



STOKES LAWRENCE



Washington Public Records Act

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Public Records Act

Was codified at RCW 42.17.250 et seq

Now codified as RCW Ch. 42.56

Amended many times

Inconsistencies; redundancies; poor language

Maybe dated — fails to fully recognize electronic media

Policies Underlying Act

People do not yield their sovereignty and do not give their public servants right to decide

Free and open examination of public records is in public interest

Even if it may cause inconvenience or embarrassment

Chapter to be liberally construed and exemptions narrowly construed

To provide full public access to public records

To protect public records from damage or disorganization

To provide fullest assistance to inquiries

To provide most timely possible action on requests

Policies found in various sections of act — see .030; .100; .550; .570

Public Agency — .010(1)

All state agencies

All local agencies

But not the courts! *Nast, Spokane & Eastern Lawyer*

Functional equivalent balancing test — *Telford, Clarke, SRDF*

- (1) Entity performs governmental functions
- (2) Level of government funding
- (3) Extent of government involvement and regulation
- (4) Whether entity was created by government

Court records

All court records presumptively public

But not covered by Public Records Act -- *Nast*

Access to court records matter of common law

Heavy presumption against sealing court records — *Cohen, Dreiling, Waldron*

Burden on one seeking sealing order

Must be compelling interest to overcome public's right to open administration of justice

Ishikawa factors

Public Record — .010(2)

Any writing, regardless of physical form or characteristic

Containing information relating to

(1) Conduct of government

(2) Performance of governmental or proprietary function

Prepared, owned, used or retained by agency

Even if agency did not retain it, its still public record —
Concerned Ratepayers

Including legislative records

RCW Ch. 40.14 all public records shall be and remain property of the State

Writing — .010(3)

Every means of recording any form of communication or representation

Regardless of physical form or characteristic

“Existing” data compilations from which information may be obtained or translated

E-mails and metadata — *Tiberino, O’Neill*

ESI?

Duty to Disclose — .070/.080

Duty to make available for public inspection and copying

Requests for identifiable public records

— “a reasonable description enabling government employee to locate records” —
Bonamy

Unless it falls within specific exemption in RCW Ch. 42.56 or “other statute”

— Not agency created rule! *See Livingston*

Requests by Mail — .080/.100

Agency must honor requests received by mail for identifiable public records unless exempt

Including requests by e-mail?

— significant challenges for agencies

Agency obligated to provide records by mail if requested — *Blaine*; but *Livingston*

Public Records Officer — .580(1)

Agency shall appoint and publicly identify PRO
PRO is point of contact for public requesting records and oversees agency's compliance

PRO may designate another agency as its PRO

State agencies publish PRO in register and maintain on Code Reviser's website

Local agencies PRO contact information shall be made known in a way reasonably calculated to provide notice to the public; posted at the agency and on internet

Making a Request

Review agency procedures for handling public records requests

- Who is PRO
- Whether they have an index
- Costs to provide copies
- List of specific exemptions .070(2)

Address letter to PRO or agency head

Cite to the chapter — but don't have to — *Wood*

Ask for identifiable public records —ESI, e-mail, metadata — *O'Neill*

Refer to underlying policies

Give your contact information

Do you want to inspect or also copy?

Offer to pay costs consistent with chapter

Prompt Response — .080/.520

Agency is to make records promptly available

Five business days

- (1) Provide records
- (2) Acknowledge receipt and provide reasonable estimate of time necessary to respond
- (3) Deny request

Additional Time — .520

Additional time may be based on need to

- (1) Clarify intent of request — but can't ask unless it's a list of individuals — .080
- (2) Locate and assemble information — partial or installment production
- (3) Notify third party affected by request
- (4) Determine whether exemption applies

Agency not required to provide reason for estimate in response — *Ockerman*

Requestor Irrelevant — .080

Agency may not distinguish among persons requesting records

Request may be by counsel; need not identify client

Agency may not require person to provide information as to purpose or intent of request

- Unless it seeks list of individuals for commercial purposes — .070(9)

- Other statutes exempt disclosure of certain records to certain persons

- New statute on multiple requests by prisoners

Fullest Assistance — .100

Agency shall provide fullest assistance to “inquirers” [requestors?] and most timely possible action on requests for “information” [public records?]

Underlying policy should guide agency responses — but doesn’t always

Responses

Ambiguous — if unclear, agency may ask requestor to clarify; if requestor fails, agency need not respond — .520

Overbroad — Agency cannot deny solely on basis request is overbroad — .080 [overrules *Hangartner*]

No limit on the number of requests an individual can make [but new statute limits prisoner's requests]

Cost of compliance no defense to disclosure — *Hoppe*

Available elsewhere or through other means no defense to disclosure — *Olsen*

Inconvenience or difficulty does not excuse strict compliance — *Zink*

More Responses

Agency not obligated to create records — *Smith*
— only produce existing records

Not obligated to compile data in form more useful
for requestor — see writing .010(3)

Need not produce piecemeal but can wait to
produce all at once — *Ockerman*
[but partial or installment basis?]

Record Retention Policies — .100

If request is made when record exists; but is scheduled for destruction

Agency shall retain possession

May not destroy or erase records

Spoliation?

Denials — .210/.520

Denial in whole or in part

Must include written statement of specific exemption and brief explanation

“Silent withholding” is failing to indicate that records are withheld or exemption applies

Substantial compliance is not the standard — *Zink*

But in judicial review, agency not limited to exemptions identified in denial — *PAWS*

Agency Review of Denial — .520

Agency shall establish mechanism for most prompt possible review of decisions denying

Review deemed completed at end of second business day following denial

Constitutes final agency action for purposes of judicial review

Send letter to agency head asking for review

Time and Place — .090

Customary office hours

- unless posted, presumed to be 9-12 1-4 M-F, except legal holidays
- may agree on different times

Agency can't limit time requestor may review records — *Zink*

Agency must make facilities and equipment available for copying

- unless unreasonably disruptive to agency operations

Costs to Copy — .070(7)/.120

No fee for locating and making available — .120

No fee for inspection — .12

Reasonable charge for providing copies or use of agency equipment — .070

- Reimburse agency actual costs per page incident to copying and actual shipping costs

- Agency determines actual cost or uses 15 cents per page

- Can ask for deposit not to exceed 10%

- May charge for each partial or installment

Other statutory provisions on costs of public records may govern

Exemptions

Exemptions from disclosure to be narrowly construed

Exemptions in RCW Ch. 42.56 and “other statutes”
— not agency created rule — but *Livingston*

Hundreds of specific exemptions

Agency promise to keep confidential does not
override PRA

Sunshine Committee — .140

Personal Information — .230

Personal information is exempt, i.e.

- in files maintained for students in public schools, patients of public institutions, welfare recipients

- in files maintained for public employees, appointees or elected officials to extent disclosure would violate their right of privacy

- required by taxpayers in connection with tax unless violates taxpayers right to privacy

Generally all personal identifying information

Health care records

Privacy — .050

Privacy is violated only if disclosure

- (1) Would be highly offensive to reasonable person;
and
- (2) Is not of legitimate public concern

Exemption waived if court determines its clearly unnecessary — .210(2) [own records?]

Acts of public employee bearing on fitness to perform public duty are matters of legitimate public concern, not private — *Bellevue John Does*

No exemption prohibits disclosure of statistical information not descriptive of readily identifiable person — .210

Financial Commercial — .270

Valuable formulae, designs, drawings, source and object code, research data

— obtained within 5 years of request

— disclosure produce private gain and public loss

Financial information of all sorts

Certain proprietary data and trade secrets

Variety of statutory provisions

Graham Leach Bliley preempts PRA to extent it is inconsistent — *Ameritrust Mortgage*

Deliberative Process — .280

Preliminary drafts, notes, recommendations and intra-agency memo

Opinions expressed, policies formulated

Applies only to subjective matters, not facts

Applies to policy creation, not implementation

Waived if agency cites to specific record in connection with agency action

Expires once final policy selection is made

— *Brouillet, West*

Investigative — .240

Investigative, law enforcement and crime victim information

Must show essential to effective law enforcement or protection of person's right to privacy — *Ashley, Cowles Publishing*

If disclosure would endanger person's life, physical safety or property

Must be an investigative agency — *Columbian Publishing*

Controversy — .290

Records relevant to controversy to which agency is a party

Records not available to other party under civil discovery rules — work product — *Limstrom*

Completed, existing or reasonably anticipated litigation — not just “litigation charged atmosphere”

Settlement agreement not exempt — agency can’t agree to keep confidential — *Yakima Newspapers*

Attorney invoices may not be withheld entirely and redactions must be justified .904 — *West*

Attorney Client Privilege

An “other statute” RCW 5.60.060 incorporates attorney client privilege

Not limited to controversy?

Adopted in *Hangartner*

Improper claims of privilege could result in larger penalties for bad faith

Very controversial today

Other statutory privileges

Security — .420

Portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal terrorist acts

Vulnerability assessments

Deployment plans

Emergency and escape response plans

Security for computer and telecom networks

Not subject to disclosure under federal law

Notice of breach of security — .590

Redaction — .070/.210(1)

If only part of document is exempt, agency should redact exempt portions and produce the rest

Exemptions inapplicable to extent information that violates personal privacy can be deleted from records

Extended beyond just personal privacy information to cover other exemptions

“Silent Redaction” is redacting portions without showing redactions or explaining applicable exemption

Numerous cases

AG Review — .530

If agency concludes record is exempt and denies opportunity to inspect or copy

Requestor may ask AG to review

AG shall provide written opinion whether record is exempt

Judicial Review of Denial — .550(1)

Motion in superior court

Agency must show cause why it refuses to allow inspection and copying

Burden on agency to show exemption properly applied — *Soter*

Agency not limited to exemptions identified in denial — *PAWS*

Judicial Review of Timeliness — .550(2)

Motion in superior court

Require agency to show cause that time estimate
for response is reasonable

Burden on agency

Little used

Injunctions — .540

Examination of public records may be enjoined
Upon motion and affidavit

By agency, representative, person named in
record, person to whom records specifically
pertains

Examination would clearly

- (1) Not be in the public interest
- (2) Substantially and irreparably damage person
- (3) Substantially and irreparably damage vital governmental functions

Requestor is not indispensable party — *Burt*

Not independent basis for denial, still must fall
within statutory exemption — *PAWS*

Venue — .550

Superior court in county where records are maintained

In injunction cases, also where movant resides

If against a county, in adjacent county RCW 36.01.050

Standard of Review — .550

De novo

No deference to agency determination

Court may review records *in camera*

May base hearing solely on affidavits

Statute of Limitations — .550(6)

Within one year of

- Agency's claim of exemption
- Last production of records on partial or installment basis

Doesn't begin to run until provides log identifying individual records withheld — *Rental Housing*

Fees and Costs — .550(4)

Any person who prevails against agency in court

Initially court adopted catalyst theory

- If filing in court was necessary to obtain disclosure

- Existence of lawsuit had causative effect

Now prevailing party determined by legal question whether records should have been disclosed

- subsequent events do not affect wrongfulness of initial agency action to withhold — *SRDF*

Costs not limited to statutory costs — *Blaine School Dist*

Penalties — .550(4)

Award of penalties is mandatory; amount is discretionary

Not less than \$5 per day not to exceed \$100 per day

Per day; but per document?

Bad faith is not required; good faith is not a defense — both go to setting amount

Trial court must consider entire penalty range reserving extremes for most and least culpable

7 mitigating factors; 9 aggravating factors — *Yousoufian* [Sanders controversy]

Agency can't avoid penalties by filing injunction suit; still responsible for per diem penalties

Thank you!

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