

The Public Records Act

RCW 42.56



The Purpose of the Act

“The people of this state do not yield their sovereignty to the agencies that serve them.” RCW 42.56.030

The Purpose of the Act

“The Act is a strongly worded mandate for the broad disclosure of public records.”

PAWS II, 125 Wn.2d 243 (1994).

What Is A Public Record?

- 1) Any *writing* containing information relating to**
- 2) 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**
- 4) regardless of *physical form or characteristics*. 42.56.010 (3)**

What Is A Public Record?

- **Purely personal information not a public record. WAC 44-14-03001**
- **But public employee may not use private device to conduct public business**

***Tiberino, 103 Wn.App. 680 (2000);
Nissen***

What and Who Does the Act Apply to?

- **Duh: Public agencies with public records**
 - 1. Includes interlocal agencies**
 - 2. Includes “functional equivalents” of an agency. Don’t “farm out” Agency records**
 - 3. See *Nissen*: The CEO of your agency can be deemed the “agency”**

***Tiberino*, 103 Wn.App. 680 (2000); *WESTNET*, 182 Wash. 2d 500 (2015);**

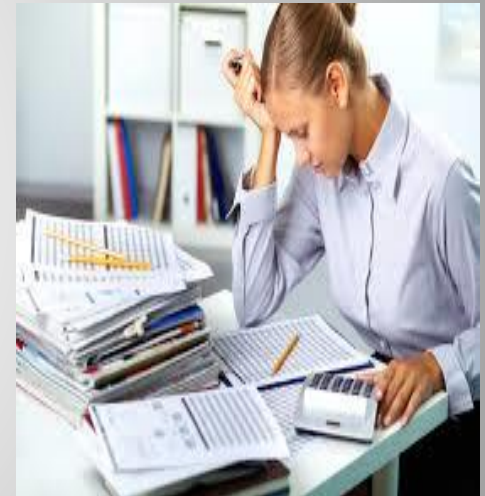
What is the “Functional Equivalent” of a Public Agency?

- **Court evaluates list of factors**
- **Ultimately, comes down to control of public agency over third parties**
- **Third-party contractors have been found to be “functional equivalents”**
- **Bottom line: Agency can’t bury public records with a third party**

Telford, 95 Wn.App. 149 (1999); Cedar Grove

Examples of Public Records

- 1. Emails on an agency's email system**
- 2. Training records**
- 3. Agency payroll records**
- 4. CBAs**
- 5. Agency's annual budget**
- 6. Public records created on *personal* devices. *See Nissen***



But is the record exempt? See below

Non-Examples of Public Records

- 1. An inquiry into “what policies” an agency *used* to investigate employee conduct**
- 2. A request for “information”**
- 3. When are records created on a fire commissioner’s personal Facebook page a public record? *See West, 2 Wn. App. 2d 586 (2018)***

Public Records Officers

RCW 42.56.580

- **Every local agency shall appoint and publicly identify a PRO**
- **PRO initiates the public records search**
- **PRO oversees compliance with the PRA**



Searching for Records



- **Agencies must conduct an “objectively reasonable search” for records. WAC 44-14-04003**
- **Search usually begins with the PRO**
- **Way search conducted depends on size of agency. WAC 44-14-04003**
- **Once request is made, records may not be destroyed, despite retention schedules. RCW 42.56.100**

Responding to a Public Records Request (PRR)

- **Requestors can ask to *inspect* records, or request *copies* of records.**
- **Agency can adopt rules and procedures for submitting requests**
- **These rules must be promptly displayed at central office. RCW 42.56.040**
- **Great form for submitting a PRR: WAC 44-14-030 (4)**
- **But an agency cannot make requestors complete its form**

Responding to a PRR

- **An agency must *respond* to a PRR within five business days of receipt. RCW 42.56.520**
- **Responding that the request is “overbroad” is not a sufficient response to a PRR. RCW 42.56.080**

Responding to a PRR

- **The request must be for an “identifiable” record. RCW 42.56.080**
- **An agency has no responsibility to “create” a record. Don’t rely on this doctrine too much.**
- **Sometimes it might be easier to “create” a record. WAC 44-14-04003**
- **Making an electronic copy of an electronic record is not “creating” a new record. WAC 44-14-03003 (5).**

Responding to a PRR

- **There are no “magic words” needed to demonstrate that a PRR is being made**
- **The agency need only be placed on “Notice with sufficient clarity”**
- **Meta-data (“data about data”) must be specifically requested**

Hangartner, 151 Wn.2d 447 (2004)

O’Neill, 170 Wn.2d 138 (2010)

Responding to a PRR

RCW 42.56.520

An agency must respond within five business days in one or more of five ways:

- 1. Provide the records**
- 2. Internet address**
- 3. Deny the PRR and provide a brief explanation for the denial, with statutory citation**
- 4. Request clarification**
- 5. Provide Reasonable Estimate**

Responding to a PRR

RCW 42.56.520

- **Agency can't provide an estimate of when it will provide an estimate. *Health Pros, No. 52135-1-II (2019)***
- **Agencies have to provide the “fullest assistance”**
- **So if Agency gives an estimate...adhere to that to the best of your ability**
- **Use language that permits estimate extensions in your five-day letter**

However...

- **Agency does *not* have to estimate when the request will be *completed***
- **If Agency is providing an estimate... it must provide an estimate of when it will first provide records, whether on an installment basis or otherwise**
- ***See Health Pros, No. 52135-1-II (2019)***

Providing Estimates: Four Factors (RCW 42.56.520)

- 1. Clarifying intent of request**
- 2. Locating and assembling records**
- 3. The need to notify third persons or agencies**
- 4. Any records exempt?**

***Ockerman*, 102 Wn.App. 212**

Installments

- **An agency may provide records on an installment basis. RCW 42.56.080**
- **To be fair, explain why you are using installments**
- **Provide installments in “logical batches.” WAC 44-14-04004 (3)**



Installments and “Standing Requests”

- **No such thing as a “standing public records request”**
- **Agencies not required to provide new records that were not in existence at the time a request is made**
- **Agencies not required to provide records that were once exempt but are made non-exempt by later events, unless a *new* request is made**

Notifying Third Parties

- **Agency has the option of notifying third parties unless notice is “required by law”. RCW 42.56.540**
- **Should have reasonable belief of exemption prior to notifying “non-target” parties. WAC 44-14-04003 (11)**
- **Immunity from liability to third parties for good faith release. RCW 42.56.060**

Seeking Clarification: What Does the Requestor Actually Want?

- **An agency may ask the requestor to clarify the request.**
- **If the requestor fails to do so, the agency need not respond. RCW 42.56.520**
- **Agency still needs to respond to the part of the request that was clear!**
- **Document closures of a request. Send a closing letter. WAC 44-14-04003 (7)**



Seeking Clarification



- **An agency cannot *require* a requestor to state the purpose of the request. RCW 42.17.270 / 42.56.080.**
- **The agency can still ask, but the requestor does not have to divulge his or her purpose. WAC 44-14-04003**
- **Can require affidavit for “lists of individuals for commercial purposes.” WAC 44-14-06002 (6)**

Later-Discovered Responsive Records

- **Agency *should* notify the requestor with brief explanation. WAC 44-14-04003 (12).**
- **Again, no such thing as a “standing public records request”**

Exemptions

RCW 42.56.070



- **All public records must be made available for public inspection and copying**
- **Unless the record falls under a specific exemption**
- **Either in RCW 42.56 or an “other statute”—can’t rely on a regulation alone**
- **Exemptions construed narrowly**

Hangartner; Baxter, No. 82418-0-1



Exemptions

RCW 42.56.070 (Redaction)

- **Agency shall delete info to prevent unreasonable invasion of privacy**
- **Justification for the deletion shall be explained fully in writing**

Exemptions (Redaction)

RCW 42.56.210



If portions of record are exempt, and others not, disclose all non-exempt info

Exemptions: Privacy

RCW 42.56.050

Privacy violation when disclosure

- 1. Would be highly offensive to a reasonable person, *and***
- 2. ... is not of legitimate concern to the public.**

Exemptions: Privacy

RCW 42.56.050

- **There is no stand-alone *statutory* privacy exemption!!! *Dawson*, 120 Wn.2d 782 (1993)**
- **However, the WA Supreme Court has recognized a *constitutional* privacy exemption. *See Freedom Foundation*, No. 95262-1 (2019)**
- **But be sure the information requested is objectively private**

Exemptions

RCW 42.56.210

- **An agency must provide a brief explanation of why the agency believes a record is exempt**
- **Along with a statute citing the specific exemption that applies to the requested records. BE SPECIFIC!**

Koenig, 160 Wash. App. 883 (2011)

Exemptions

RCW 42.56.230 (3)

- **“Personal information in files maintained for [public] employees”**
- **Disclosure must violate privacy. HIGH BAR**
- **Names of employees subject to allegations not exempt**
- **Specific instances of misconduct not exempt**
- **Unsubstantiated Allegations Exempt**

Predisik, 179 Wn.App. 513 (2014); Limstrom, 933 P.2d 1055 (1998)

Exemptions

RCW 42.56.230 (3)

**Contents of non work-related
employee emails found exempt because
they were highly personal. *Tiberino*,
103 Wn.App. 680 (2000)**

Exemptions

RCW 42.56.240

- **Specific intelligence information and investigative records**
- **Records must be “essential to effective law enforcement”**
- **Or disclosure must violate privacy**
- **This exemption does not apply to internal personnel investigations**
- **When investigation is over, exemption no longer applies**

Hicks, 345 P.3d 1 (2015); Ashley, 16 Wn.App. 830 (1977)

Exemptions

RCW 42.56.240

- **“Law enforcement involves the imposition of sanctions for illegal conduct” and the “imposition of a fine or prison term.”**
- **In other words, any ol’ investigative record is not covered by this exemption**

Brouillet, 114 Wn.2d 788 (1990)



Exemptions

RCW 42.56.280

Deliberative Process Exemption

- **Covers preliminary drafts, notes, recommendations and *intra-agency* memorandums**
- **Opinions must be expressed, and policies formulated**
- **After action is taken on these opinions, exemption no longer applies**
- **However, thanks to WA Supreme Court, agencies do not have to provide the no-longer-exempt records if the records were exempt at the time of the request. *See Gipson, No. 96164-6 (2019)***

Exemptions

RCW 42.56.280

Four Factors

- 1. The records contain pre-decision materials as part of the deliberative process, and**
- 2. Disclosure would be harmful to the deliberative or consultative function of the agency, and**
- 3. Disclosure would interfere with the “flow” of ideas, AND**
- 4. The records reflect policy recommendations and not simply the raw factual data underlying a decision.**

See Port of Olympia, 146 Wn.App. 108 (2008)

Exemptions

RCW 42.56.280

**Discussions *between* agencies are
not necessarily deliberative nor
exempt**

***Columbian Publishing*, 36 Wn.App. 25
(1983)**



Exemptions

RCW 42.56.290



- **“Records relevant to controversy” to which agency is a party**
- **The term “relevant to a controversy” means “completed, existing or reasonably anticipated litigation.”**

Dawson, 120 Wn.2d 782 (1993)

Miscellaneous Exemptions

1. **Examination Data. RCW 42.56.250 (1)**
2. **Application materials *submitted with respect to an applicant for Public Employment. Id (2)*. What about psych screenings?**
3. **Personal info about volunteers and employees of the agency—residential addresses, phone numbers etc... *Id (3)***
4. **Information identifying “unfair practices” complainant, if they request non-disclosure. *Id (4)***
5. **“Unfair practices” complaint investigations, compiled *during* investigation. *Id (5)*. But remember *Gipson (2019)***
6. **“Mediation Communications.” RCW 42.56.600**

Sheats 6 Wn. App. 2d 523

Miscellaneous Exemptions

1. Health Care Information. RCW 42.56.360

- **Treat requests for MedRecs under RCW 70.02, NOT the PRA**
- **Treat employee medical records like “health care information”**

2. Appraisals, except when project abandoned (may not be withheld for more than 4 years). RCW 42.56.260

3. Documents pertaining to site acquisition when price may increase. *Id.*

4. Documents pertaining to sale when price may decrease. *Id.*

“Other Statutes”

RCW 42.56.070

- **When construing whether an “other statute” prevents disclosure, the courts will consider the overall policy of the PRA**
- **“Other statutes” are rarely, if ever, cited to exempt disclosure**

Hearst, 90 Wn.2d 123 (1978)

BILLING FOR “ACTUAL COSTS”

RCW 42.56.070 (7)

- **Your agency can enact a policy of charging the “actual costs” of searching for and providing records**
- **Must hold a public hearing prior to adopting such a policy**
- **Cannot bill based on salaries of persons searching out records**
- **Staff time can only be billed for “copying and sending” records, i.e. staff time generally cannot be billed for providing records electronically**

BILLING WITHOUT A POLICY:

RCW 42.56.120

- **If your agency does not have an “actual cost” policy:**
 - 1. \$.10 per *page* for photocopies**
 - 2. \$.05 per *file* attached to an email**
 - 3. \$.10 per GB of records provided electronically**
 - 4. Actual costs of digital storage media (thumb drives etc.)**

You can adopt flat fee of up to \$2.00 if actual costs equals or exceeds \$2.00

Statute of Limitations

RCW 42.56.550

- **One year from when the initial request was made, or last installment was produced**
- **This means the PRO must engage with the requestor**
- **Send a closing letter to get the “clock” ticking**



Penalties

RCW 42.56.550



- **Civil penalties may range between \$5-\$100 per day/per PAGE for each day**
- **Record must have been “wrongfully withheld”**
- **The court may also award the prevailing requestor costs and attorneys’ fees**
- **A court can impose criminal penalties for wilful destruction of public records. 40.16.010**

Penalties

Yousoufian, 137 Wn. App. 69 (2007)

- **Trial courts have a lot of discretion in this area and may consider the financial/administrative capacity of the agency**
- **Among those factors the courts will consider in determining a penalty (use your common sense):**
 1. **Mitigating Factors**
 - a) **The agency's good faith. *See Hoffman*, No. 96286-3 (2019)**
 - b) **Proper training and supervision of personnel**
 2. **Aggravating Factors**
 - a) **The agency's bad faith**
 - b) **Improper training and supervision**

Training Requirements: RCW

42.56.150

- **Today's presentation based on Model Rules to the PRA and guidance from Attorney General**
- **Elected and Appointed Officials must obtain OGTA Training within 90 days of taking the oath of office or otherwise assuming duties of office—also applies to OPMA!**
- **Same for Public Records Officers as to the PRA and records retention**



Questions and Answers

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