

Public Records Act Training



Presentation to Office of Chehalis Basin—July 7, 2017

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(using slides created by Assistant Attorney General Nancy Krier)



Your attention please

Examples of PRA penalty orders, judgments and settlements following lawsuits by requesters alleging PRA violations by a public agency.
(Does NOT include attorneys fees and costs in all cases).

- **\$600,000** – Snohomish County
- **\$575,000** – Snohomish County
- **\$550,000** – Clallam County
- **\$502,827** – L & I (*upheld by State Supreme Court*)
- **\$500,000** – Board of Accountancy (*global settlement of 7 lawsuits and 15 PRA disputes*)
- **\$488,000** - Bainbridge Island (*\$350,000 penalty, remainder is attorneys fees/costs*)
- **\$371,340** – King County
- **\$192,000** – LCB (*included other open government claims*)
- **\$187,000** – Port of Olympia
- **\$175,000** – Mesa (*reduced from \$353,000 - possible appeal*)
- **\$174,000** – Seattle
- **\$100,000** – Shoreline (*with attorneys fees, total amount was more than \$500,000*)
- **\$100,000** – Spokane County
- **\$85,000** – San Juan County
- **\$45,000** – Kennewick
- **\$45,000** – Everett
- **\$45,000** – Port of Vancouver

- **\$723,290** – UW (*reversed on appeal*)
- **\$649,896** – DSHS (*reversed on appeal*)



Touchstone:



- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



Public Record



“Public record” means:

- 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.”

~ RCW 42.56.030

Writing

- “**Writing**” includes “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 42.56.030

- So, “**public record**” is broadly defined.

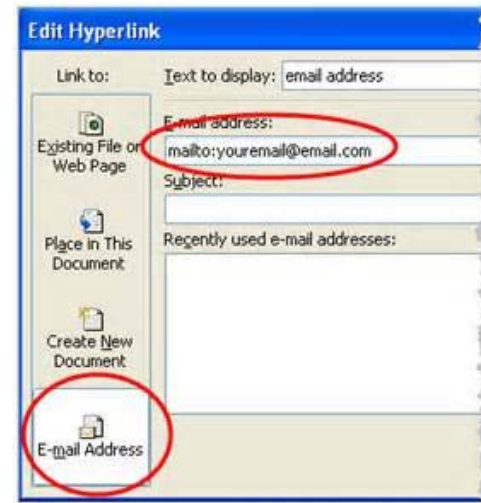


Note: Public Records Can Include...

...records of agency business when they are created or retained by agency employees or officials on home computers or devices, or in non-agency email accounts or files.



Let's Go Digital



If an agency employee conducts agency business on a personal computer, with a personal e-mail account, or with a personal device, then the records are subject to a public records request.

PRA Developments: Litigation Re Home Computers & Personal Devices



- Searches of agency + home/personal computers/devices can be **costly**, depending upon the scope of the request. *Forbes v. City of Gold Bar* (2013)(city contracted with computer consultant, hired an additional employee, and transferred an employee from another department).
- Court **might be asked to order the entire hard drive searched** if it finds agency conducted insufficient search. *O'Neill v. City of Shoreline* (2008). This was an issue *Paulson v. City of Bainbridge Island* (now settled). However, see more recent case - *Nissen v. Pierce County* (upcoming slides).



Nissen v. Pierce County (Aug. 2015)

- Text Messages

- Text messages sent and received by a public employee in the employee's official capacity are public records of the employer, regardless of the public or private nature of the device used to create them; thus, even if the employee uses a private cell phone.
- A record that an agency employee prepares, owns, uses, or retains ***within the scope of employment*** is a record "prepared, owned, used or retained by a state or local agency" under the PRA.
 - An employee's communication is "within the scope of employment" *when the job requires it, the employer directs it, or it furthers the employer's interests.*
 - This inquiry is always case- and record-specific.



Post- *Nissen*: *West v. Vermillion, Puyallup* (Nov. 8, 2016)

- PRA request for public records in a **local elected official's personal residence, on a personal computer, and in a personal email account.**
- *Official's position*: Refused to provide records. Official said he had an expectation of privacy under state and federal constitutions.
- *Court of Appeals*: Official's arguments rejected.
 - Public records must be disclosed. The constitutions do not provide an individual a privacy interest in those public records.
 - Case remanded to have superior court amend its order and conform the procedures to *Nissen*.
- See upcoming slide on “privacy.”

General PRA Procedures



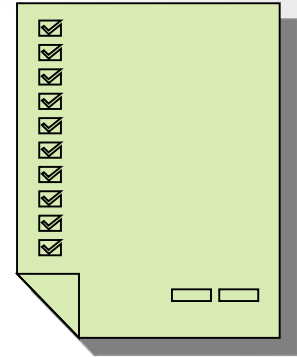
Under PRA, agencies must:

- Appoint a **public records officer**.
- Publish **procedures** describing certain agency organization, operations, rules of procedure, and other items listed in PRA that:
 - Provide full public access to public records,
 - Protect public records from damage/disorganization
 - Prevent excessive interference with other agency functions.
 - Provide **fullest assistance** to requesters
 - Provide most timely possible action on requests.
- Publish **fee schedule**.
- Maintain a **list of laws** the agency believes exempts or prohibits disclosure.
- Provide certain **indexes** of records.
- Make non-exempt records **available for inspection and copying during customary business hours** for a minimum of 30 hours per week, excluding holidays.
 - ❖ Post customary business hours on the agency's website and make hours known by other public means.



~ RCW 42.56.040, RCW 42.56.070 - .090, RCW 42.56.580, RCW 42.56.580.

Requests for Public Records



- Persons can request **identifiable public records** from public agencies.
 - A request for “information” is not a request for “records” under the PRA.
 - At minimum, requester must **identify documents with sufficient clarity to allow the agency to locate them**. “Agencies are not required to be mind readers.”
 - Request for all or substantially all of an agency’s records is not a valid request (HB 1595)
- Requesters can ask to **inspect** records, or request **copies** of records.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.

~ RCW 42.56.520; RCW 42.56.080, RCW 42.56.040, RCW 42.56.100;
Hangartner v. City of Seattle; *Bonamy v. City of Seattle*; *Hobbs v. State*.

Requests (Cont.)



- Requesters do not:
 - Generally need to identify **purpose** of request, unless required by law (e.g., restriction on providing lists of individuals for a commercial purpose).
 - Need to limit the **number** of requests they make.
 - Need to **exhaust** an agency's internal appeal procedures prior to seeking judicial review when a record is denied and two business days have passed. (Agencies are to have review mechanisms but review deemed completed after 2 business days following the denial of inspection.)

~ *RCW 42.56.070, RCW 42.56.520, Zink v. City of Mesa*

Agency Responses to Requests

- The agency has **five business days** to respond to a public records request.



- Agency response can:
 1. **Acknowledge receipt of the request and provide a reasonable estimate for a further response;** or
 2. **Fulfill the request;** or
 3. **Provide an internet address and link** to the records on the agency's website (which fulfills part or all of the request); or
 4. **Seek clarification** (still need to give estimate of time); or,
 5. **Deny** the request with an accompanying written statement of the specific **reasons**.

~ RCW 42.56.520

respond

Seeking Clarification

- An agency can seek clarification of a request if it is **not reasonably clear**, or does not request “**identifiable records**.”
- Remember: agency’s rules are to give “fullest assistance.”
- Agency should explain why it needs clarification, in order to provide fullest assistance to requester and to search for potentially responsive records.
- If requester does not respond to request for clarification, the agency may close the request.

~ RCW 42.56.520



Installments



- Agencies can provide records in **installments**, particularly for larger requests.
- Agencies can request a deposit up front for copies (not to exceed 10 percent).
- Agencies can provide an installment by providing links to records on its website.
 - ❑ Note: Agencies are encouraged to post commonly-requested records on their websites. This:
 - Makes records more accessible.
 - Enables quicker agency responses.
 - Enables requesters to choose to view or copy only those records they want.

~ RCW 42.56.080, RCW 42.56.120



Searches



- An agency should **read the request carefully** to understand what records are requested.
 - Clarify the request if needed.
 - An agency can also ask the requester to suggest search terms.
- An agency must conduct an **adequate search** for responsive records.
 - Consider all formats (paper, electronic, etc.)
 - Consider records of current staff/officials, and former staff/officials, if potentially responsive.
 - Consider possible locations (e.g., file cabinets, agency website, audio files, etc.)
- The search should be **reasonably calculated to uncover responsive records**.
- The search should follow **obvious leads** to possible locations where records are likely to be found.
- If responsive records are on or in **employees' personal devices, personal accounts, or personal files**, those must be searched, too. (*See upcoming slides*).
- The focal point of the judicial inquiry is the agency's **search process**, not the outcome of the search.
- It is a good idea to **document** search efforts (locations, search terms used, etc.)
The agency bears the **burden of proof** to show the adequacy of the search.
~ *RCW 42.56.520; Neighborhood Alliance of Spokane v. Spokane County; Hobbs v. State; Block v. City of Gold Bar; Nissen v. Pierce County.*



“Mechanics” of Searching/Producing Public Records Controlled by Employee

- The public **employee** must **obtain, segregate and produce** to the employer those public records that are responsive to a PRA request from the employee’s **personal accounts, files, and devices**.
- The employee must produce any public records (e-mails, texts, and any other type of data) **to the employer agency**.



Exemptions

professionally redact [REDACTED] in Word Documents.
you've ever had to [REDACTED] to purge corporate confidential or personal
information, you know it's not fun. You either need to [REDACTED]
[REDACTED] or getting far
matting tools.
it got a better solution: A [REDACTED]
or documents a sort-of CIA-like professional appearance.

- Records are presumed open.
- If a record, or part of a record, is withheld from the public, the agency must cite to an **“exemption”** in law and give a brief explanation.
- Exemptions are **narrowly construed**.
- The general rule is the agency withholds only the exempt information, and releases the rest.
- Exemptions must be authorized in law --- in PRA or other laws.

~ RCW 42.56.050, RCW 42.56.210 - .510, RCW 42.56.550

Privacy



- **There is no general “privacy” exemption in the PRA.**
- If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
 1. **“Highly offensive to the reasonable person” and**
 2. **“Not of legitimate concern to the public.”**

~ RCW 42.56.050

This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes.

Predisk v. Spokane School Dist. No. 81: A person “has a right to privacy under the PRA only in ‘matter[s] concerning the private life.’” Those are “private facts” fairly comparable to these:

“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 or humiliating 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.”

Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
- A court is to consider the **factors** in requiring an agency to pay a penalty.
- Plus, a court will award the prevailing requester’s **attorneys fees and costs**.
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.

~ RCW 42.56.550, RCW 42.56.565; *Yousoufian v. Sims*

Penalty Factors

A court must consider these nonexclusive **factors** in deciding whether an agency should pay a penalty:

❑ **Mitigating factors** (factors that can reduce a penalty):

- A lack of clarity in the PRA request.
- The agency's prompt response or legitimate follow-up inquiry for clarification.
- The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.
- Proper training & supervision of the agency's personnel.
- The reasonableness of any explanation for noncompliance by the agency.
- The helpfulness of the agency to the requester.
- The existence of agency systems to track and retrieve public records.

~ *Yousoufian v. Sims*



❑ Aggravating factors (factors that can increase a penalty):

- A delayed response by the agency, especially in circumstances making time of the essence.
- Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions.
- Lack of proper training & supervision of the agency's personnel.
- Unreasonableness of any explanation for noncompliance by the agency.
- Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.
- Agency dishonesty.
- The public importance of the issue to which the request is related, where the importance was foreseeable to the agency.
- Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency.
- A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.
- The inadequacy of an agency's search for records.

~ *Yousoufian v. Sims; Neighborhood Alliance v. Spokane County*



Penalties Outside of PRA



Penalties in Other Laws:

There can be criminal liability for willful destruction or alteration of a public record.

~ *RCW 40.16.010*

For state employees, penalties can be assessed under the State Ethics Law if an employee intentionally conceals a record that must be disclosed under the PRA, unless decision to withhold was in good faith.

~ *RCW 42.52.050*

Open Government Training

- Effective July 1, 2014, elected local and statewide officials, and records officers, are to receive open government training (“Open Government Trainings Act”). RCW 42.56.150, RCW 42.56.152, RCW 42.30.205.
- They can take training sooner than July 1. Refresher training occurs no later than every 4 years.
- Training can be taken online, in person, or by other means.



- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General’s Office Open Government Training Web Page:

<http://www.atg.wa.gov/open-government-training>



Open Government Assistance

- The **Washington State Attorney General's Office** has provided an explanatory pamphlet and other materials about the PRA. It also has materials about the OPMA. *Updated manual: see next slide.*
- The Attorney General's Office has also published PRA Model Rules.
- The Attorney General has also appointed an Assistant Attorney General for Open Government. The AGO can provide technical assistance and training.
- The Attorney General's Office **materials about the PRA**, and other open government topics and resources, are on its website at www.atg.wa.gov.
- The Attorney General's Office Open Government Training Web Page with training resources, videos, and other materials is at:
<http://www.atg.wa.gov/open-government-training>
- The Attorney General's Office may also review a state agency denial of a record when the agency concludes the record is exempt.
- The Attorney General's Office may issue formal opinions about the PRA for qualified requesters.

~ RCW 42.56.155, 42.56.570,
RCW 42.56.530, RCW 42.30.210



Risk Management Tips

- Establish a culture of compliance with the PRA, beginning with agency leadership and support.
- Train appropriate staff and officials about the PRA's requirements.
- Review available resources; institute best practices.
- Review penalty factors.
- Keep updated on current developments in PRA through legislative action or court decisions; correctly apply law.
- Consult with agency's legal counsel.



Thank you!

