http://www.atg.wa.gov/records/*.

Statutes

RCW 4.24.550 – Release of Information Concerning Sexual Offenders

In re Meyer, 142 Wn.2d 608, 621-22 (2001).

> "Preventing law enforcement agencies from issuing appropriate community notification would adversely affect an agency's ability to assist parents in avoiding the potential for harm to their children."

State v. Ward, 123 Wn.2d 488, 502 (1994).

> "This state's policy as expressed in [RCW 4.24.550] is to require the exchange of relevant information about sexual predators among public agencies and officials and to authorize the release of necessary and relevant information about sexual predators to members of the general public."

James Pidduck, "Confidentiality of Police Personnel Records and Other Police Records Under the Public Disclosure Act (chapter 42.17 RCW) and the Washington Criminal Records Privacy Act (chapter 10.97 RCW)," *Legal Notes* Information Bulletin No. 458 (1989).

RCW 42.56.550(3) & (4)

City of Lakewood v. Koenig. 176 Wn. App. 397 (2013)

> Koenig sought certain records from the city, which the city provided, redacting some information, such as driver's license information. The city asked Koenig to confirm that it had satisfied his request. When Koenig failed to make such a confirmation, the City filed a declaratory action for such a determination. Koenig, on the other hand, sought costs and attorney fees, arguing that the city had not given a brief explanation for the redactions it had made. The trial court concluded that the city had complied and denied the request for costs and attorney fees; Koenig appealed. The court reversed the trial court's decision regarding costs and attorney fees. While the city had cited statutes that would or might exempt

some of the requested information, it failed to provide a brief explanation as to why the exemptions applied. Failure to give a brief explanation entitled Koenig to costs and attorney fees.

RCW 5.60.060(2)(a) – Attorney-Client Privilege

Hangartner v. City of Seattle, 151 Wn.2d 439 (2004)

The court ruled that the attorney-client privilege is an "other statute" (under RCW 42.17.260(1)) that prohibits disclosing certain records through the Public Disclosure Act.

RCW 9.73.070 – through 9.73.080 – Private Communications

Fisher Broadcasting v. City of Seattle, 180 Wn.2d 515 (2014)

A local television station requested records associated with police vehicle dash-cam tapes (log sheets, lists of recordings tagged for retention and copies of tagged recordings). Some were provided, some were not and the station sued. Superior court agreed that the logs need not be produced, as they did not exist. On appeal, the supreme court agreed; the logs were no longer kept and older ones had been destroyed. As to the list of tagged videos, the city argued that such lists did not exist, the trial court concluded that they should have been provided and the supreme court agreed. Even though the lists did not exist in the form requested, the fact that the requested information was in a database designed for a different purpose required its production; the production of the information is not necessarily a creation of a record. Since the city had the capacity to produce a partially responsive record, it should have done so. Tagged tapes were not exempt from disclosure, pursuant to RCW 9.73.090(1)(c). That statute does not categorically exempt the tapes, but it does allow the delay of their production while there is actual, pending litigation.

AGO 1988 No. 11 – Disclosure of 911 telephone calls.

RCW 10.97.080 – Privacy of Criminal History (Rap Sheet) Information

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011)

After being stopped by a Bainbridge Island police officer, a driver alleged that she had been choked and sexually assaulted by the officer. Mercer Island and Puyallup police departments investigated the incident and issued reports; the incident was found to be "unsubstantiated" and no charges were brought against the police officer. One of the reports was released, a news account published, and then, in response to other public records requests for the reports, an injunction was sought and granted. On appeal, in a divided decision, the court's lead opinion found that the officer's initial failure to object to the report's release did not constitute a waiver from later objecting, under privacy grounds, to other records' requests. The court concluded that the reports were "personal information" and that the right to privacy had not been lost due to the initial release. The decision found that the release of the officer's identity would be highly offensive; however, release of the reports, with identity information redacted, would satisfy a legitimate public concern. Also, under an argument relating to the criminal records privacy act, the court held that RCW 10.97.080 requires redaction of only criminal history record information and does not exempt information relating to the conduct of the police during the investigation.

Beltran v. Wash. Dep't of Soc. & Health Servs., 98 Wn. App. 245, 260 (1999).

The *Hudgens* court permitted viewing of nonconviction data, but sustained the trial court's decision to prohibit copying or retaining the documents: "The statute [RCW 10.97.080] clearly states (1) that nonconviction information cannot be retained or mechanically reproduced, except in certain situations, and (2) that RCW 42.17 shall not be construed to require or authorize copying of the nonconviction information." (citing *Hudgens*).

Hudgens v. Renton, 49 Wn. App. 842, 844 (1987), *rev. denied*, 110 Wn.2d 1014 (1988).

RCW 10.97.080 ". . . precludes the copying or returning of non-conviction information, and exempts such information from the disclosure requirements of RCW 42.17."

Chapter 13.50 RCW – Juvenile Records

Deers v. DSHS, 122 Wn. App. 84 (2004).

AGO 1992 No. 9, 4-7 (disclosure analysis under ch.13.50 RCW).

AGO 1996 No. 1 (confidentiality of juvenile court truancy records).

Chapter 19.108 – Uniform Trade Secrets Act

Robbins, Geller v. Attorney General, 179 Wn. App. 711 (2014)

The court provides an analysis of "trade secret" protection provided by chapter 19.108, which qualifies as an "other statute" under RCW 42.56.070(1). The court reviewed business information and the evidence necessary to show that the information qualifies for protection.

RCW 42.56.010 – Definition of "Agency"

Worthington v. Westnet, ___ Wn. App. ___ (03/11/2014)

Westnet was created through an interlocal agreement entered into by a number of local governments. Worthington sought records from Westnet but the superior court concluded that Westnet was not an entity for purposes of the Public Records Act. On appeal, the court of appeals agreed. The interlocal agreement indicated that no separate entity was created, each participating agency had representatives on Westnet's policy advisory board. Each participating agency paid its own costs. Each participant was considered an independent contractor; they could not enter into any contract to bind the others. Any employee who worked on a Westnet project was considered an employee of the participating agency. Worthington failed to show that westnet was a covered entity for public disclosure purposes. Worthington argued but could not prove that Westnet was the "functional equivalent" of a public entity. If Worthington wanted to obtain documents, he must contact the participating agencies.

Yakima County v. Herald-Republic, 170 Wn.2d 775 (2011)

A newspaper sought documents from the court and county regarding attorney costs associated with the defense of two indigent murder defendants. (One of the defendants plead guilty; the other was tried and found guilty and that conviction was appealed.) Having been initially denied the requested records, the newspaper appealed. On appeal the Court affirmed long standing case law and held that the documents prepared by court personnel in connection with court cases and maintained by the court were judicial documents governed by GR 15. It also held that such documents, when transferred to nonjudicial county entities, are governed by the Public Records Act unless they are subject to an additional protective order. The Court held that a trial court has jurisdiction to consider a motion to unseal court documents and is not required to seek permission from an appellate court pursuant to RAP 7.2 when the sealing order will not impact a separate decision on appeal, and that a limited intervention by a third party in a criminal case is a proper procedure after trial has ended. The Court remanded the case to the trial court to determine whether continued sealing of these financial documents is proper pursuant to GR 15(e), given the current posture of the criminal case.

City of Federal Way v. Koenig, 167 Wn.2d 341 (2009)

Relying on its prior decision, *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986), the state Supreme Court affirmed its conclusion that the Public Records Act does not apply to the judiciary because courts are not "agencies" under the act. The court also noted that the legislature has acquiesced to the *Nast* decision by not modifying the PRA.

Spokane & Eastern Lawyer v.Tompkins, 136 Wn. App. 616 (2007).

A nonprofit corporation sought copies of correspondence from the Spokane Superior Court to the state and local bar associations. The request was denied and the nonprofit sued under the Public Disclosure Act. On review and citing earlier authority, the court denied the request, finding that the court was not

an "agency" under the Public Disclosure Act and thus was not required to provide the requested letters.

Research & Defense Fund v. Community Development Association, 133 Wn. App. 602 (2006).

The court reviewed the definition of an "agency" subject to the Public Records Act, concluding in this case that the 501(c)(3) organization possessed no material governmental attributes or characteristics, even though the entity leased space in a public building in a public park, and received substantial funding from the city. The court concluded that the entity acts as an independent contractor and is not under the control of the city, and thus not covered by the PRA.

Telford v. Thurston County Bd. of Comm'rs, 95 Wn. App. 149, 152 (1999), *review denied* 138 Wn.2d 1015 (1999).

In determining whether an organization is a public agency under the PDA, the appeals court has adopted a four factor balancing test: "The factors are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government."

RCW 42.56.010 – Definition of "Public Record" and "Writing"

O'Neill v. City of Shoreline, ___ Wn. 2d ___ (10/7/2010)

Is the metadata (data about electronic data) subject to disclosure? On appeal, the Supreme Court has determined that such data is subject to disclosure. The court, in a divided opinion (5 to 4), concluded that an electronic version of a record, including its embedded metadata, is a public record subject to disclosure subject to disclosure. The court also determined that the city should inspect a councilmember's hard drive for the metadata to determine whether it had provided the requested information when it had provided a paper copy as well as other information associated with the inquirer's request. The case was returned to the trial court to determine whether the city had violated the state's public records disclosure requirements.

O'Neill v. Shoreline, 145 Wn. App. 913 (2008).

A councilmember/deputy mayor referenced an e-mail she had received during a council meeting. O'Neill requested a copy of the e-mail. O'Neill sued to obtain the e-mail. However, the electronic record of the e-mail had been altered through the removal of the heading (the To/From information). The court concluded that the record was a public record, even though it had been received by the councilmember on a private computer. Although O'Neill had been furnished a paper copy of the e-mail, she had requested the full electronic document, including the metadata. The court found that metadata fell within the definitions of "public record" and "writing".

Confederated Tribes v. Johnson, 135 Wn.2d 734, 746 (1998) (quoting RCW 42.17.020(41)).

A "public record," subject to disclosure under the Act includes [1] any writing [2] containing information relating to the conduct of government or the performance of any governmental or proprietary function [3] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

Smith v. Okanogan County, 100 Wn. App. 7, 15-16 (2000).

Oaths taken by attorneys who could have been *potentially appointed* by county superior court were not public records, because they did not relate to the conduct of government or relate to the performance of any governmental function. On the other hand, a request for a copy of each judge's oath was a public record.

Tiberino v. Spokane County, 103 Wn. App. 680, 687 (2000).

Employee e-mail was a public record where excessive personal use of e-mail was a reason for discharge, and the County printed the e-mails in preparation for litigation over termination, a proprietary function. Consequently, the e-mails contained information relating to the conduct of a "governmental or proprietary function."

Concerned Ratepayers Ass'n v. Pub. Utility Dist. No. 1 of Clark County, 138 Wn.2d 950, 960 (1999).
Under RCW 42.17.020, which defines the term "public record," to determine whether information has been "used" turns on whether the requested information bears a nexus with the agency's decision-making process.

Limstrom v. Ladenburg, 85 Wn. App. 524, 529 (1997), *rev'd*, 136 Wn.2d 595 (1998).
Criminal investigation files held by prosecutor and prosecutor's personnel files were public records.

Servais v. Port of Bellingham, 127 Wn.2d 820, 828 (1995).
Research data (a cash flow analysis prepared by a consulting firm for the purposes of planning by the Port) was a writing which related to the conduct and performance of a governmental function, thus, was a public record.

Yakima Newspapers, Inc. v. City of Yakima, 77 Wn. App. 319, 324 (1995).
A settlement agreement containing information about the City's termination of an employee was a public record because termination is a proprietary function.

Dawson v. Daly, 120 Wn.2d 782, 789 (1993).
Documents compiled by a prosecutor for use in cross-examining a defense expert in child sexual abuse cases were documents relating to the performance of prosecutorial functions and were used by the prosecutor's office in carrying out those governmental functions and, thus, were public records.

Oliver v. Harborview Medical Center, 94 Wn.2d 559, 566 (1980).
Medical records of a patient treated at a public hospital were public records because the records contained information of a public nature, "i.e., administration of health care services, facility availability, use and care, methods of diagnosis, analysis, treatment and costs, all of which . . . relate to the performance of a governmental or proprietary function."

RCW 42.56.040 Duty to Publish Procedures

Parmelee v. Clarke, 147 Wn. App. 1035 (2008)
The Department of Corrections Public Records Act procedures specifically identify the Public Records Officer and provide that all requests should be sent to that officer. The Court held that, because the requester had actual knowledge of those procedures, the requester was required to follow those procedures and make public records requests to the identified officer. Thus, the court dismissed the requester's claims that were based on requests made to other persons. Tip: all local government agencies should provide a copy of their PRA policy, or the essential information from that policy, in every five day response.

RCW 42.56.050 – Definition of "Right to Privacy"

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011)
After being stopped by a Bainbridge Island police officer, a driver alleged that she had been choked and sexually assaulted by the officer. Mercer Island and Puyallup police departments investigated the incident and issued reports; the incident was found to be "unsubstantiated" and no charges were brought against the police officer. One of the reports was released, a news account published, and then, in response to other public records requests for the reports, an injunction was sought and granted. On appeal, in a divided decision, the court's lead opinion found that the officer's initial failure to object to the report's release did not constitute a waiver from later objecting, under privacy grounds, to other records' requests. The court concluded that the reports were "personal information" and that the right to privacy had not been lost due to the initial release. The decision found that the release of the officer's identity would be highly offensive; however, release of the reports, with identity information redacted, would satisfy a legitimate public concern. Also, under an argument relating to the criminal records privacy act, the court held that RCW 10.97.080 requires redaction of only criminal history record information and does not

exempt information relating to the conduct of the police during the investigation.

AGO 1988 No. 12.

Hearst v. Hoppe, 90 Wn.2d 123, 135-36 (1978) (definition of privacy as codified by RCW 42.56.050).
A person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." If only one prong is satisfied, the requested record must be disclosed.

Brouillet v. Cowles Pub. Co., 114 Wn.2d 788, 798 (1990).
A test that balances the individual's privacy interests against the interest of the public in disclosure is not permitted. Instead, the statute requires the government to prove that the information would be offensive *and* of no legitimate public interest.

Prong 1: Highly Offensive to the Reasonable Person

Bellevue John Does v. Bellevue School District, 164 Wn.2d 199 (2008).
The court held that the identity of a teacher accused of sexual misconduct is to be disclosed to the public only if the misconduct was substantiated or discipline resulted. Identities of teachers who were subjects of unsubstantiated allegations are exempt from disclosure as it would violate the teachers' right to privacy.

Tacoma Pub. Library v. Woessner, 90 Wn. App. 205 (1998).
It was permissible for the Library to redact employee identification numbers from the report it released, but it should not have redacted employee names. Release of employee's identification numbers were determined to be highly offensive, because disclosure could lead to public scrutiny of individuals concerning information unrelated to any governmental operation and impermissible invasions of privacy. However, release of employee names would not be similarly offensive or lead to such invasions of privacy.

PAWS v. UW, 125 Wn.2d 243, 254 (1995).
Public employee's social security numbers, residential addresses, and telephone numbers are highly offensive, hence, exempt from disclosure. Also, residential addresses and telephone numbers are independently exempt under RCW 42.56.250(3).

Dawson v. Daly, 120 Wn.2d 782, 797 (1993).
Disclosure of performance evaluations of city prosecutor, which did not discuss specific instances of misconduct, was presumed to be highly offensive within the meaning of RCW 42.56.050. Compare this case to *Spokane Research & Def. Fund*, *infra*, which found that City Manager evaluations were of legitimate concern to the public, hence, disclosable.

Brown v. Seattle Pub. Schools, 71 Wn. App. 613, 619-20 (1993) (relying on analysis of employee evaluations in *Dawson*).
Principal's evaluations did not contain specific instances of misconduct; therefore, such records were highly offensive and not disclosable. The court opined that ". . . if disclosure of these evaluations is allowed, the quality of public employee performance will suffer because employees will not receive the guidance and constructive criticism required for them to improve their performance and increase their efficiency. . . ."

Spokane Police Guild v. Liquor Control Board, 112 Wn.2d 30, 38 (1989).
Liquor Board investigation of bachelor party held on Spokane Police Guild Club premises was a record that must be disclosed. While the situation ". . . might well cause 'inconvenience or embarrassment' to the attendee. . . . That does not, by itself . . . meet the 'highly offensive to a reasonable person' standard . . . under the act."

Prong 2: Legitimate Concern to the Public

Bellevue John Does v. Bellevue School District, 164 Wn.2d 199 (2008).

The court held that the identity of a teacher accused of sexual misconduct is to be disclosed to the public only if the misconduct was substantiated or discipline resulted. Identities of teachers who were subjects of unsubstantiated allegations are exempt from disclosure as it would violate the teachers' right to privacy.

Koenig v. City of Des Moines, 123 Wn. App. 285 (2004).

In a case dealing with a father's request for all of the criminal case records concerning a sexual assault on his minor daughter, the court reviewed the application of RCW 42.56.240 (protecting the identity of child victims of sexual assault); (criminal investigative records and records disclosing the identity of crime victims); and RCW 42.56.050 (discussing what is of "legitimate public concern"). The court ruled that "highly offensive information" could be redacted from the records.

Spokane Research & Def. Fund v. City of Spokane, 99 Wn. App. 452, 456-58 (2000).

A city manager's evaluation that did not contain a particular incident of misconduct was disclosable, because there is a legitimate or reasonable public interest in its disclosure despite the record being highly offensive to the reasonable person. The use of a test that balances the individual's privacy interests against the interest of the public in disclosure is not permitted, even if the disclosure of the information would be offensive to the employee. RCW 42.56.050 is a two-pronged test; therefore, a record shall be disclosed if one prong is met.

Tacoma v. Tacoma News, 65 Wn. App. 140, 148-49 (1992).

Newspaper access to police department records containing certain child abuse allegations was denied. In making a determination of whether to disclose a record, RCW 42.56.050 allows agencies and courts to consider (1) whether information in public records is true or false, and (2) whether such information has been substantiated, because false records are not of concern to the public. If information remains unsubstantiated after reasonable efforts to investigate it, that fact is indicative, though not always dispositive, of falsity.

<u>Additional Privacy Cases</u>

Cowles Publishing Co. v. Pierce County Prosecutor's Office, 111 Wn. App. 502 (2002).

Defendant's post-conviction, mitigation package was exempt, *inter alia*, under RCW 42.56.050. First, the record contained information about defendant's family that was not a matter of legitimate public concern. Secondly, a reasonable person would find disclosure to be highly offensive, because the record contained mostly family responses to how they would feel if the defendant were executed.

Tiberino v. Spokane County, 103 Wn. App. 680 (2000).

Employee's numerous personal e-mails created while employed at the county prosecutor's office, which factored into her termination, were exempt from disclosure. First, disclosing her non-work related personal e-mail would be highly offensive. Second, the public has no legitimate concern in requiring the release of the individual e-mails – the public's only interest was the amount of personal e-mail sent, not its content.

RCW 42.56.070(1) – Disclosure Required Unless Exemption Applies, Rules Required, Deletion Allowed to Protect "Right to Privacy"

Robbins, Geller v. Attorney General, 179 Wn. App. 711 (2014)
The court provides an analysis of "trade secret" protection provided by chapter 19.108, which qualifies as an "other statute" under RCW 42.56.070(1). The court reviewed business information and the evidence necessary to show that the information qualifies for protection.

Freedom Foundation v. Department of Transportation, ___ Wn. App. ___ (05/10/2012)
Following a ferry boat accident, drug and alcohol tests were performed on the crew of the ferry. Although records were provided by the Foundation, the Department of Transportation (DOT) redacted the crew's drug and alcohol test results in compliance with a federal regulation, 49 C.F.R. § 40.321 (2006), directing marine employers to keep test results confidential, because that regulation qualifies as an "other statute" exemption under RCW 42.56.070(1). On appeal, the court agreed that the federal regulation was an "other statute" and that the redacted information was exempt.

Livingston v. Cedeno, 164 Wn.2d 46 (2008).
The state supreme court balanced the broad PRA requirement for disclosure against the security concerns in the prison environment, concluding that mailing requested records to an inmate met the requirements of the PRA, but prison officials had the authority, pursuant to RCW 72.09.530, to withhold that mail from the inmate due to security concerns.

Hangartner v. City of Seattle, 151 Wn.2d 439 (2004).
The court ruled that the attorney-client privilege is an "other statute" (under RCW 42.56.070(1)) that prohibits disclosing certain records through the Public Disclosure Act.

American Civil Liberties Union v. City of Seattle, 121 Wn. App. 544, (2004).
Construing RCW 42.56.070(1), the court ruled that an Open Public Meetings Act provision (RCW 42.30.140(4)(a)) allowing executive session meetings for labor negotiation sessions or labor negotiation strategy discussion does not translate into a public records exemption for records pertaining to labor negotiations.

Tacoma Pub. Library v. Woessner, 90 Wn. App. 205 (1998).
Library properly redacted employee identification numbers from the report it released pursuant to RCW 42.56.070.

Dawson v. Daly, 120 Wn.2d 782, 789 (1993) (citing RCW 42.56.070(1)).
The Public Disclosure Act authorizes removal of private information in accordance with the exemptions of RCW 42.56.210.

RCW 42.56.070(3) and (4) – Index of Records

Vance v. Thurston County Commissioners, 117 Wn. App. 660, 670 (2003).
The County is required by statute to either keep a document index, or issue and publish an unduly burdensome order.

RCW 42.56.070(9) – Disclosure of Lists Requested for Commercial Purposes

AGO 1988. No. 2.

AGO 1983 No. 9.

AGO 1980 No. 1.

AGO 1975 No. 15.

RCW 42.56.080 – Request for "Identifiable" Public Records, Prompt Response Required, Motivation Not Relevant in Most Situations

Hangartner v. City of Seattle, 151 Wn.2d 439 (2004).
A government agency need not comply with an overbroad request.

Bonamy v. City of Seattle, 92 Wn. App. 402 (1998); *Wood v. Lowe*, 102 Wn. App. 872 (2000).
A requested public record is not "identifiable" unless the public agency responding to the request is provided with a reasonable description that would enable the agency to locate the record.

ACLU of Wash. v. Blaine School Dist. No. 503, 86 Wn. App. 688, 695 (1997).
Agencies are required to mail records in response to a request when asked to do so.

RCW 42.56.210(1) – Deletion of Information Violating Right to Privacy or Vital Government Interests

PAWS v. UW, 125 Wn.2d 243, 261-62 (1994).

RCW 42.56.210(3) – Citation of Specific Exemption with Brief Explanation

City of Lakewood v. Koenig. ___ Wn. App. ___ (09/04/2013)
Koenig sought certain records from the city, which the city provided, redacting some information, such as driver's license information. The city asked Koenig to confirm that it had satisfied his request. When Koenig failed to make such a confirmation, the City filed a declaratory action for such a determination. Koenig, on the other hand, sought costs and attorney fees, arguing that the city had not given a brief explanation for the redactions it had made. The trial court concluded that the city had complied and denied the request for costs and attorney fees; Koenig appealed. The court reversed the trial court's decision regarding costs and attorney fees. While the city had cited statutes that would or might exempt some of the requested information, it failed to provide a brief explanation as to why the exemptions applied. Failure to give a brief explanation entitled Koenig to costs and attorney fees.

RCW 42.56.210(3) – Explanation of How Exemption Applies

Sanders v. State, 169 Wn.2d 827 (2010).
Claimed exemptions cannot be vetted for validity if they are unexplained (at p. 846). Failure to provide a brief explanation should be considered when awarding costs, fees and penalties (at pp. 847-48).

Citizens v. Dep't of Corrections, 117 Wn. App. 411, 431 (2003).
"[R]efusing inspection . . . of any public record shall include a statement of the specific exemption authorizing the withholding of the record . . . and a brief explanation of how the exemption applies to the record withheld."

PAWS v. UW, 125 Wn.2d 243, 261 (1994)
Agencies must withhold only those portions of individual records which come under a specific exemption and disclose the rest.

RCW 42.56.230 – Personal information, taxpayer information, credit card numbers, etc.

Predisik v. Spokane School District, ___ Wn. App. ___ (02/27/1014)
Two teachers were placed on administrative leave for alleged misconduct. The school district received public records requests for records related to the leaves, and the two teachers sought to enjoin the release

of the records. The trial court allowed release of the records, but with the names of the teachers redacted, citing RCW 42.56.230(3) and 42.56.240(1). The teachers appealed and the court affirmed. There was no right to privacy in the records that did not detail the unsubstantiated misconduct, but the name of the teacher should be redacted. The teachers contended that disclosure of the redacted records still would violate their right to privacy because the public could figure out their identities in the redacted records. The court concluded, though, that nonexempt information in a record must be produced, even if disclosure of this information would result in the court's inability to protect the identity of an individual.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011)

After being stopped by a Bainbridge Island police officer, a driver alleged that she had been choked and sexually assaulted by the officer. Mercer Island and Puyallup police departments investigated the incident and issued reports; the incident was found to be "unsubstantiated" and no charges were brought against the police officer. One of the reports was released, a news account published, and then, in response to other public records requests for the reports, an injunction was sought and granted. On appeal, in a divided decision, the court's lead opinion found that the officer's initial failure to object to the report's release did not constitute a waiver from later objecting, under privacy grounds, to other records' requests. The court concluded that the reports were "personal information" and that the right to privacy had not been lost due to the initial release. The decision found that the release of the officer's identity would be highly offensive; however, release of the reports, with identity information redacted, would satisfy a legitimate public concern. Also, under an argument relating to the criminal records privacy act, the court found that hold that RCW 10.97.080 requires redaction of only criminal history record information and does not exempt information relating to the conduct of the police during the investigation.

Bellevue John Does v. Bellevue School District #405, 129 Wn. App. 832 (2005).

This case thoroughly reviews the extent to which a public employer must disclose records concerning allegations of sexual misconduct, some of which are patently untrue, some not substantiated, and some involving former employees.

King County v. Sheehan, 114 Wn. App. 325, 349 (2002).

A list of the full names and ranks of police officers is not exempt from disclosure.

Tacoma Pub. Library v. Woessner, 90 Wn. App. 205, 217-18 (1998).

Records featuring employees' rates of pay, benefits, and pension contributions, with employee numbers redacted, were not exempt from disclosure. When determining what is a personnel file, the focus is ". . . whether the requested file contains personal information that is normally maintained for the benefit of employees, disclosure of which would violate their right to privacy."

Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712, 727 (1988).

Disclosure of officers' names in internal affairs investigative files would not violate their rights to privacy, therefore, the requested record is not exempt from disclosure under RCW 42.56.230(2).

Dawson v. Daly, 120 Wn.2d 782 (1993).

Records of deputy prosecutor's performance evaluations were exempt from disclosure.

Brown v. Seattle Public Schools, 71 Wn. App. 613 (1993).

Elementary school principal's personnel records were exempt from disclosure.

Yakima Newspapers v. Yakima, 77 Wn. App. 319 (1995).

Former fire chief's settlement which included information of his performance of his public office was not exempt from disclosure.

RCW 42.56.230(3) – Taxpayer Information

AGO 1980 No. 1.

RCW 42.56.240(1) – Investigative Records

Sargent v. Seattle Police Department, 179 Wn.2d 376 (2013)

Sargent was arrested for the assault of an off-duty police officer. Since Sargent was jailed, materials were transmitted to the prosecuting attorney for an expedited review and charging. The prosecutor, however, declined to file charges and the case was returned to the police for further investigation. Later the file was submitted to the city attorney who also declined to file charges. Sargent requested the investigative files, including an internal investigation file. Sargent's records request was denied by the city, which argued them exempt for effective law enforcement purposes. Sargent sued. Following earlier proceedings, the supreme court considered the issue and, in a 5 - 4 decision, mostly supported the release of the documents to Sargent. The court held that the effective law enforcement exemption ceases to apply categorically to investigative records once the case is first referred to a prosecutor for a charging decision. The court also held that the city violated the PRA by withholding records of an internal disciplinary investigation. Since the effective law enforcement exemption does not apply categorically to this type of material, the exemption might be applicable, but the city would need to demonstrate that disclosure would endanger a person's life, physical safety, or property, or that a witness had requested nondisclosure.

Gronquist v. Department of Corrections, 177 Wn. App. 389 (2013)

Gronquist was a prisoner at a state institution. He sought a series of records, including records relating to the use of undocumented alien workers by the Department of Corrections (DOC), surveillance tapes from the prison, and an investigative file. The DOC responded by indicating that the requested records relating to undocumented aliens did not exist, the surveillance tapes were exempt from disclosure and it provided the investigative file, less one page that was inadvertently omitted but later provided. The court of appeals found that the undocumented alien records did not exist and were not identifiable, the surveillance tapes were exempt as investigative records under RCW 42.56.240(1), and that no penalty was due for the inadvertent omission of one page (and, in any case, prisoners are not entitled to penalties unless there is bad faith (and there was none)).

Koenig v. Thurston County, 175 Wn.2d 837, 2012

Koenig sought various records associated with a voyeurism conviction, including a special sex offender sentencing alternative (SSOSA) report and a victim impact statement. The county argued that both were exempt under the investigative records exemption, RCW 42.56.240. On appeal, in a 5-4 decision, the court disagreed. To be exempt, the court held, a court must find that an investigative entity is compiling and using the relevant record to perform an investigative function. A victim impact statement is primarily a communication between a victim and a judge and the SSOSA evaluation principally provides a basis for the court to impose sentencing alternatives. Neither of these records is part of an investigation into criminal activity or an allegation of malfeasance. Because the Public Records Act requires that exemptions be narrowly construed, the court declined to protect documents that are created to aid a court in its sentencing decision. Neither record is an "investigative record."

Sargent v. Seattle Police Department, 167 Wn. App. 1 (2011)

The court ruled that a request for the production of jail records made by the person who is the subject of the records but that is signed by the person's attorney constitutes a grant of permission by the person.

Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011)

After being stopped by a Bainbridge Island police officer, a driver alleged that she had been choked and sexually assaulted by the officer. Mercer Island and Puyallup police departments investigated the incident and issued reports; the incident was found to be "unsubstantiated" and no charges were brought against the police officer. One of the reports was released, a news account published, and then, in response to other public records requests for the reports, an injunction was sought and granted. On appeal, in a divided decision, the court's lead opinion found that the officer's initial failure to object to the report's release did not constitute a waiver from later objecting, under privacy grounds, to other records' requests. The court concluded that the reports were "personal information" and that the right to privacy had not been lost due to the initial release. The decision found that the release of the officer's identity would be highly offensive; however, release of the reports, with identity information redacted, would satisfy a legitimate public concern. Also, under an argument relating to the criminal records privacy act, the court

found that hold that RCW 10.97.080 requires redaction of only criminal history record information and does not exempt information relating to the conduct of the police during the investigation.

Koenig v. Thurston County, 55 Wn. App. 398 (2010)

The court held that a crime victim impact statement prepared for sentencing can be exempt under the investigative records exemption. In determining whether an item or document in the possession of a law enforcement agency is essential to effective law enforcement, a court may consider affidavits from those with direct knowledge of and responsibility for the investigation. A special sex offender sentencing alternative evaluation is not exempt under the investigative records exemption, but portions of the report identifying victims can and should be redacted.

Koenig v. City of Des Moines, 158 Wn.2d 173 (2006).

The case deals with a father's request for all of the criminal case records dealing with a sexual assault on his minor daughter. The court reviewed the application of RCW 42.56.240(5) (protecting the identity of child victims of sexual assault); RCW 42.56.240(1) and (2) (criminal investigative records and records disclosing the identity of crime victims); and RCW 42.56.050 (discussing what is of "legitimate public concern"). The court balanced the above factors and ruled that the details of the crime, including sexually explicit information, are of legitimate public concern and must be disclosed, with only the identifying personal information redacted. The records must be disclosed even if the requestor may potentially connect the facts of the crime to a specific victim or knows the identity of the victim.

Prison Legal News v. Dept. of Corrections, 154 Wn.2d 628 (2005).

The court reviews the "investigative records" exception, particularly the phrase "the nondisclosure of which is essential to effective law enforcement," pointing out that just because the records concern a law enforcement agency does not mean the records fall under the exemption.

King County v. Sheehan, 114 Wn. App. 325, 337 (2002).

RCW 42.56.240(1) exemption applies only to specific intelligence information; this would not include a general list of officer's names.

Cowles Pub. Co. v. Pierce County Prosecutor's Office, 111 Wn. App. 502, 508 (2002).

A mitigation package qualifies as an investigative record under RCW 42.56.240(1).

Cowles Pub. Co. v. Spokane Police Dept., 139 Wn.2d 472, 479 (1999).

In cases where the suspect has been arrested and the matter referred to the prosecutor, there will not be a categorical nondisclosure of all records in the police investigative file.

Newman v. King County, 133 Wn.2d 565, 574 (1997).

The "investigative records" exception to the Public Disclosure Act (RCW 42.56.240(1)) categorically exempts from disclosure, all police investigative records in an *unsolved, open investigation*. The supreme court refused to extend *Newman* to include public disclosure requests for criminal litigation files held by a prosecutor in *Limstrom v. Ladenburg*, 136 Wn.2d 595 (1998). In addition, the supreme court distinguished the *Newman* exemption from cases where a suspect has already been arrested and the case referred to the prosecutor for a charging decision in *Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 479 (1999). The court's decisions in these cases are unified by its reasoning that it is ". . . concerned both with the difficulty police would have segregating information in unsolved cases, and with the propriety of charging courts with responsibility of determining whether nondisclosure was critical to solving the case – a task which [the court] felt was better left to the professional judgment of the police." *Cowles Pub. Co. v. Spokane Police Dept.* at 477.

Ames v. Fircrest, 71 Wn. App. 284 (1993).

Regarding investigatory record of plaintiff's misconduct, plaintiff failed to establish an essential element of his case, that nondisclosure of the records was essential to effective law enforcement. Therefore, the investigative record was not exempt from disclosure.

Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 796-97 (1990).

Specific investigative records compiled by a state agency with the responsibility to discipline teachers, were not exempt from disclosure. Retaining the records was not essential to effective law enforcement pursuant to RCW 42.56.240(1), because the agency administers a school system – it does not enforce law.

Cowles Publishing Co. v. State Patrol, 109 Wn.2d 712, 733 (1988).
The confidentiality of the names of persons reflected in the records of internal investigations is necessary to effective law enforcement; therefore, where internal investigation files have already been released, the names of the complainants, witnesses and officers involved are exempt from disclosure under RCW 42.56.240(1).

Ashley v. Public Disclosure Commission, 6 Wn. App. 830 (1977)
This early public disclosure case ruled that records of an ongoing investigation by the Public Disclosure Commission were exempt under the "investigative records" exemption. The unusual aspect of this decision is the application of that exemption in a context where the investigation is not concerning a violation of criminal laws. The court specifically notes that it is not ruling on whether the Public Disclosure Commission is a "criminal justice agency", but notes that the agency has "law enforcement related responsibilities" – see footnote 8 of the decision.

RCW 42.56.240(5) – Identity of Child Victims of Sexual Assault Exempt

Koenig v. City of Des Moines, 123 Wn. App. 285 (2004).
The case deals with a father's request for all of the criminal case records dealing with a sexual assault on his minor daughter. The court reviewed the application of RCW 42.56.240(5) (protecting the identity of child victims of sexual assault); RCW 42.56.240(1) and (2) (criminal investigative records and records disclosing the identity of crime victims); and RCW 42.56.050 (discussing what is of "legitimate public concern"). The court ruled that the "highly offensive information" could be redacted from the records.

RCW 42.56.250 – Employment and Licensing

Meredith Mechling v. City of Monroe, 152 Wn. App. 830, at 847 (2009).
The court held that RCW 42.56.250 "does not exempt disclosure of personal e-mail addresses used by elected officials to discuss city business".

RCW 42.56.270(1) – Valuable Formulae, Designs and Research Data

Evergreen Freedom Foundation v. Locke, 127 Wn. App. 243 (2005).
The purpose of the valuable designs exemption is to prevent private gain derived from the exploitation of potentially valuable intellectual property created for public benefit.

Lindberg v. County of Kitsap, 133 Wn.2d 729, 747 (1997).
Requesting copies of engineering drawings from Kitsap County, for preparing comments prior to public hearing, is a reasonable "fair use" qualifying as an exception to the exclusive right of the copyright owner of the materials. Therefore, the engineering documents must be made available for copying.

Servais v. Port of Bellingham, 127 Wn.2d 820 (1995).
Cash flow analysis, prepared to provide the Port with data for use in negotiations with developers should remain exempt, to permit the Port to conduct negotiations in the best interests of the public and to perform its statutory duties.

PAWS v. UW, 125 Wn.2d 243, 255 (1994) (affirming disclosure of portions of a grant proposal).
[I]n science, data and hypotheses are inextricably intertwined. Valuable "research data" include not only raw data but also the guiding hypotheses that structure the data. . . . If the data or hypotheses . . . were prematurely released, the disclosure would produce both the private gain constituted by potential intellectual property piracy and the public loss of patent or other rights . . . .

Rocco N. Treppiedi, "Disclosing Proprietary Information Obtained in Competitive Bidding," *Legal Notes* Information Bulletin No. 432 (1985).

Kyle J. Crews, "Second Update on Public Disclosure, Public Bidding Documents: E-Mail, GIS Data, Public Employment Records," *Legal Notes* Information Bulletin No. 491 (1995).

RCW 42.56.270 – Private Financial and Commercial Information Provided to Local Government Agencies in Applying for Certain Economic Development Program Assistance

Clean v. City of Spokane, 133 Wn. 2d 455 (1997).

An addendum to a report prepared for the city by an accounting firm is exempt from disclosure under RCW 42.56.270 because the project's HUD loan was pending at the time the trial court made its ruling.

RCW 42.56.280 – Disclosure of Preliminary Notes and Drafts Involving Policy Formulation

West v. Washington Public Ports Ass'n., Wn. Court of Appeals, unpublished, filed July 22, 2008.

The port was requested to furnish a copy of a lease it had entered into with Weyerhaeuser. The request was denied for several reasons, including the "deliberative process" exemption. The court held that the records could not be denied just because the port would enter into other leases and the lease in question could affect those subsequent negotiations. Since the lease had been approved, the exemption no longer applied.

Tom Carr, "Recent Legal Issues in the City of Seattle: Growth Management Act, Public Disclosure Act and Pipeline Regulation," *Legal Notes* Information Bulletin No. 517, p. 17-4 (2003).

Discussion of superior court ruling denying ACLU's proposed order to show cause based on the deliberative process exemption.

American Civil Liberties Union v. City of Seattle, 121 Wn. App. 544 (2004).

The term "intra-agency" does not subsume but is in addition to other forms of communication the exemption lists. The court also reviewed whether certain collective bargaining records should be disclosed, and held that the city had established that disclosure of the records in question would be injurious to the deliberative or consultative function and inhibit the negotiation process.

PAWS v. UW, 125 Wn.2d 243, 256 (1994).

Scientists' comments, which were incorporated into a formal written evaluation known as a "pink sheet," were exempt from disclosure.

Yacobellis v. Bellingham, 55 Wn. App. 706, 715 (1989).

A fact-gathering survey by a municipal golf course manager contained merely facts and therefore was not exempt from disclosure.

Columbian Publishing v. Vancouver, 36 Wn. App. 25 (1983).

Statements by police officers concerning specific complaints about police chief are not exempt from public disclosure.

Moser v. Kanekoa, 49 Wn. App. 529 (1987).

Interview summaries of jail employees and administrators are not exempt from disclosure.

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132-33 (1978).

Records of county assessor must be disclosed. For a record to be exempt, an agency must show that documents contain (1) pre-decisional opinions or recommendations of subordinates expressed as part of the deliberative process; (2) that disclosure would be injurious to the deliberative or consultative function; (3) that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, (4) that the exemption is claimed only for documents reflecting policy recommendations and opinions

and not for the raw factual data upon which a decision is based.

RCW 42.56.290 – Records Relevant to Pending or Potential Litigation

DOT v. Medoza De Sugiyama, 182 Wn.App. 588 (2014).
The "controversy" exemption of RCW 42.56.290 does not exempt records from disclosure under the PRA merely because a judge has issued a protective order regarding public records of an agency in a pending civil action because providing the records would be unduly burdensome – the records are still "available" under the civil rules of pretrial discovery.

Sanders v. State, 169 Wn.2d 827 (2010).
Under the work product and controversy exception, the "controversy" does not have to be apparent on the face of the document, nor does an agency citing the exemption need to specify the precise controversy to which the document relates (at pp. 854-56).

Koenig v. Pierce County, 151 Wn. App. 221, (2009).
Following his arrest for a matter that was never prosecuted, the defendant Koenig sought from the county sheriff and county prosecutor all of the materials relating to the decision to not prosecute. While some materials were provided by both county departments, the prosecutor's office withheld some records as being work product. Koenig sued. Following a decision favorable to the county, Koenig appealed, and the court upheld the superior court's decision. The court upheld the county's use of the plurality decision in Limstrom v. Ladenburg, 136 Wn.2d 595, 604, 963 P.2d 869 (1998), relating to the withholding of work product and the application of CR 26.

Sorter v. Cowles Publishing Co., 162 Wn. 2nd 716 (2007).
All of the notes taken by attorneys or other members of a legal team when interviewing witnesses constitute opinion work product that will be revealed only in rare circumstances.

Hangartner v. City of Seattle, 151 Wn.2d 439 (2004).
A "litigation-charged atmosphere" does not necessarily constitute a "controversy" if the public agency fails to establish that there was any threat or reasonable anticipation of litigation.

Kleven v. King County Prosecutor, 112 Wn. App. 18, 24 (2002).
"A plain language interpretation of [RCW 42.56.290] is that records relevant to a controversy to which an agency is a party are exempt from public inspection and copying under the Public Records Act if those records would not be available to another party under superior court rules of pretrial discovery . . . set forth in the civil rules for superior court, CR 26."

Roger Wynne, "Does the Public Disclosure Act Exempt Attorney-Client Communications Where No "Controversy" is Present?" and "When is a "Controversy" Sufficiently Controversial under the PDA?," *Legal Notes* Information Bulletin No. 512 (2002). An analysis of the "controversy" exemption under RCW 42.56.290.

Limstrom v. Ladenburg, 136 Wn.2nd 595, 605 (1998).
A citizen has the right to inspect documents, or portions of documents, in a public attorney's criminal litigation file, unless the documents requested would not be available to a party under the discovery rules set forth in the civil rules for superior court, or the information is otherwise protected from disclosure under the state Criminal Records Privacy Act or other statutory provision.

Harris v. Pierce County, 84 Wn. App. 222, 233-36 (1996).
Since the memorandum in question was unavailable under the pretrial discovery rules it was exempt from public disclosure.

Yakima Newspapers v. Yakima, 77 Wn. App. 319, 325 (1995).
Affirming that a settlement agreement which does not contain information probative of either party's position was not relevant to the controversy, therefore, it was not exempt from public disclosure.

Laurie Flinn Connelly, "The Status of Attorney-Client Privilege and Attorney Work Product in Municipal Law Practice and Relationship to Public Records Act," *Legal Notes* Information Bulletin No. 486 (1994).

Dawson v. Daly, 120 Wn.2d 782, 790-91 (1993).
The term "controversy" is defined by court work product rules, is triggered prior to the official initiation of litigation, and extends beyond the official termination of litigation.

RCW 42.56.330(6) – Police Access to Electrical Utility Records

Personal Restraint of Maxfield, 133 Wn.2d 332 (1997).
There is a privacy interest in electric consumption records which the citizens of this state are entitled to hold free from governmental trespass. (Be sure to read the concurring and dissenting opinions.)

State v. Cole, 128 Wn.2d 262, 290 (1995).
Allowing power consumption records to be obtained by means of a search warrant satisfies the requirements of RCW 42.56.330(6).

RCW 42.56.520 – Prompt Responses Required

West v. Department of Natural Resources, ___ Wn. App. ___ (08/23/2011)
West requested numerous records concerning the department's chief financial officer, including emails. The department made its initial response eleven days after the request. Some of the emails had been lost due to a change in equipment. The department spent considerable time and expense seeking to recover the emails, but the effort ultimately proved futile. West sued. The response was due within five business days. While the response may have been reasonable, it was not timely, since it was given after eleven days. Five days means five days. There was no suggestion that the department intentionally destroyed the records, and it was shown that substantial effort was made to recover them. There was no liability associated with the lost records. The plaintiff also argued improper withholding based on attorney-client privilege; the court ruled against this argument.

Hangartner v. City of Seattle, 151 Wn.2d 439 (2004).
When a public agency receives an overbroad request for disclosure, the agency is excused from complying with it.

Bonamy v. City of Seattle, 92 Wn. App. 403 (1998).
A city is not required to respond to broad requests for information that do not constitute a request for disclosure of identifiable public records.

RCW 42.56.540 – Court Protection of Public Records

City of Lakewood v. Koenig, ___ Wn. App. ___ (03/29/2011)
Koenig sought various records regarding three city police officers. While the city provided the requested records, it redacted information regarding drivers license numbers. The city asked whether its provision of documents was sufficient; no response was given. The city then filed an action for declaratory action on the issue whether it had fully complied with Koenig's request. As part of its lawsuit, the city, using civil court rules, sought information regarding Koenig through interrogatories (litigation Koenig had been involved in) and a request to supply documents (favorable settlements of litigation). Koenig objected, indicating that the requests had nothing to do with whether the city had complied with his records' requests. The trial court ordered Koenig to respond and Koenig appealed. On appeal, the court held that

the city could use civil rules for discovery, but it concluded the interrogatory and request for production at issue were not reasonably calculated to lead to the discovery of admissible evidence. The court denied attorney fees for Koenig since he did not substantially prevail and because no court has found that the City violated the Public Records Act.

Seattle Times v. Serko, 170 Wn.2d 581 (2010)

The court reviewed RCW 42.56.540 and the extent to which that statute can be used as a basis for denying disclosure when the fair trial rights of a defendant are at issue. The appellate court held that a trial court "that orders the withholding of documents based on protecting a fair trial right must find with particularity that it is more probable than not that unfairness or prejudice will result from the pretrial disclosure and must consider alternatives to disclosure. . . . Application of the standard should be done as to each record requested, with the trial court conducting an in camera review."

Burt v. Department of Corrections, 168 Wn. 2d 828 (2010)

A state prisoner sought information regarding certain employees from the Department of Corrections. The Department notified the affected employees, and the employees obtained an injunction prohibiting the release of the requested documents. The prisoner argues that he should have been joined as a party in the lawsuit that sought the injunction. A divided Supreme Court agreed, finding that the requesting party was necessary to protect his interests and advocate for the release of the documents. (The Department did not object to the injunction sought by its employees.)

Sorter v. Cowles Publishing Co., 162 Wn. 2nd 716 (2007).

Public agencies or persons named in a public record may seek a determination from the superior court as to whether an exemption applies.

Bellevue John Does v. Bellevue School District #405, 129 Wn. App. 832 (2005).

RCW 42.56.540 does not furnish an independent basis for exempting records from disclosure.

Tiberino v. Spokane County, 103 Wn. App. 680, 692 (2000) (prevailing party in RCW 42.56.540 cases will not be awarded fees).

Confederated Tribes v. Johnson, 135 Wn. 2d 734, 757 (1998).

RCW 42.56.550(4), which provides penalties, costs, and fees to prevailing parties requesting disclosure, does not apply to RCW 42.56.540 cases, because section .540 cases involve an individual – rather than an agency – who opposes disclosure of the records, and subsection .540 cases are brought to prevent, rather than compel, disclosure.

PAWS v. UW, 125 Wn.2d 243, 257-58 (1994).

RCW 42.56.540 ". . . merely creates an injunctive remedy, and is not a separate substantive exemption . . . [s]tated another way, section .540 governs access to a remedy, not the substantive basis for that remedy."

Brown v. Seattle Public Schools, 71 Wn. App. 613 (1993).

Elementary school principal successfully sought injunction against release of performance evaluations in his personnel records.

RCW42.56.550 – Judicial Review of Agency Actions

Forbes v. City of Gold Bar, 171 Wn. App. 857 (2012).

Forbes sought numerous electronic records from the city. Given the volume of the requested records, other records that were being requested by others, the need to search private computers and electronic devices, the city was unable to provide the records as quickly as Ms. Forbes sought. She sued and the trial court ruled in the city's favor. On appeal, the court affirmed. The response to the request was reasonable in light of the difficulty the city had in retrieving the information and the efforts it expended to recover the information. The city conducted an extensive search of multiple sites where the records Forbes

requested might be housed. This search was reasonably calculated to uncover all relevant documents. (The city hired a consultant to retrieve the requested information, it updated Ms. Forbes on the status of its response to her requests, it provided documents in batches as they became available.) It was not necessary to conduct an in camera review of personal emails or prepare an exemption log regarding such emails since they were personal, not public records.

RCW 42.56.550(3) and (4)

(Note that in all court decisions prior to July 2011 statutory penalties were mandatory, not discretionary. RCW 42.56.550 was amended by SHB 1899 in 2011.)

Robbins, Geller v. Attorney General, 179 Wn. App. 711 (2014)

A party that ultimately obtains the production of public records from an agency is not entitled to attorney fees, costs, or penalties if the agency was willing to release the records but was prevented from doing so by a court order.

Double H, LP v. Dept. of Ecology, 166 Wa. App. 707 (2012)

The court ruled that a trial court making a penalty assessment for failing to timely fulfill a public disclosure request has the discretion to group records for purposes of determining the daily penalty.

Mitchell v. Dept. of Corrections, 164 Wa. App. 599 (2011)

The court held that because a pro se litigant does not incur attorney fees , an award of attorney fees may not be made to a pro se litigant under RCW 42.56.550 (4).

Bricker v. Labor and Industries, 164 Wa. App. 16 (2011)

The court clarified issues related to per record penalties and per day penalties, and held that a court may consider the total penalty that would result from imposition of both. The court also discussed mitigating and aggravating factors and how those relate to penalty assessment.

Neighborhood Alliance of Spokane County v. County of Spokane, 72 Wn.2d 702 (2011)

The Alliance sought records from the county that would help explain certain hiring decisions. The county provided some records, including a seating chart that existed on a computer. The county, however, did not search an earlier computer for the record, and subsequently the prior version of the chart that was on that computer was erased. The Alliance sued and, after review by the court of appeals, asked the supreme court to define the scope of discovery allowed in Public Records Act (PRA) provoked lawsuits, and what constitutes an adequate search. The court held that discovery in a PRA case is the same as in any other civil action and is therefore governed only by relevancy considerations. The court adopted Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search. An inadequate search may be considered an aggravating factor in calculating daily penalties. And, finally, since the harm was done at the time the record's request was made by the Alliance and refused, it may be entitled to recover costs and fees if the agency wrongfully failed to disclose documents in response to its request.

Pierce v. City of Des Moines (8/8/11) Ct. of Appeals, Div. I (unpublished decision)

The court held that if an agency unreasonably delays providing nonexempt records, the requestor is a "prevailing party" even though the agency ultimately provided the records prior to the lawsuit being filed. A delay in responding to a valid request can expose an agency to the statutory penalties and attorney fees provided for in RCW 42.56.550(4).

City of Lakewood v. Koenig, 160 Wn. App. 883 (2011)

In litigation concerning the PRA, a government agency can use discovery under the Civil Rules the same as the requestor. If a party requesting disclosure prevails on appeal, appellate attorney fees are not awardable to the requestor if further fact finding is necessary to determine whether the PRA was violated and disclosure is required.

Sanders v. State, 169 Wn.2d 827 (2010).

If an agency fails to provide a brief explanation of how an exemption applies to a record that is being withheld, that can be considered an aggravating factor when computing the appropriate penalties. When computing the number of days that records were withheld, it is proper for the court to include the adjudication time, including delays, regardless of which party added to the delay (at pp. 863-64).

Guild v. Kitsap County, 156 Wn. App. 110 (2010)

A government agency's good faith reliance on a statutory exemption as a basis for withholding a record from disclosure does not insulate the agency from an assessment of fees and penalties under RCW 42.56.550(4). If a law suit is filed to rule on whether records were improperly withheld, in the absence of a court order enjoining disclosure, the agency is required to respond to the request and the potential penalties are not tolled during pendency of the suit.

Yousoufian v. The Office of Ron Sims, 165 Wn.2d 439 (2009).

In what we hope is the final chapter in this series of Yousoufian decisions, the state Supreme Court provides guidance for setting penalties for noncompliance with the PRA. The court chose to list the mitigating and aggravating factors that should be considered when setting the penalty – see section III A of the decision. This analysis is different than what was set out in the 2007 Yousoufian decision issued by the Court of Appeals.

Zink v. City of Mesa, 140 Wn. App. 328 (2007).

The Zinks made numerous and lengthy public records requests of the city. When the records were slow in coming, due to the volume of the requests and the limited size of the city staff, the Zinks sued. The trial court was sympathetic to the city, finding that, in view of the nature of the requests, the city had "substantially complied," that compliance to the requests amounted to a "practical impossibility," and that the requests amounted to unlawful harassment. On appeal, the Court of Appeals disagreed, finding that strict – not substantial – compliance was required. The city had limited the Zinks to one hour per day to review records; the Court held that that limit was not adequate. The Court further found that the city had disparately treated the Zinks, as it had no rules in place to allow its delays and limits on access; it does not matter that the city would have treated others similarly. The Court also found that the city's inclusion of staff time in making diskettes and tapes of records was permissible.

Yousoufian v. The Office Of Ron Sims, 137 Wn. App. 69 (2007).

In this decision the court proposed a tiered approach for setting penalties for violations of the PRA - based on degrees of culpability. This approach was rejected by the supreme court on appeal. See the case brief directly above.

Koenig v. Des Moines, 158 Wn.2d 173 (2006).

If an agency wrongfully withholds access to a public record, the minimum penalty per day must be imposed, and it is irrelevant whether the plaintiff filed his suit in a timely manner or whether there was a period when an injunction prohibited the city from disclosing the record. The penalty period commences when access to the record is denied.

Spokane Research v. City of Spokane, 155 Wn.2d 89 (2005).

A penalty may be assessed against an agency for a tardy disclosure of public records if the records should have been disclosed when the request was first made.

Yousoufian v. Office of Ron Sims, 152 Wn.2d 421(2004).

Interpreting RCW 42.56.550(4), the court held that under the PDA penalties need not be assessed per record, and that trial courts must assess a per day penalty for each day a record is wrongly withheld. The court also held that the standard of review when the appellate courts look at PDA penalties assessed by the trail court is not de novo.

King County v. Sheehan, 114 Wn. App. 325, 355 (2002).

A penalty of *at least* $5 per day is mandatory.

Lindberg v. County of Kitsap, 133 Wn.2d 729, 747 (1997).
Fees and penalties are within the discretion of the court, and the court need not specify the basis of the award.

Amren v. City Kalama, 131 Wn.2d 25, 37 (1997).
A prevailing party is ". . . entitled to an award not less than $5 and not more than $100 for each day . . . [a] . . . report has been withheld."

Doe I v. Washington State Patrol, 80 Wn. App. 296, 302 (1996).
An award of attorney fees is mandatory, but the amount is within the court's discretion.

Dawson v. Daly, 120 Wn. 2d 782, 797 (1993).
". . . mere embarrassment . . . alone is insufficient grounds for nondisclosure under RCW 42.56.550(3).

RCW 42.56.550(6) – Statute of Limitations

Tobin v. Worden, ___ Wn. App. ___ (6/21/2010)
The Court of Appeals held that one year statute of limitations only applies in situations where an agency has claimed an exemption or after the last production of record on a partial or installment basis. If those factors do not exist, then there is no applicable one year limitation.

Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525 (2009)
The state supreme court held that the "claim of exemption" wording in the 2005 statute refers to the date when the public agency supplies the required identification of each specific exemption relied upon and how the exemption applies to each record withheld. "Without the information a privilege log provides, a public citizen and a reviewing court cannot know (1) what individual records are being withheld, (2) which exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption of a particular record."

RCW 42.56.565 – Inspection or Copying by Persons Serving Criminal Sentences – Injunction

Faulkner v. Dept. of Corrections, 183 Wn. App 93 (2014)
When reviewing whether an incarcerated inmate is entitled to damages under RCW 42.56.565 due to an agency's bad faith response, the court held that ". . . to establish bad faith, an inmate must demonstrate a willful or wanton act or omission by the agency." The court explains that standard by reference to several prior decisions.

Francis v. Dept. Of Corrections, 178 Wn. App 42 (2013)
This court decision provides guidance on the standards to apply when a court calculates damages in a PRA suit brought by an incarcerated offender. RCW 42.56.565(1) provides that penalties are only available when the agency responded in "bad faith". The decision explains what would constitute bad faith in such situations.

Franklin County Sheriff's Office v. Parmalee, ___ Wn.2d ___ (09/20/2012)
Parmalee, a state prisoner, sought numerous records from the Sheriff's Office. Although the county provided some records, it denied others and sought an injunction against further release under RCW 42.56.540. The superior court ruled it could not consider a requester's identity and scheduled a permanent injunction hearing to determine whether the records were exempt from disclosure. Franklin County sought review of the trial court's ruling regarding identity. The court of appeals disagreed with the superior court and held that identity could be considered under RCW 42.56.540 because a superior court's injunctive powers are equitable; it also held that RCW 42.56.565(which allows denial of certain disclosure requests by prisoners), enacted while review was pending, was retroactive. On appeal, the supreme court concluded that the superior court should have first determined whether the requested records were exempt from disclosure. Without a determination regarding possible exemptions, no basis existed for the trial court to determine the additional "public interest" and "harm" findings necessary

under RCW 42.56.540 for the exemption. It also was premature to decide if RCW 42.56.565 applies retroactively.

RCW 42.56.904 – Legislative Intent and Exemption of Attorney Invoices

Yakima County v. Herald-Republic, 170 Wn.2d 775 (2011)

A newspaper sought documents from the court and county regarding attorney costs associated with the defense of two indigent murder defendants. (One of the defendants plead guilty; the other was tried and found guilty and that conviction was appealed.) Having been initially denied the requested records, the newspaper appealed. On appeal the Court affirmed long standing case law and held that the documents prepared by court personnel in connection with court cases and maintained by the court were judicial documents governed by GR 15. It also held that such documents, when transferred to nonjudicial county entities, are governed by the Public Records Act unless they are subject to an additional protective order. The Court held that a trial court has jurisdiction to consider a motion to unseal court documents and is not required to seek permission from an appellate court pursuant to RAP 7.2 when the sealing order will not impact a separate decision on appeal, and that a limited intervention by a third party in a criminal case is a proper procedure after trial has ended. The Court remanded the case to the trial court to determine whether continued sealing of these financial documents is proper pursuant to GR 15(e), given the current posture of the criminal case.

West v. Thurston County, 144 Wn. App. 573 (2008)

West sought copies of outside legal counsel billings for legal work performed for the county in the defense of a lawsuit. The court of appeals reversed the trial court, referencing 2007 legislation which clarified the availability of billing information (RCW 42.56.904): billings should be made available except as to work product which would include factual information which is collected or gathered by an attorney, as well as the attorney's legal research, theories, opinions, and conclusions. The court applied the legislation retroactively.

RCW 46.52.060 – Tabulation and analysis of reports – Availability for use

Gendler v. Batiste, ____ Wa.2d. ____ (filed 4/12/2012)

This decision follows up on the prior Guillen decisions and deals with the obligation to disclose accident report data that the state alleged were exempt because the information was gathered by the state patrol for the state DOT purposes, and was prohibited from disclosure by 23 USC section 409. The court ruled that the information was gathered by the state patrol pursuant to their statutory obligation under RCW 46.52.060, and thus must be disclosed.

RCW 70.02.020 – Disclosure by Health Care Provider

Prison Legal News v. Dept. of Corrections, 154 Wn.2d 628 (2005).

The court analyzed a request for records regarding misconduct by prison staff related to health care for inmates, pointing out that “health care information” has two requisites: patient identity and information about the patient’s health care. Medical information that cannot be readily associated with a particular individual can be disclosed.

RCW 70.48.100 – Jail Records and Booking Photographs

Sargent v. Seattle Police Department, 167 Wn. App. 1 (2011)

The court ruled that a request for the production of jail records made by the person who is the subject of the records but that is signed by the person’s attorney constitutes a grant of permission by the person.

Cowles Pub. Co. v. Spokane Police Dept., City of Spokane, 139 Wn.2d 472, 481 (1999).
Booking photographs do not fall within the disclosure mandate of the PDA.

RCW 82.32.330 – Disclosure of Tax Records

AGO 1986 No. 7.

RCW 84.40.020 – Real Property Tax Assessment Records

AGO 1980 No. 1.

AGO 1988 No. 12.

WAC 44-14-04004(4)

Double H, LP v. Dept. of Ecology, 166 Wa. App. 707 (2012)
A party that makes a public disclosure request must make a refresher request for documents created after the initial request.

WAC 44-14-05001 – Processing of public records requests – Electronic records

Meredith Mechling v. City of Monroe, 152 Wn. App. 830, at p. 850 (2009)
Even though there is no express obligation to provide public records in electronic format, local governments should do so if requested, and if it is reasonable and feasible to do so.

Mitchell v. Dept. of Corrections, 164 Wa. App. 599 (2011)
The court held that the model rules are not binding, but rather provide useful guidance to agencies. In responding to a request for an electronically held public record that requires redaction, an agency has no obligation to print the record, redact the record, and then scan the redacted record back into electronic format.

23 USC [section symbol] 409 – Evidence of certain accident reports

Gendler v. Batiste, ____ Wa.2d. ____ (filed 4/12/2012)
This decision follows up on the prior Guillen decisions and deals with the state patrol's obligation to disclose accident report data that the state alleged were exempt because the information was gathered by the state patrol for the state DOT purposes, and was prohibited from disclosure by 23 USC section 409. The court ruled that the information was gathered by the state patrol pursuant to their statutory obligation under RCW 46.52.060, and thus must be disclosed.

Appendix B

Sample Disclosure Policies and Ordinances

The following are samples of public disclosure ordinances and policies from cities and counties. Unless noted otherwise, all the referenced documents are available online through MRSC. City and county codes may be found at *http://mrsc.org/codes.aspx*. Other documents are available at **mrsc.org** by following the "Legal Resources" link to "MRSC Legal Topics," then clicking "Public Records Disclosure." We encourage you to visit our web site often, as it is frequently updated.

Cities

City of Bellevue

Bellevue Municipal Code ch. 2.26
Bellevue Admin. Order No. 94-03 (1994).
Policy and procedure for maintaining and disclosing electronic records.

City of Des Moines

Des Moines Municipal Code §§ 1.20.010-1.20.210
Comprehensive code relating to public records, defining terms, requiring the safe keeping of public records, and establishing procedures for granting and denying access to public records by the general public.

The city provides a web site to educate the public about its public disclosure process at *http://www.desmoineswa.gov/dept/city_clerk/req_records.html*. Includes Public Disclosure Request Form and Fee Schedule

City of Langley

City of Langley, Ord. 575 (1990), *codified as* Langley Municipal Code ch. 2.10.
Implementing Procedures for the Inspection of Public Records.

Langley E-mail Policies

City of Longview

Longview Municipal Code §§ 2.10.010-2.10.080.

City of Mountlake Terrace

Mountlake Terrace, Resolution No. 483.
Establishes procedures for access to electronic information contained in the city's geographic information system (GIS).

City of Redmond

The city web site educates the public about its procedures for requesting the disclosure of police case reports at: *http://www.ci.redmond.wa.us/insidecityhall/police/records/publicdisclosure.asp*. Information provided at the site includes a public disclosure form, fees for case reports, and procedural information related to a request.

City of Tacoma

Tacoma, Charter §9.2.

City of Tacoma E-mail: Guidelines for Use
These guidelines were originally prepared for state agencies, but they contain provisions appropriate for cities.

City of Vancouver

"Employment Policy," City of Vancouver 69-71 (2002).
Outlines electronic records retention policy for employees.

Counties

Clark County

Clark County Code §§ 2.71.010-2.71.050.
Creates a records management committee.

King County

King County Code §§ 2.14.010-2.14.040,.
Public access to records and information.

King County Code §§ 2.12.005-2.12.200.
Maintenance of permanent records and copy fees.

Snohomish County

Snohomish County Code §§ 2.51.010-2.51.110.

Spokane County

Spokane County Code §§ 1.42.010-1.42.080.
Inspection and copying of public records.

Yakima County

Yakima County Code §§ 2.92.010-2.92.060.
Fees for recording public records.

Appendix C

Exemption and Prohibition Statutes Not Listed in Chapter 42.56 RCW

RCW 42.56.070(2):
For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

MRSC will keep updating this list on our web site. If you become aware of additions or corrections that should be made to the list, please notify one of the staff attorneys at MRSC. Some of the exemptions and prohibitions on the list concern public record information that may not be relevant for your jurisdiction. For instance, cities would not normally have records regarding marriage license applications or adoption records.

Washington State Statutes

Citation	Records
RCW 2.64.111	Documents regarding discipline/retirement of judges
RCW 2.64.113	Confidentiality - violations
RCW 4.24.550	Information on sex offenders
RCW 5.60.060	Privileged communications
RCW 5.60.070	Court-ordered mediation records
RCW 7.68.140	Victims' compensation claims
RCW 7.69A.030(4)	Child victims and witnesses – protection of identity
RCW 7.69A.050	Rights of child victims and witnesses – addresses
RCW 7.75.050	Records of Dispute Resolution Centers
RCW 9.02.100	Reproductive privacy
RCW 9A.82.170	Financial institution records – wrongful disclosure
RCW 9.51.050	Disclosing transaction of grand jury
RCW 9.51.060	Disclosure of grand jury deposition
RCW 9.73.090(1)(c)	Prohibition regarding specified emergency response personnel

Citation	Records
	recordings
RCW 10.27.090	Grand jury testimony/evidence
RCW 10.27.160	Grand jury reports – release to public only by judicial order
RCW 10.29.030	Organized crime special inquiry judge
RCW 10.29.090	Records of special inquiry judge proceedings
RCW 10.52.100	Records identifying child victim of sexual assault
RCW 10.77.210	Records of persons committed for criminal insanity
RCW 10.97.040	Criminal history information released must include disposition
RCW 10.97.050	Conviction and criminal history information
RCW 10.97.060	Deletion of certain criminal history record information, conditions
RCW 10.97.070	Disclosure of identity of suspect to victim
RCW 10.97.080	Inspection of criminal record by subject
RCW 13.32A.090	Crisis residential centers notice to parent about child
RCW 13.34.115	Court dependency proceedings
RCW 13.40.217	Juveniles adjudicated of sex offenses – release of information
RCW 13.50.010	Maintenance of and access to juvenile records
RCW 13.50.050	Juvenile offenders
RCW 13.50.100	Juvenile/children records not relating to offenses
RCW 13.60.020	Missing children information
RCW 13.70.090	Citizen juvenile review board – confidentiality
RCW 18.04.405	Confidentiality of information gained by CPA
RCW 18.19.060	Notification to clients by counselors
RCW 18.19.180	Confidential communications with counselors
RCW 19.215.020	Destruction of personal health and financial information
RCW 19.34.240(3)	Private digital signature keys
RCW 19.215.030	Compliance with federal rules

Citation	Records
RCW 26.04.175	Name and address of domestic violence victim in marriage records
RCW 26.12.170	Reports of child abuse/neglect with courts
RCW 26.23.050	Child support orders
RCW 26.23.120	Child support records
RCW 26.26.041	Uniform Parentage Act – protection of participants
RCW 26.26.450	Confidentiality of genetic testing
RCW 26.33.330	Sealed court adoption records
RCW 26.33.340	Agency adoption records
RCW 26.33.343	Access to adoption records by confidential intermediary
RCW 26.33.345	Release of name of court for adoption or relinquishment
RCW 26.33.380	Adoption – identity of birth parents confidential
RCW 26.44.010	Privacy of reports on child abuse and neglect
RCW 26.44.020(19)	Unfounded allegations of child abuse or neglect
RCW 26.44.030	Reports of child abuse/neglect
RCW 26.44.125	Right to review and amend abuse finding – confidentiality
RCW 27.53.070	Records identifying the location of archaeological sites
RCW 29A.08.720	Voter registration records – place of registration confidential
RCW 29A.08.710	Voter registration records – certain information exempt
RCW 35.102.145	Municipal business and occupation tax – Confidentiality, privilege, and disclosure
Chapter 40.14 RCW	Preservation and destruction of public records
RCW 42.23.070(4)	Municipal officer disclosure of confidential information prohibited
RCW 42.41.030(7)	Identity of local government whistleblower
RCW 42.41.045	Non-disclosure of protected information (whistleblower)
RCW 46.52.080	Traffic accident reports – confidentiality
RCW 46.52.083	Traffic accident reports – available to interested parties

Citation	Records
RCW 46.52.120	Traffic crimes and infractions – confidential use by police and courts
RCW 46.52.130(2)	Abstract of driving record
RCW 48.62.101	Local government insurance transactions – access to information
RCW 50.13.060	Access to employment security records by local government agencies
RCW 50.13.100	Disclosure of non-identifiable information or with consent
RCW 51.28.070	Worker's compensation records
RCW 51.36.060	Physician information on injured workers
RCW 60.70.040	No duty to disclose record of common law lien
RCW 68.50.105	Autopsy reports
RCW 68.50.320	Dental identification records – available to law enforcement agencies
Chapter 70.02 RCW	Medical records – access and disclosure – entire chapter (HC providers)
RCW 70.05.170	Child mortality reviews by local health departments
RCW 70.24.022	Public health agency information regarding sexually transmitted disease investigations - confidential
RCW 70.24.024	Transcripts and records of hearings regarding sexually transmitted diseases
RCW 70.24.105	HIV/STD records
RCW 70.28.020	Local health department TB records – confidential
RCW 70.48.100	Jail records and booking photos
RCW 70.58.055	Birth certificates – certain information confidential
RCW 70.58.104	Vital records, research confidentiality safeguards
RCW 70.94.205	Washington Clean Air Act – confidentiality of data.
RCW 70.96A.150	Alcohol and drug abuse treatment programs
RCW 70.123.075	Client records of domestic violence programs
RCW 70.125.065	Records of rape crisis centers in discovery
RCW 71.05.390	Information about mental health consumers

Citation	Records
RCW 71.05.395	Ch. 70.02 RCW applies to mental health records
RCW 71.05.400	Information to next of kin or representative
RCW 71.05.425	Notice of release or transfer of committed person after offense dismissal
RCW 71.05.427	Information that can be released
RCW 71.05.430	Statistical data
RCW 71.05.440	Penalties for unauthorized release of information
RCW 71.05.445	Release of mental health information to Dept. of Corrections
RCW 71.05.620	Authorization requirements and access to court records
RCW 71.05.630	Release of mental health treatment records
RCW 71.05.640	Access to treatment records
RCW 71.05.650	Accounting of disclosures
RCW 71.24.035(5)(g)	Mental health information system – state, county and regional support networks – confidentiality of client records
RCW 71.34.200	Mental health treatment of minors – records confidential
RCW 71.34.210	Court records for minors related to mental health treatment
RCW 71.34.225	Release of mental health services information
RCW 71A.14.070	Records regarding developmental disability – confidentiality
RCW 72.09.345	Notice to public about sex offenders
RCW 72.09.585(3)	Disclosure of inmate records to local agencies – confidentiality
RCW 73.04.030	Veterans discharge papers exemption (see related RCW 42.56.440)
RCW 74.04.060	Applicants and recipients of public assistance
RCW 74.04.520	Food stamp program confidentiality
RCW 74.09.900	Medical assistance
RCW 74.13.121	Financial information of adoptive parents
RCW 74.13.280	Children in out-of-home placements - confidentiality
RCW 74.20.280	Child support enforcement – local agency cooperation, information

Citation	Records
RCW 74.34.095	Abuse of vulnerable adults - confidentiality of investigations and reports
RCW 82.32.330	Disclosure of tax information
RCW 84.36.389	Confidential income data in property tax records held by assessor
RCW 84.40.020	Confidential income data supplied to assessor regarding real property

Selected Federal Confidentiality Statutes and Rules

18 USC § 2721 - 2725	Driver and License Plate Information
20 USC § 1232g	Family Education Rights and Privacy Act
23 USC § 409	Evidence of certain accident reports
42 USC 290dd-2	Confidentiality of Substance Abuse Records
42 USC § 405(c)(2)(C)(viii)(I)	Limits on Use and Disclosure of Social Security Numbers.
42 USC 654(26)	State Plans for Child Support
42 USC 671(a)(8)	State Plans for Foster Care and Adoption Assistance
42 USC 1396a(7)	State Plans for Medical Assistance
7 CFR 272.1(c)	Food Stamp Applicants and Recipients
34 CFR 361.38	State Vocational Rehabilitation Services Programs
42 CFR Part 2 (2.1 - 2.67)	Confidentiality of Alcohol and Drug Abuse Patient Records
42 CFR 431.300 - 307	Safeguarding Information on Applicants and Recipients of Medical Assistance
42 CFR 483.420	Client Protections for Intermediate Care Facilities for the Mentally Retarded
42 CFR 5106a(b)(2)(A)	Grants to States for Child Abuse and Neglect Prevention and Treatment Programs
45 CFR 160-164	HIPAA Privacy Rule
46 CFR 40.321	USCG regulations regarding confidentiality of drug and alcohol test results done by marine employers

Appendix D

Public Disclosure Act Model Rules

Chapter 44-14 WAC
PUBLIC RECORDS ACT—MODEL RULES

WAC

INTRODUCTORY COMMENTS

44-14-00001 Statutory authority and purpose.
44-14-00002 Format of model rules.
44-14-00003 Model rules and comments are nonbinding.
44-14-00004 Recodification of the act.
44-14-00005 Training is critical.
44-14-00006 Additional resources.

AUTHORITY AND PURPOSE

44-14-010 Authority and purpose.

Comments to WAC 44-14-010

44-14-01001 Scope of coverage of Public Records Act.
44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests.
44-14-01003 Construction and application of act.

AGENCY DESCRIPTION—CONTACT INFORMATION—PUBLIC RECORDS OFFICER

44-14-020 Agency description—Contact information—Public records officer.

Comments to WAC 44-14-020

44-14-02001 Agency must publish its procedures.
44-14-02002 Public records officers.

AVAILABILITY OF PUBLIC RECORDS

44-14-030 Availability of public records.

Comments to WAC 44-14-030

44-14-03001 "Public record" defined.
44-14-03002 Times for inspection and copying of records.
44-14-03003 Index of records.
44-14-03004 Organization of records.
44-14-03005 Retention of records.
44-14-03006 Form of requests.

PROCESSING OF PUBLIC RECORDS REQUESTS—GENERAL

44-14-040 Processing of public records requests—General.

Comments on WAC 44-14-040

44-14-04001 Introduction.
44-14-04002 Obligations of requestors.
44-14-04003 Responsibilities of agencies in processing requests.
44-14-04004 Responsibilities of agency in providing records.
44-14-04005 Inspection of records.
44-14-04006 Closing request and documenting compliance.
44-14-04007 Later-discovered records.

PROCESSING OF PUBLIC RECORDS REQUESTS—ELECTRONIC RECORDS

44-14-050 Processing of public records requests—Electronic records.

Comments to WAC 44-14-050

44-14-05001 Access to electronic records.
44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records.
44-14-05003 Parties should confer on technical issues.
44-14-05004 Customized access.
44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information."

EXEMPTIONS

44-14-060 Exemptions.

Comments to WAC 44-14-060

44-14-06001 Agency must publish list of applicable exemptions.
44-14-06002 Summary of exemptions.

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS

44-14-070 Costs of providing copies of public records.

Comments to WAC 44-14-070

44-14-07001 General rules for charging for copies.
44-14-07003 Charges for electronic records.
44-14-07004 Other statutes govern copying of particular records.
44-14-07005 Waiver of copying charges.
44-14-07006 Requiring partial payment.

REVIEW OF DENIALS OF PUBLIC RECORDS

44-14-080 Review of denials of public records.

Comments to WAC 44-14-080

44-14-08001 Agency internal procedure for review of denials of requests.
44-14-08002 Attorney general's office review of denials by state agencies.
44-14-08003 Alternative dispute resolution.
44-14-08004 Judicial review.

INTRODUCTORY COMMENTS

WAC 44-14-00001 Statutory authority and purpose. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time. RCW 42.17.348 (2) and (3)/42.56.570 (2) and (3). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, RCW 42.17.250/42.56.040 through 42.17.348/42.56.570 ("act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.

The act applies to all state agencies and local units of government. The model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "name of agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, www.atg.wa.gov/records/modelrules.

The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments that are contained in the rule-making file. The model rules reflect many of the points and concerns presented in those forums.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all"

approach in the model rules, therefore, may not be best for requestors and agencies.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00002 Format of model rules. We are publishing the model rules with comments. The comments have five-digit WAC numbers such as WAC 44-14-04001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-040.

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. To do so, the comments contain many citations to statutes, cases, and formal attorney general's opinions.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00004 Recodification of the act. On July 1, 2006, the act will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic. The recodification does not change substantive law. The model rules provide dual citations to the current act, chapter 42.17 RCW, and the newly codified act, chapter 42.56 RCW (for example, RCW 42.17.340/42.56.550).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00005 Training is critical. The act is complicated, and compliance requires training. Training can be the difference between a satisfied requestor and expensive litigation. The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance. All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-00006 Additional resources. Several web sites provide information on the act. The attorney general office's web site on public records is www.atg.wa.gov/records/deskbook.shtml. The municipal research service center, an entity serving local governments, provides a public records handbook at www.mrsc.org/Publications/prdpub04.pdf. A requestor's organization, the Washington Coalition for Open Government, has materials on its site at www.washingtoncog.org.

The Washington State Bar Association is publishing a twenty-two-chapter deskbook on public records in 2006. It will be available for purchase at www.wsba.org.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-00006, filed 1/31/06, effective 3/3/06.]

AUTHORITY AND PURPOSE

WAC 44-14-010 Authority and purpose. (1) RCW 42.17.260(1)/42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" to include 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 the agency. RCW 42.17.260(2)/42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-010, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-010

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW 42.17.260(1)/42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17.020(2).

Court files and judges' files are not subject to the act.[1] Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

(1) Whether the entity performs a government function;

(2) The level of government funding;

(3) The extent of government involvement or regulation; and

(4) Whether the entity was created by the government. Op. Att'y Gen. 2 (2002).[2]

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). However, the act defines the county as a whole as an "agency" subject to the act. RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (agency's public records officer must "oversee the agency's compliance" with act).

Notes: [1]*Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

[2]*See also Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886, *review denied*, 138 Wn.2d 1015, 989 P.2d 1143 (1999); Op. Att'y Gen. 5 (1991).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides: "Agencies shall adopt and enforce reasonable rules and regulations…to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency…. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290/42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW 42.17.270/42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-01003 Construction and application of act. The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.17.251/42.56.030. The act further provides: "…mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The act further provides: "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.17.340(3)/42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.

The act emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW 42.17.010, 42.17.251/42.56.030, 42.17.920.[1] The act places the burden on the agency of proving a record is not subject to disclosure or that its estimate of time to provide a full response is "reasonable." RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The act also encourages disclosure by awarding a requestor reasonable attorneys fees, costs, and a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure or its estimate is not "reasonable." RCW 42.17.340(4)/42.56.550(4).

An additional incentive for disclosure is RCW 42.17.258, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

Note: [1]*See King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-01003, filed 1/31/06, effective 3/3/06.]

AGENCY DESCRIPTION—CONTACT INFORMATION—PUBLIC RECORDS OFFICER

WAC 44-14-020 Agency description—Contact information—Public records officer. (1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number)
(e-mail)

Information is also available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-020, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-020

WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW 42.17.250(1)/42.56.040(1).[1] A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local agency. RCW 42.17.250(1)/42.56.040(1). An agency should post its public records rules on its web site. An agency cannot invoke a procedure if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW 42.17.250(2)/42.56.040(2).

Note: [1]*See, e.g.*, WAC 44-06-030 (attorney general office's organizational and public records methods statement).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-02001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW 42.17.253(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW 42.17.253(3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-02002, filed 1/31/06, effective 3/3/06.]

AVAILABILITY OF PUBLIC RECORDS

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency).

(2) **Records index.** (*If agency keeps an index.*) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed on-line at (web site address). (If there are multiple indices, describe each and its availability.)

(*If agency is local agency opting out of the index requirement.*) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form, or by letter, fax, or e-mail addressed to the public records officer and including the following information:

- Name of requestor;
- Address of requestor;
- Other contact information, including telephone number and any e-mail address;
- Identification of the public records adequate for the public records officer or designee to locate the records; and
- The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), standard photocopies will be provided at (amount) cents per page.

(c) A form is available for use by requestors at the office of the public records officer and on-line at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or des-

ignee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-030, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-030

WAC 44-14-03001 "Public record" defined. Courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.[1]

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: "…handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.17.020(48). An e-mail is a "writing."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself were not.[2]

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."[3] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.[4] The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.[5]

Sometimes agency employees work on agency business from home computers. These home computer records (including e-mail) were "used" by the agency and relate to the "conduct of government" so they are "public records." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property.[6] If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

Notes:

[1] *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998). For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41).

[2] *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).

[3] *Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).

[4] *Id.*

[5] *See* Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

[6] *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW 42.17.280/42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03003 Index of records. State and local agencies are required by RCW 42.17.260/42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6)/42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies.

A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW 42.17.260(5)/42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW 42.17.260 (4)(a)/42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03004 Organization of records. An agency must "protect public records from damage or disorganization." RCW 42.17.290/42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).

The legislature encourages agencies to electronically store and provide public records:

Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens...and governments. ...

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW 43.105.250. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. Agencies are encouraged to do so. For those without access to the internet, an agency could provide a computer terminal at its office.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.[1] Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at www.secstate.wa.gov/archives/gs.aspx.

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling e-mails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all e-mails after a short period may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules.

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW 42.17.290/42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. An exception exists for certain portions of a state employee's personnel file. RCW 42.17.295/42.56.110.

Note: [1]An agency can be found to violate the act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record. *See Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request.[1] A request can be sent in by mail. RCW 42.17.290/42.56.100. A request can also be made by e-mail, fax, or orally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies). An agency is encouraged to make its public records request form available on its web site.

A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the

exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-04002(1), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.

An agency should have a public records request form. An agency request form should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form should recite that inspection of records is free and provide the per-page charge for standard photocopies.

An agency request form should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or e-mail should be provided. Requestors should provide an e-mail address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

An agency cannot require the requestor to disclose the purpose of the request with two exceptions. RCW 42.17.270/42.56.080. First, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose.[2] An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW 42.17.260(9)/42.56.070(9).

Second, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to a claimant for benefits or his or her representative. In such cases, an agency is authorized to ask the requestor if he or she fits this criterion.

An agency is not authorized to require a requestor to indemnify the agency. Op. Att'y Gen. 12 (1988).[3]

Notes: [1]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.").

[2]Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.

[3]RCW 42.17.258/42.56.060 provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-03006, filed 1/31/06, effective 3/3/06.]

PROCESSING OF PUBLIC RECORDS REQUESTS—GENERAL

WAC 44-14-040 Processing of public records requests—General. (1) **Providing "fullest assistance."** The (name of agency) is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

(2) **Acknowledging receipt of request.** Within five business days of receipt of the request, the public records officer will do one or more of the following:

(a) Make the records available for inspection or copying;

(b) If copies are requested and payment of a deposit for the copies, if any, is made or terms of payment are agreed upon, send the copies to the requestor;

(c) Provide a reasonable estimate of when records will be available; or

(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone. The public records officer or designee may revise the estimate of when records will be available; or

(e) Deny the request.

(3) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should consider contacting the public records officer to determine the reason for the failure to respond.

(4) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

(5) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record or a portion of the record is being withheld. If only

a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

(6) **Inspection of records.**

(a) Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

(b) The requestor must claim or review the assembled records within thirty days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

(7) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying.

(8) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

(9) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a diligent search for the requested records and made any located nonexempt records available for inspection.

(10) **Closing withdrawn or abandoned request.** When the requestor either withdraws the request or fails to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the (name of agency) has closed the request.

(11) **Later discovered documents.** If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-040, filed 1/31/06, effective 3/3/06.]

Comments on WAC 44-14-040

WAC 44-14-04001 Introduction. Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to request identifiable records, inspect the assembled records or pay for the copies, and be respectful to agency staff.[2]

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

The burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable." RCW 42.17.340(2)/42.56.550(2). An agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. An agency is allowed, of course, to do more for the requestor than is required by the letter of the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW 43.105.270 (state agencies encouraged to post frequently sought documents on the internet).

Notes: [1]RCW 42.17.260(1)/42.56.070(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

[2]*See* RCW 42.17.270/42.56.080 ("identifiable record" requirement); RCW 42.17.300/42.56.120 (claim or review requirement); RCW 42.17.290/42.56.100 (agency may prevent excessive interference with other essential agency functions).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04002 Obligations of requestors. (1) **Reasonable notice that request is for public records.** A requestor must give an agency reasonable notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.[1] A request using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests) should provide an agency with reasonable notice in most cases. A

requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW 42.17.270/42.56.080 and 42.17.340(1)/42.56.550(1). An "identifiable record" is one that agency staff can reasonably locate.[2] The act does not allow a requestor to search through agency files for records which cannot be reasonably identified or described to the agency.[3] However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.[4]

An "identifiable record" is not a request for "information" in general.[5] For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."[6] A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories. An agency is not required to conduct legal research for a requestor.[7] A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW 42.17.270/42.56.080. However, if such a request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes: [1]*Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

[2]*Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

[3]*Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002).

[4]*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).

[5]*Bonamy*, 92 Wn. App. at 409.

[6]*Id.*

[7]*See Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public.").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is for a commercial use or would violate another statute prohibiting disclosure). RCW 42.17.270/42.56.080.[1] The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.17.290/42.56.100 and 42.17.270/42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.[3]

An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW 42.17.270/42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

(2) **Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor. RCW 42.17.290/42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW 42.17.290/42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW 42.17.290/42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

(3) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If the request is modified orally, the public records officer or designee should memorialize the communication in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she

is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

(4) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;

(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to fully respond;

(c) Seek a clarification of the request; or

(d) Deny the request. RCW 42.17.320/42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.[2]

(5) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.[4] However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. If the agency is considering creating a new record instead of disclosing the underlying records, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records. Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. Similarly, eliminating a field of an electronic record can be a method of redaction; it is similar to redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying.

(6) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.17.320/42.56.520. Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW 42.17.340(2)/42.56.550(2). See WAC 44-14-08004 (5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW 42.17.340(2)/42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to fully provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requestor the basis for the estimate in the initial response. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

(7) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" request. RCW 42.17.320/42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320/42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW 42.17.320/42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(8) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW 42.17.290/42.56.100.[5] Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(9) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own.[6] A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees if they have responsive records. If the agency is larger, the agency

may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments. It is better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records.

Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents.

(10) **Expiration of reasonable estimate.** An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record.

(11) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure.[7] RCW 42.17.330/42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW 42.17.330/42.56.540. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW 42.17.330/42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258/42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258/42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date to avoid any confusion. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include the notice period in the "reasonable estimate" it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

(12) **Later discovered records.** If the agency becomes aware of the existence of records responsive to a request which were not provided, the agency should notify the requestor in writing and provide a brief explanation of the circumstances.

Notes: [1]*See also* Op. Att'y Gen. 2 (1998).

[2]*See Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty.").

[3]While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.

[4]*Smith*, 100 Wn. App. at 14.

[5]An exception is some state-agency employee personnel records. RCW 42.17.295/42.56.110.

[6]*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

[7]The agency holding the record can also file a RCW 42.17.330/42.56.540 injunctive action to establish that it is not required to release the record or portion of it.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-04003, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or e-mail briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the

request had been closed. However, a cover letter or e-mail might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW 42.17.270/42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.[1] Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.[2] The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its web site. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge.

(3) **Providing records in installments.** The act now provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.17.270/42.56.080. The purpose of this provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments.

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW 42.17.290/42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

Does not have the record;

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; or

Without justification, fails to provide the record after the reasonable estimate expires.

(a) **When the agency does not have the record.** An agency is only required to provide access to public records it has or has used.[3] An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

(b) **Claiming exemptions.**

(i) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW 42.17.310(2)/42.56.210(1). There are a few exceptions.[5] Withholding an entire record where only a portion of it is exempt violates the act.[6] Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure. RCW 42.17.310 (1)(e)/42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW 42.17.310(2)/42.56.210(1). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a

copy. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted. For electronic records such as data bases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). See (b)(ii) of this subsection.

(ii) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4)/42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).[7] The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

(5) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.[8] The notification should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. The notification can be oral to provide the most timely possible response.

(6) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making an index or list of the files or records made available for inspection.

Notes:

[1] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

[2] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997).

[3] *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

[4] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

[5] The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

[6] *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

[7] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

[8] For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-04004, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04005 Inspection of records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW 42.17.300/42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW 42.17.300/42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW 42.17.290/42.56.100.

If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors, can process the repeat request for the now-refiled records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW 42.17.280/42.56.090.

Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290/42.56.100. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not destroyed or disorganized. RCW 42.17.290/42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: [1]*See, e.g.*, WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04006 Closing request and documenting compliance. (1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW 42.17.270/42.56.080. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW 42.17.290/42.56.100.

(3) **Retain copy of records provided.** In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided. A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for a period of time consistent with the agency's retention schedules for records related to disclosure of documents.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04006, filed 1/31/06, effective 3/3/06.]

WAC 44-14-04007 Later-discovered records. An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-04007, filed 1/31/06, effective 3/3/06.]

PROCESSING OF PUBLIC RECORDS REQUESTS—ELECTRONIC RECORDS

WAC 44-14-050 Processing of public records requests—Electronic records. (1) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

(2) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the agency and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by WAC 44-14-07003.

(3) **Customized access to data bases.** With the consent of the requestor, the agency may provide customized access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested. The (agency) may charge a fee consistent with RCW 43.105.280 for such customized access.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-050, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-050, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-050

WAC 44-14-05001 Access to electronic records. The Public Records Act does not distinguish between paper and electronic records. Instead, the act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be obtained or translated." RCW 42.17.020(48) (incorporated by reference into the act by RCW 42.56.010). Many agency records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW 43.105.250 provides: "It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public

records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public." In general, an agency should provide electronic records in an electronic format if requested in that format. Technical feasibility is the touchstone for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the agency might consider customized access. See WAC 44-14-05004. An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC 44-14-050(3). What is technically feasible in one situation may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC 44-14-05003. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05001, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records. (1) **"Reasonably locatable" electronic records.** The act obligates an agency to provide nonexempt "identifiable…records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC 44-14-04002(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the agency's current software. For example, a retained e-mail containing the term "XYZ" is usually reasonably locatable by using the e-mail program search feature. However, an e-mail search feature has limitations, such as not searching attachments, but is a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained e-mails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's e-mail program, a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a data base of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the data base to determine which businesses are publicly traded corporations.

(2) **"Reasonably translatable" electronic records.** The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine. Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take reasonable steps to translate the agency's original into a useable copy for the requestor.

The "reasonably translatable" concept typically operates in three kinds of situations:

(a) An agency has only a paper record;

(b) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or

(c) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

(i) **Agency has paper-only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual cost for scanning. See WAC 44-14-07003. Providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.

(ii) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. An agency cannot instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legi-

ble one. Similarly, the WordPerfect® "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

(iii) **Agency has electronic records in an electronic format other than the format requested**. When an agency has an electronic record in an electronic format (such as a Word® document) but the requestor seeks a copy in another format (such as WordPerfect®), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, this would be "reasonably translatable." The agency's record might not translate perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a data base in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a data base program (such as Access®) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word®) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word® format but the requestor refuses. The agency can easily convert the Word® document into a standard text file which, in turn, can be converted into most programs. The Word® document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, an agency should keep, when feasible, an electronic copy of the electronic records it provides to a requestor to show the exact records it provided. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05002, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05003 Parties should confer on technical issues. Technical feasibility can vary from request to request. When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the requirement that agencies provide the "fullest assistance" to a requestor. RCW 42.56.100 and WAC 44-14-04003(2). Furthermore, if a requestor files an enforcement action under the act to obtain the records, the burden of proof is on the agency to justify its refusal to provide the records. RCW 42.56.550(1). If the requestor articulates a reasonable technical alternative to the agency's refusal to provide the records electronically or in the requested format, and the agency never offered to confer with the requestor, the agency will have difficulty proving that its refusal was justified.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05003, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05004 Customized access. When locating the requested records or translating them into the requested format cannot be done without specialized programming, RCW 43.105.280 allows agencies to charge some fees for "customized access." The statute provides: "Agencies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue." Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards. Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state agency's old computer system stored data in a manner in which it was impossible to extract the data into comma-delimited or tab-delimited formats, but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it. Before resorting to customized access, the agency should confer with the requestor to determine if a technical solution exists not requiring the specialized programming.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05004, filed 6/15/07, effective 7/16/07.]

WAC 44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information." The December 2006 amendments to the Federal Rules of Civil Procedure provide guidance to parties in litigation on their respective obligations to provide access to, or produce, "electronically stored information." See Federal Rules of Civil Procedure 26 and 34. The obligations of state and local agencies under those federal rules (and under any state-imposed rules or procedures that adopt the federal rules) to search for and provide electronic records may be different, and in some instances more demanding, than those required under the Public Records Act. The federal discovery rules and the Public Records Act are two separate laws imposing different standards. However, sometimes requestors make public records requests to obtain evidence that later may be used in non-Public Records Act litigation against the agency providing the records. Therefore, it may be prudent for agencies to consult with their attorneys regarding best practices of retaining copies of the records provided under the act so there can be no question later of what was and what was not produced in response to the request in the event that electronic records, or records derived from them, become issues in court.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-05005, filed 6/15/07, effective 7/16/07.]

EXEMPTIONS

WAC 44-14-060 Exemptions. (1) The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of agency) for inspection and copying:

(List other laws)

(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-060, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-060

WAC 44-14-06001 Agency must publish list of applicable exemptions. An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. RCW 42.17.260(2)/42.56.070(2). The list is "for informational purposes" only and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW 42.17.260(2)/42.56.070(2). A list of possible "other statute" exemptions is posted on the web site of the Municipal Research Service Center at www.mrsc.org/Publications/prdpub04.pdf (scroll to Appendix C).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-06001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-06002 Summary of exemptions. (1) **General.** The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules merely provide guidance on a few of the most common issues.

An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.[1]

An agency cannot define the scope of a statutory exemption through rule making or policy.[2] An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).[3] Any agency contract regarding the disclosure of records should recite that the act controls.

An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.[4]

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.[5] Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

(2) **"Privacy" exemption.** There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).[6] However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b)/42.56.210 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b)/42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.

"Privacy" is defined in RCW 42.17.255/42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.[7]

Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255/42.56.050 as an exemption.[8]

(3) **Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.[9] In addition, RCW 42.17.310 (1)(j)/42.56.210 (1)(j) exempts attorney work-product involving a "controversy," which means completed, existing, or reasonably anticipated litigation involving the agency.[10] The exact boundaries of the attorney-client privilege and work-product doctrine is beyond the scope of these comments. However, in general, the attorney-client privilege covers records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. The attorney-client privilege does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.[11] A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product doctrine is available at www.atg.wa.gov/records/modelrules.

(4) **Deliberative process exemption.** RCW 42.17.310 (1)(i)/42.56.210 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[12] Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.[13] It applies only to those portions of a record containing recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.[14] The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.[15] The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.[16]

(5) **"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270/42.56.080. See WAC 44-14-04002(3).

(6) **Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9)/42.56.070(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.[17] This authority is limited to a list of individuals, not a list of companies.[18] A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.[19]

(7) **Trade secrets.** Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.[20] However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.

When an agency receives a request for a record that might be a trade secret, often it does not have enough information to determine whether the record arguably qualifies as a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320/42.56.520.

When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330/42.56.540. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of why it contends the record is a trade secret, and state that if the record is not a trade secret or otherwise exempt from disclosure that the agency intends to release it. The agency should inform the potential holder of a trade secret that its explanation will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330/42.56.540.

As a general matter, many agencies do not assert the trade secret exemption on behalf of the potential holder of the trade secret but rather allow the potential holder to seek an injunction.

Notes:

[1] *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("*PAWS II*").

[2] *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).

[3] *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).

[4] *PAWS II*, 125 Wn.2d at 253.

[5] Op. Att'y Gen. 7 (1986).

[6] *See* RCW 42.17.255/42.56.050 ("privacy" linked to rights of privacy "specified in (the act) as express exemptions").

[7] *King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).

[8] Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").

[9] *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).

[10] *Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).

[11] This summary comes from the attorney general's proposed definition of the privilege in the first version of House Bill No. 1758 (2005).

[12] *PAWS II*, 125 Wn.2d at 256.

[13] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.

[14] *PAWS II*, 125 Wn.2d at 256.

[15] *Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).

[16] *Dawson*, 120 Wn.2d at 793.

[17] Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9)/42.56.070(9).

[18] Op. Att'y Gen. 2 (1998).

[19] RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270/42.56.080 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. *See* Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).

[20] *PAWS II*, 125 Wn.2d at 262.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-06002, filed 1/31/06, effective 3/3/06.]

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS

WAC 44-14-070 Costs of providing copies of public records. (1) **Costs for paper copies.** There is no fee for inspecting public records. A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.

(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white photocopy of a record selected by a requestor. A statement of the factors and the manner used to determine this charge is available from the public records officer.

Before beginning to make the copies, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the agency has scanning equipment at its offices: The cost of scanning existing (agency) paper or other non-electronic records is (amount) per page.) There will be no charge for e-mailing electronic records to a requestor, unless another cost applies such as a scanning fee.

(3) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.

(4) **Payment.** Payment may be made by cash, check, or money order to the (name of agency).

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-070, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-070, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-070

WAC 44-14-07001 General rules for charging for copies. (1) **No fees for costs of inspection.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW 42.17.300/42.56.120.[1] An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from offsite. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

(2) **Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.

If it attempts to charge more than the fifteen cents per page maximum for photocopies, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to the determine the actual per page cost." RCW 42.17.260(7)/42.56.070(7). An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.260 (7)(a)/42.56.070 (7)(a).[2] An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260 (7)(a) and (b)/42.56.070 (7)(a) and (b) and 42.17.300/42.56.120.

If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.[3] A price list with no analysis is insufficient. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers.

If an agency opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs. RCW 42.17.260(8)/42.56.070(8).

(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. An agency can charge its actual costs for nonstandard photocopies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.

(4) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW 42.17.300/42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed, provided that the requestor is informed that inspection is free. Informing the requestor on a request form that inspection is free is sufficient.

(5) **Use of outside vendor.** An agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor. An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. An agency cannot charge the default fifteen cents per page rate when its "actual cost" at a copying vendor is less. The default rate is only for agency-produced copies. RCW 42.17.300/42.56.120.

(6) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

(7) **Costs of mailing.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope). RCW 42.17.260 (7)(a)/42.56.070 (7)(a).

Notes: [1]*See also* Op. Att'y Gen. 6 (1991).

[2]The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. *See* RCW 42.17.300/42.56.120 ("No fee shall be charged for locating public documents and making them available for copying.").

[3]*See also* Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07003 Charges for electronic records. Providing copies of electronic records usually costs the agency and requestor less than making paper copies. Agencies are strongly encouraged to provide copies of electronic records in an electronic format. See RCW 43.105.250 (encouraging state and local agencies to make "public records widely available electronically to the public."). As with charges for paper copies, "actual cost" is the primary factor for charging for electronic records. In many cases, the "actual cost" of providing an existing electronic record is de minimis. For example, a requestor requests an agency to e-mail an existing Excel® spreadsheet. The agency should not charge for the de minimis cost of electronically copying and e-mailing the existing spreadsheet. The agency cannot attempt to charge a per-page amount for a paper copy when it has an electronic copy that can be easily provided at nearly no cost. However, if the agency has a paper-only copy of a record and the requestor requests an Adobe Acrobat PDF® copy, the agency incurs an actual cost in scanning the record (if the agency has a scanner at its offices). Therefore, an agency can establish a scanning fee for records it scans. Agencies are encouraged to compare their scanning and other copying charges to the rates of outside vendors. See WAC 44-14-07001.

[Statutory Authority: 2005 c 483 § 4, amending RCW 42.56.570. 07-13-058, § 44-14-07003, filed 6/15/07, effective 7/16/07. Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07004 Other statutes govern copying of particular records. The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW 42.17.305/42.56.130. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07004, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07005 Waiver of copying charges. An agency has the discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07005, filed 1/31/06, effective 3/3/06.]

WAC 44-14-07006 Requiring partial payment. (1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request before beginning to copy the records. RCW 42.17.300/42.56.120.[1] The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.

When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ten cents per page so the cost would be three hundred dollars. The agency obtains a ten percent deposit of thirty dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The thirty dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining two hundred sixty dollars before providing the records to the requestor.

(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment. RCW 42.17.300/42.56.120. The agency may agree to provide an installment without first receiving payment for that installment.

Note: [1]*See* RCW 42.17.300/42.56.120 (ten percent deposit for "a request").

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-07006, filed 1/31/06, effective 3/3/06.]

REVIEW OF DENIALS OF PUBLIC RECORDS

WAC 44-14-080 Review of denials of public records. (1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including e-mail) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two

business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW 42.17.325/42.56.530, if the (name of state agency) denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW 42.17.340/42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-080, filed 1/31/06, effective 3/3/06.]

Comments to WAC 44-14-080

WAC 44-14-08001 Agency internal procedure for review of denials of requests. The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW 42.17.320/42.56.520. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency. The act deems agency review to be complete two business days after the initial denial, after which the requestor may obtain judicial review. Large requests or requests involving many redactions may take longer than two business days for the agency to review. In such a case, the requestor could agree to a longer internal review period.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08001, filed 1/31/06, effective 3/3/06.]

WAC 44-14-08002 Attorney general's office review of denials by state agencies. The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW 42.17.325/42.56.530. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or publicrecords@atg.wa.gov.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08002, filed 1/31/06, effective 3/3/06.]

WAC 44-14-08003 Alternative dispute resolution. Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. No mechanisms for formal alternative dispute resolution currently exist in the act but parties are encouraged to resolve their disputes without litigation.

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08003, filed 1/31/06, effective 3/3/06.]

WAC 44-14-08004 Judicial review. (1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW 42.17.320/42.56.520.[1] Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.[2] An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW 42.17.320/42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.[3] To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW 42.17.340 (1) and (3)/42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW 42.17.340(6)/42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).[4] The case must be filed in the superior court in the county in which the record is maintained. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW 42.17.340(5)/42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.[5] However, most cases are decided on a motion to show cause.[6]

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW 42.17.340 (1) and (2)/42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW 42.17.340(1)/42.56.550(1). This is the most common kind of case.

(b) **"Reasonable estimate."** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response. RCW 42.17.340(2)/42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330/42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.[7] The party seeking to

prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.[8]

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW 42.17.340(3)/42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.[9]

An agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees, costs, and a daily penalty. RCW 42.17.340(4)/42.56.550(4). Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.[10] A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.[11] In an injunctive action under RCW 42.17.330/42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.[12]

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.[13] However, a court is only authorized to award "reasonable" attorneys' fees. RCW 42.17.340(4)/42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.[14]

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.[15]

A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."[16] An agency's "bad faith" can warrant a penalty on the higher end of this scale.[17] The penalty is per day, not per-record per-day.[18]

Notes:

[1] *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW 42.17.320/42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

[2] *See, e.g.*, WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

[3] *Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

[4] *See generally Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

[5] *Id*. at 106.

[6] *Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

[7] *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

[8] *PAWS II*, 125 Wn.2d at 257-58.

[9] *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

[10] RCW 42.17.340(4)/42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

[11] *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

[12] *Confederated Tribes*, 135 Wn.2d at 757.

[13] *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU II*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

[14] *Id*. at 118.

[15] *Id*. at 115.

[16] *American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").

[17] *Id*.

[18] *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

[Statutory Authority: 2005 c 483 § 4, RCW 42.17.348. 06-04-079, § 44-14-08004, filed 1/31/06, effective 3/3/06.]

Appendix E

Recodification Tables and Model Rules References

We would like to acknowledge the Foster Pepper firm for their work in compiling the chapter RCW 42.17 and chapter RCW 42.56 citations. MRSC has added the references to the WAC Model Rules.

Note that most of the specific statutory exemptions are not referenced in the Model Rules. The Model Rules focus primarily on the process for public records disclosure.

Table 1: Chapter 42.17 RCW to Chapter 42.56 RCW

PDA *(until 7/1/06)*	**PRA** *(after 7/1/06)*	**WAC** **Model Rules**
42.17.020	42.56.010	44-14-01001
42.17.250	42.56.040	44-14-02001
42.17.251	42.56.030	44-14-01003 44-14-06002
42.17.253	New**	44-14-020 44-14-02002
42.17.255	42.56.050	44-14-06002(2)
42.17.258	42.56.060	44-14-01003 44-14-04003
42.17.260	42.56.070	44-14-03003
42.17.260(1)	42.56.070	44-14-010 44-14-06002
42.17.260(2)	42.56.070(2)	44-14-010 44-14-060 44-14-06001
42.17.260(7)	42.56.070(7)	44-14-07001
42.17.260(9)	42.56.070(9)	44-14-03006 44-14-06002(6)

PDA *(until 7/1/06)*	**PRA** *(after 7/1/06)*	**WAC** **Model Rules**
42.17.270	42.56.080	44-14-01002 44-14-03006 44-14-04002 44-14-04003 44-14-04006
42.17.280	42.56.090	44-14-03002 44-14-04005
42.17.290	42.56.100	44-14-01002 44-14-04001 44-14-03004 44-14-04003 44-14-04006
42.17.295	42.56.110	
42.17.300	42.56.120	44-14-04005 44-14-070 44-14-07001
42.17.305	42.56.130	
42.17.310	42.56.210	44-14-04004 44-14-06002
42.17.310(1)(a)	42.56.230	
42.17.310(1)(b)	42.56.230	
42.17.310(1)(c)	42.56.230	
42.17.310(1)(d)	42.56.240	
42.17.310(1)(e)	42.56.240	
42.17.310(1)(f)	42.56.250	
42.17.310(1)(g)	42.56.250	
42.17.310(1)(h)	42.56.270	
42.17.310(1)(i)	42.56.280	44-14-06002(4)
42.17.310(1)(j)	42.56.290	44-14-06002(3)
42.17.310(1)(k)	42.56.300	
42.17.310(1)(l)	42.56.310	
42.17.310(1)(m)	42.56.270	

PDA *(until 7/1/06)*	**PRA** *(after 7/1/06)*	**WAC Model Rules**
42.17.310(1)(n)	42.56.480	
42.17.310(1)(o)	42.56.270	
42.17.310(1)(p)	42.56.320	
42.17.310(1)(q)	42.56.330	
42.17.310(1)®	42.56.270	
42.17.310(1)(s)	42.56.340	
42.17.310(1)(t)	42.56.250	
42.17.310(1)(u)	42.56.250	
42.17.310(1)(v)	42.56.330	
42.17.310(1)(w)	42.56.350	
42.17.310(1)(x)	42.56.360	
42.17.310(1)(y)	42.56.360	
42.17.310(1)(z)	42.56.270	
42.17.310(1)(aa)	42.56.270	
42.17.310(1)(bb)	42.56.270	
42.17.310(1)(cc)	42.56.370	
42.17.310(1)(dd)	42.56.250	
42.17.310(1)(ee)	42.56.250	
42.17.310(1)(ff)	42.56.380	
42.17.310(1)(gg)	42.56.270	
42.17.310(1)(hh)	42.56.360	
42.17.310(1)(ii)	42.56.480	
42.17.310(1)(jj)	42.56.270	
42.17.310(1)(kk)	42.56.390	
42.17.310(1)(ll)	42.56.330	

PDA *(until 7/1/06)*	**PRA** *(after 7/1/06)*	**WAC Model Rules**
42.17.310(1)(mm)	42.56.330	
42.17.310(1)(nn)	42.56.330	
42.17.310(1)(oo)	42.56.360	
42.17.310(1)(pp)	42.56.400	
42.17.310(1)(qq)	42.56.320	
42.17.310(1)(rr)	42.56.240	
42.17.310(1)(ss)	42.56.230	
42.17.310(1)(tt)	42.56.270	
42.17.310(1)(uu)	42.56.410	
42.17.310(1)(vv)	42.56.320	
42.17.310(1)(ww)	42.56.420	
42.17.310(1)(xx)	42.56.430	
42.17.310(1)(yy)	42.56.430	
42.17.310(1)(zz)	42.56.430	
42.17.310(1)(aaa)	42.56.440	
42.17.310(1)(bbb)	42.56.420	
42.17.310(1)(ccc)	42.56.420	
42.17.310(1)(ddd)	42,56,420	
42.17.310(1)(eee)	42.56.400	
42.17.310(1)(fff)	42.56.270	
42.17.310(1)(ggg)	42.56.330	
42.17.310(1)(hhh)	42.56.270	
42.17.310(1)(iii)	New**	
42.17.310(1)(jjj)	42.56.270++	
42.17.310(1)(jjj)	42.56.380++	

PDA *(until 7/1/06)*	**PRA** *(after 7/1/06)*	**WAC Model Rules**
42.17.310(1)(kkk)	42.56.380	
42.17.311	42.56.510	
42.17.312	42.56.360	
42.17.313	42.56.450	
41.17.314	42.56.330	
42.17.315	42.56.320	
42.16.316	42.56.360	
42.17.317	42.56.380	
42.17.318	42.56.240	
42.17.319	42.56.270	
42.17.31901	42.56.240	
42.17.31902	42.56.360	
42.17.31903	42.56.400	
42.17.31904	42.56.400	
42.17.31905	42.56.400	
42.17.31906	42.56.460	
42.17.31907	42.56.380	
42.17.31908	42.56.400	
42.17.31909	42.56.380	
42.17.31910	42.56.360	
42.17.31911	42.56.400	
42.17.31912	42.56.330	
42.17.31913	42.56.250	
42.17.31914	42.56.420	
42.17.31915	42.56.400	

PDA *(until 7/1/06)*	**PRA** *(after 7/1/06)*	**WAC** **Model Rules**
42.17.31916	42.56.400	
42.17.31917	42.56.400	
42.17.31918	42.56.380	
42.17.31919	42.56.380	
42.17.31920	42.56.480	
42.17.31921	42.56.470	
42.17.31922	New**	
42.17.31923	New**	
42.17.320	42.56.520	44-14-04003 44-14-08001 44-14-08004
42.17.325	42.56.530	44-14-08002
42.17.330	42.56.540	44-14-04003 44-14-08004(5)
42.17.340	42.56.550	44-14-01003 44-14-04001 44-14-04003 44-14-08004
42.17.341	42.56.560	
42.17.348	42.56.570	
New	42.56.020	
New	42.56.900	
New	42.56.901	
New	42.56.902	

** Not yet recodified, see Laws of 2006, ch. 209 §§15 & 16

++ Laws of 2006 ch. 75, §2 and ch. 302, §11 both added a subsection (jjj) to 42.17.310(1)

Table 2: Chapter 42.56 RCW to Chapter 42.17 RCW

PRA *(after 7/1/06)*	**PDA** *(until 7/1/06)*	**WAC** **Model Rules**
42.56.010	42.17.010	
42.56.020	New	44-14-00004
42.56.030	42.17.251	44-14-01003 44-14-06002
42.56.040	42.17.250	44-14-02001
42.56.050	42.17.255	44-14-06002(2)
42.56.060	42.17.258	44-14-01003 44-14-04003
42.56.070	42.17.260	44-14-03003
42.56.070(1)	42.17.260(1)	44-14-010 44-14-06002
42.56.070(2)	42.17.260(2)	44-14-010 44-14-060 44-14-06001
42.56.070(3)	42.17.260(3)	44-14-030 44-14-03003
42.56.070(4)	42.17.260(4)	44-14-030 44-14-03003
42.56.070(7)	42.17.260(7)	44-14-07001
42.56.070(9)	42.17.260(9)	44-14-03006, 44-14-06002(6)
42.56.080	42.17.270	44-14-01002, 44-14-03006, 44-14-04004, 44-14-04002, 44-14-04003, 44-14-04005 & 44-14-4006
42.56.090	42.17.280	44-14-03002, 44-14-04005

PRA *(after 7/1/06)*	**PDA** *(until 7/1/06)*	**WAC** **Model Rules**
42.56.100	42.17.290	44-14-01002, 44-14-03004, 44-14-04001, 44-14-04003, 44-14-04005, 44-14-04006
42.56.110	42.17.295	
42.56.120	42.17.300	44-14-04005, 44-14-070, 44-14-07001
42.56.130	42.17.305	
42.56.210(1)	42.17.310(2)	44-14-04004
42.56.210(2)	42.17.310(3)	
42.56.210(3)	42.17.310(4)	44-14-04004, 44-14-06002
42.56.230	42.17.310(1)(a); 42.17.310(1)(b); 42.17.310(1)(c); 42.17.310(1)(ss)	
42.56.240	42.17.310(1)(d); 42.17.310(1)(e); 42.17.310(1)(rr); 42.17.318; 421731901	
42.56.250	42.17.310(1)(f); 42.17.310(1)(t); 42.17.310(1)(u); 42.17.310(1)(dd); 42.17.310(1)(ee); 42.17.31913	
42.56.260	42.17.310(1)(g)	

PRA *(after 7/1/06)*	**PDA** *(until 7/1/06)*	**WAC** **Model Rules**
42.56.270	42.17.310(1)(h); 42.17.310(1)(m); 42.17.310(1)(o); 42.17.310(1)(r); 42.17.310(1)(z); 42.17.310(1)(aa); 42.17.310(1)(bb); 42.17.310(1)(gg); 42.17.310(1)(jj); 42.17.310(1)(tt); 42.17.310(1)(fff); 42.17.310(1)(hhh); 42.17.319	
42.56.280	42.17.310(1)(i)	44-14-06002(4)
42.56.290	42.17.310(1)(j)	44-14-06002(3)
42.56.300	42.17.310(1)(k)	
42.56.310	42.17.310(1)(l)	
42.56.320	42.17.310(1)(p); 42.17.310(1)(qq); 42.17.310(1)(vv); 42.17.315	
42.56.330	42.17.310(1)(q); 42.17.310(1)(v); 42.17.310(1)(ll); 42.17.310(1)(mm); 42.17.310(1)(nn); 42.17.310(1)(ggg); 42.17.314; 42.17.31912	
42.56.340	42.17.310(1)(s)	
42.56.350	42.17.310(1)(w)	
42.56.360	42.17.310(1)(x); 42.17.310(1)(y); 42.17.310(1)(hh); 42.17.310(1)(oo); 42.17.312; 42.17.316; 42.17.31902; 42.17.31910	
42.56.370	42.17.310(1)(cc)	

PRA *(after 7/1/06)*	**PDA** *(until 7/1/06)*	**WAC** **Model Rules**
42.56.380	42.17.310(1)(ff);	
	42.17.317; 42.17.31907; 42.17.31909; 42.17.31909; 42.17.31918; 42.17.31919	
42.56.390	42.17.310(1)(kk)	
42.56.400	42.17.310(1)(pp); 42.17.310(1)(eee); 42.17.31903; 42.17.31904; 42.17.31905; 42.17.31908; 42.17.31911; 42.17.31915; 42.17.31916; 421731917	
42.56.410	42.17.310(1)(uu)	
42.56.420	42.17.310(1)(ww); 42.17.310(1)(bbb); 42.17.310(1)(ccc); 42.17.310(1)(ddd); 421731914	
42.56.430	42.17.310(1)(xx); 42.17.310(1)(yy); 42.17.310(1)(zz);	
42.56.440	42.17.310(1)(aaa)	
42.56.450	4217313	
42.56.460	421731906	
42.56.470	421731921	
42.56.480	42.17.310(1)(n); 42.17.310(1)(ii); 42.17.31920	
42.56.510	42.17.311	
42.56.520	42.17.320	44-14-04003 44-14-08001 44-14-08004

PRA *(after 7/1/06)*	**PDA** *(until 7/1/06)*	**WAC** **Model Rules**
42.56.530	42.17.325	
42.56.540	42.17.330	44-14-04003 44-14-08004(5)
42.56.550	42.17.340	44-14-01003 44-14-04001 44-14-04003 44-14-08004
42.56.560	42.17.341	
42.56.570	42.17.348	
42.56.900	New	
42.56.901	42.17.963	
42.56.902	New	

Laws of 2006 amending sections
Chapters and (section amended):
8, §210 (.400) & §112 (.360);
84, §17 (.400); 86 §1 (.300); 171, §8 (.270); 183, §37 (.270);
209, §7 (.270) & §8 (.330); 284, §17 (400); 302, §12 (.270); 330, §26 (.380); 338, §5 (.270); 341, §6 (.270);
369, §2 (.270)

Laws of 2006 adding new sections
Chapter 25 §3;
Chapter 209, §§15 & 16 (recodifying 42.17.253; 42.17.310(1) (iii); 42.17.31922; & 42.17.31923)

Appendix F

Preservation of Electronic Records

Chapter 434-662 WAC
PRESERVATION OF ELECTRONIC PUBLIC RECORDS

WAC

434-662-010	Purpose.
434-662-020	Definitions applicable to all sections of this chapter.
434-662-030	Retention scheduling and disposition of electronic public records.
434-662-040	Agency duties and responsibilities.
434-662-050	Disposition of electronic public records identified by records committees as archival.
434-662-055	Disposition of electronic public records identified by records committees as nonarchival.
434-662-060	Authentication and chain of custody of electronic records.
434-662-070	Use of encryption on electronic records.
434-662-090	Transmittal agreement for transfer of electronic records.
434-662-100	Media format and protocol for transfer.
434-662-110	Metadata requirements.
434-662-140	Web site management.
434-662-150	E-mail management.

WAC 434-662-010 Purpose. Pursuant to the provisions of chapters 40.14 and 42.56 RCW, and RCW 43.105.250, the rules contained in this chapter are intended to ensure that electronic public records are securely preserved for their minimum retention period for present and future access and/or are transferred to the Washington state digital archives for retention so that valuable legal and historical records of the state may be centralized, made more widely available, and permanently preserved.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-010, filed 10/13/08, effective 1/1/09.]

WAC 434-662-020 Definitions applicable to all sections of this chapter. Unless the context indicates otherwise, words used in this chapter shall have the meaning given in this section.

"Agency" means any department, office, commission, board, or division of state government; and any county, city, district, or other political subdivision or municipal corporation or any department, office, commission, court, or board or any other state or local government unit, however designated.

"Archival value" means those public records, as determined by state archivist's appraisal, that are worthy of long-term or permanent preservation by the archives due to their historical, legal, fiscal, evidential, or informational value, or are designated such by statute.

"Authentic" means that a public record is accepted by the state archives as genuine, trustworthy, or original.

"Authentication" means the process of verifying that a public record is acceptable as genuine, trustworthy, original, or authentic.

"Chain of custody" means the documentation of the succession of offices or persons who held public records, in a manner that could meet the evidentiary standards of a court of law until their proper disposition according to an approved records retention schedule.

"Confidential record" means any public record series, file, record or data base field with restrictions on public access as mandated by federal, state or local laws, or court order.

"Data base management system" means a set of software programs that controls the organization, storage and retrieval of data in a data base, as well as the security and integrity of the data base.

"Digital archives" means the mass storage facility for electronic records located in Cheney, Washington and operated by the Washington state archives. The digital archives is designed to permanently preserve electronic state and local government records with archival value in an environment designed for long-term storage and retrieval.

"Disposition" means the action taken with a record once its required retention period has expired. Disposition actions include but are not limited to transfer to the archives or destruction.

"Elected official" means any person elected at a general or special election to any public office, and any person appointed to fill a vacancy in any such office.

"Electronic record" includes those public records which are stored on machine readable file format.

"Encryption" means the process of rendering plain text unintelligible by converting it to ciphertext so it can be securely transmitted and can only be read by those authorized to decode the plain text from the ciphertext.

"File format" means the type of data file stored on machine readable materials such as hard disks, floppy disks, CD-ROMs, DVDs, flash media cards, USB storage devices, magnetic tape, and any other media designed to store information electronically, as well as the application program necessary to view it.

"Metadata" means data used to describe other data. Metadata describes how, when, and by whom particular content was collected, how the content is formatted, and what the content is. Metadata is designed to provide a high level of categorization to aid in the storage, indexing, and retrieving of electronic records for public use.

"Public record" has the same meaning as in chapters 40.14 and 42.56 RCW.

"Records committees" means the local records committee created in RCW 40.14.070 and the state records committee created in RCW 40.14.050.

"Retention period" means the required minimum amount of time a records series must be retained to meet legal, fiscal, administrative or historical value as listed on an approved records retention schedule or general records retention schedule.

"Records retention schedule" means a legal document approved by the state or local records committee that specifies minimum retention periods for a records series and gives agencies ongoing disposition authority for the records series after the records' approved retention period has been satisfied.

"Spider" means a software program that automatically collects and retrieves on-line web content and all documents linked to such content. Examples include, but are not limited to: Web spiders, web crawlers, robots, and bots.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-020, filed 10/13/08, effective 1/1/09]

WAC 434-662-030 Retention scheduling and disposition of electronic public records. Electronic records are bound by the same provisions as paper documents as set forth in chapter 40.14 RCW. Electronic records must be retained pursuant to the retention schedules adopted by the records committees. Destruction of, or changes to the retention period of, any public record, regardless of format, requires legal approval from the state or local records committee pursuant to chapters 40.14 RCW, 434-635 WAC and other applicable state laws. Public records that are designated "archival" by the state archivist must be maintained pursuant to the provisions of this chapter until such time as they are transferred to the state archives.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-030, filed 10/13/08, effective 1/1/09]

WAC 434-662-040 Agency duties and responsibilities. Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period. Printing and retaining a hard copy is not a substitute for the electronic version unless approved by the applicable records committee.

An agency is responsible for a security backup of active records. A security backup must be compatible with the current system configuration in use by the agency.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-040, filed 10/13/08, effective 1/1/09]

WAC 434-662-050 Disposition of electronic public records identified by records committees as archival. Electronic records designated as "archival" must be retained in their original format along with the hardware and software required to read the data in that format unless the converted records have been sampled for completeness and accuracy of the migration to a new system and/or file format. Original data, hardware, and software must be maintained until successful migration to a new system has been verified. Agencies have a duty to work with the state archivist to centralize, preserve, and/or transfer archival records to the digital archives. All records transferred to the digital archives will be administered and managed in accordance with all public access and disclosure laws and requirements.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-050, filed 10/13/08, effective 1/1/09]

WAC 434-662-055 Disposition of electronic public records identified by records committees as nonarchival. Electronic records rendered obsolete through the verified accurate migration to a more current media file format for readability and not designated as "archival" may be considered a secondary copy and disposed of as directed by chapter 40.14 RCW.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-055, filed 10/13/08, effective 1/1/09]

WAC 434-662-060 Authentication and chain of custody of electronic records. The agency must maintain chain of custody of the record, including employing sufficient security procedures to prevent additions, modifications, or deletion of a record by unauthorized parties. If there is a break in chain of custody, it must be noted in the transmittal to the archives.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-060, filed 10/13/08, effective 1/1/09]

WAC 434-662-070 Use of encryption on electronic records. If encryption is employed on public records, the agency must maintain the means to decrypt the record for the life of the record as designated by the approved required minimum retention period for that record.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-070, filed 10/13/08, effective 1/1/09]

WAC 434-662-090 Transmittal agreement for transfer of electronic records. The digital archives must develop a transmittal agreement for the transfer of electronic records from state and local government agencies to the digital archives. At a minimum, a transmittal agreement between the digital archives and a state or local government agency must contain:

(1) Identification of the record series;

(2) Disposition authority;

(3) Number of records to be transferred;

(4) Method, schedule, and frequency of record transmittal;

(5) Relevant metadata/indexing fields;

(6) The decryption means for any record transmitted in an encrypted format;

(7) Media file format;

(8) Identification of any access restriction and the statutory authority for such restriction;

(9) Other technical information, such as backend data base management systems, necessary for ingestion of electronic data into the digital archives repository; and

(10) Procedures for collecting any fees for public copies as provided by statute or ordinance.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-090, filed 10/13/08, effective 1/1/09]

WAC 434-662-100 Media format and protocol for transfer. Electronic records will be directly transferred to the digital archives via web services, secure File Transfer Protocol, T-1 line or other direct transmission as outlined in the transmittal agreement. When direct transmission is not practicable, records must be transmitted via portable media formats including, but not limited to tape, compact disc, digital versatile disc, flash media cards, universal serial bus storage devices, external hard drive, or diskette.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-100, filed 10/13/08, effective 1/1/09]

WAC 434-662-110 Metadata requirements. Electronic records transferred to the digital archives must contain

sufficient metadata to categorize, search and retrieve the records. All transfers of electronic records to the digital archives must identify the name of the originating agency, the date of transfer, the records series, and other appropriate metadata as specified in the transmittal agreement. The digital archives will not accept electronic records that do not contain appropriate metadata as specified in the transmittal agreement.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-110, filed 10/13/08, effective 1/1/09]

WAC 434-662-140 Web site management. All state and local government agencies must retain all web content in accordance with the approved retention schedules. Pursuant to a transmittal agreement, the digital archives will use a software program commonly known as a spider to copy state and local government web sites that are determined to have archival value either annually or more frequently. All state and local government agencies shall use the following best management practices in the maintenance of their web sites:

(1) Each page shall contain identifying information as outlined in the transmittal agreement;

(2) If an agency web site is determined to have archival value and cannot be copied using a spider software program, the agency must copy and preserve all code for the web site.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-140, filed 10/13/08, effective 1/1/10.]

WAC 434-662-150 E-mail management. E-mails created and received by any agency of the state of Washington in the transaction of public business are public records for the purposes of chapter 40.14 RCW and are subject to all of the laws and regulations governing the retention, disclosure, destruction and archiving of public records. The e-mails of all elected government officials and public employees are subject to the records retention periods and disposition promulgated by the records committees, and any and all e-mails with archival value must be retained. Agencies may be relieved of the obligation to permanently retain archival e-mail by transmitting e-mail and all associated metadata to the digital archives pursuant to a transmittal agreement as provided for in WAC 434-662-090. This section does not apply to state legislators or members of the state judiciary.

[Statutory Authority: RCW 40.14.020(6), chapters 40.14, 42.56, and 43.105 RCW. 08-21-073, § 434-662-150, filed 10/13/08, effective 1/1/10.]