

# ELECTRONIC RECORDS AND WASHINGTON'S PUBLIC RECORDS ACT

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## WASHINGTON'S PUBLIC RECORDS 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 that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.*

RCW 42.56.030.

Washington's Public Disclosure Act was adopted in 1972 by a direct vote of the people of Washington and provides for broad rights of access to public records. The law was renamed the **Public Records Act** ("PRA") in 2006. *See Bellevue John Does 1-11 v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008). It requires all records to be made available unless there is a specific exemption authorizing nondisclosure. *Prison Legal News, Inc. v. Dep't of Corrections*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005); *see also Rental Housing Ass'n of Puget Sound v. City of Des Moines ("RHA")*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009). The burden of proof is on public agencies to demonstrate why a record should not be made available. RCW 42.56.550; *Bellevue John Does 1-11*, 164 Wn.2d at 209.

The Washington Supreme Court described the Act as follows:

It is a strongly worded mandate for broad public disclosure. While 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. The provisions of the act are to be liberally construed to promote full access to public records so as to assure continuing public confidence in governmental processes, and to assure that the public interest will be fully protected.

*Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989). The court further held that "[w]ithout tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests." *Progressive Animal Welfare Soc'y v. Univ. of Washington ("PAWS II")*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). For a complete analysis of the PRA and case law interpreting the Act, *see PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS ("DESKBOOK")* (Greg Overstreet, ed. Wash. State Bar Assoc. 2006).

## I. THRESHOLD INQUIRY: TO WHAT RECORDS DOES THE PRA APPLY?

The Public Records Act (“PRA”) applies to the public records of all state and local agencies. RCW 42.56.070(1) & .010(1) & .010(2).

### A. “Agency” Under the PRA

“Agency” is defined in the PRA as:

[Including] 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 42.56.010(1). This definition is written very broadly as it was designed to encompass all governmental agencies within Washington. This includes **state agencies**, *see, e.g., O’Connor v. State Dept. of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001); **cities**, *see e.g., RHA*, 165 Wn.2d 525; **counties**, *see, e.g., Koenig v. Pierce County*, --Wn. App.--, 211 P.3d 423 (2009); **ports**, *see, e.g., West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008). Even individual **municipal officials** acting in their official capacities have been deemed “agencies” for the purposes of a PRA suit, *see, e.g., Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993).

Whether an entity is an “agency” under the “other local public agency” language of the above definition is determined by a four-factor “functional equivalency” test: “(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.” *Telford v. Thurston County Bd. of Comm’rs*, 95 Wn. App. 149, 162, 974 P.2d 886 (1999); *see also Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 192-95, 181 P.3d 881 (2008) (applying *Telford* functional equivalency test in concluding entity was an “agency” under the PRA); WAC 44-14-01001 (Attorney General’s non-binding model rules on public records).

### B. “Public Record” Under the PRA

The PRA only applies to public records, so the determination of whether the records at issue are “public” is often the threshold inquiry in PRA cases. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 746, 958 P.2d 260 (1998); *see also O’Neill v. City of Shoreline*, 145 Wn. App. 913, 922, 187 P.3d 822 (2008), *review granted*, -- Wn.2d --, 208 P.3d 554 (2009) (“A threshold issue under the PRA is whether the requested documents are public records.”) (citation omitted).

Under the PRA, a “public record” includes

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 42.56.010(2).

Further, a “writing” as defined by the PRA means any

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 42.56.010(3).

The above definition of “public record” is construed broadly under the PRA to effectuate the PRA’s purpose of allowing full access to government records. *See Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn. App. 319, 323, 890 P.2d 544 (1995) (public record is defined “broadly” under the PRA); *see also Ames of City of Fircrest*, 71 Wn. App. 284, 291, 857 P.2d 1083 (1993) (same). *See also* Attorney General Open Government Internet Manual (Att’y Gen. Manual”), Chapter 1, §1.2 (same). Part of this threshold inquiry also involves whether the record is “**identifiable**,” meaning that the request must be with sufficient clarity to “give the agency fair notice that it has received a request for a public record.” *Beal v. City of Seattle*, 150 Wn. App. 865, 872-73, 209 P.3d 872 (2009) (citing *Wood v. Lowe*, 102 Wn. App. 872, 878 10 P.3d 494 (2000)).

Thus, to be subject to the PRA, a record must meet a 3-part test: it must **(1)** be a 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. *Confederated Tribes*, 135 Wn.2d at 746; *see also Dragonslayer, Inc. v. Washington State Gambling Comm’n*, 139 Wn. App. 433, 444, 161 P.3d 428 (2007) (“All three elements of this three-prong test must be satisfied for a record to be a public record.”) (citation omitted).

This presentation will be limited to discussing the PRA’s application to electronic public records, including rules specific to the disclosure, redaction, and retention of electronic records.

## II. ELECTRONIC RECORDS

In general terms, “electronic records” are essentially records created and readable by a machine—this includes emails, scanned images, web pages, databases, and word processing files created by programs such as Word or WordPerfect. *See* Office of Secretary of State—Washington State Archives, “Frequently Asked Questions for Digital WAC 434-662” (“Secretary of State FAQ”), at 1.

The broad definition of “public record” delineated above includes electronic records. *O’Neill v. City of Shoreline*, 145 Wn. App. at 923-24. Moreover, the PRA does not distinguish between paper and electronic records. *See* WAC 44-14-05001 (comment to non-binding Attorney General Model Rules). Therefore, the disclosure provisions and unusually-strong policy considerations specified in the PRA apply with equal force to electronic public records.

### A. Policy Behind Electronic Records

Within the past decade, agencies have increasingly compiled and stored their public records in an electronic format. This trend has greatly increased the flexibility, portability, and efficiency of locating and providing responsive public records to those that request them. A task force was formed in 1994 by the Legislature called the Public Information Access Policy Task Force to help provide recommendations and craft policy statements to guide this transition period. *See* MUNICIPAL RESEARCH & SERVICES CENTER, *Public Records Act for Washington Cities and Counties*, Report Number 81 (May 2007) (“MRSC Report”) at 8 (citing Isabel R. Safora, “Municipal Policies on Internet Usage & E-mail Document Retention,” *Legal Notes Information Bulletin No. 487*, §§ VI-VII (1997)). This trend is in keeping with the policy statement of the Legislature in regards to electronic 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 help 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.

RCW 43.105.250 (quoted in part in WAC 44-14-05001).

The policy of giving encouragement and incentives to all state and local agencies to store and provide records electronically was further articulated by Directive 07-08 issued to State Agency Directors by Governor Christine Gregoire on September 18, 2007:

I know you share my support for open government and our state’s Public Records Act (Act). As more public records are available electronically, state agencies have an opportunity to work with people who request electronic copies of public records and, when possible, make electronic copies of non-exempt public records available in electronic format.

Numerous writers, scholars and lawyers have expressed views on this topic of production of electronic records. Very few states have addressed any aspect of this issue in their state public records laws. At least one court has ruled that Washington’s Public Records Act does not require the production of electronic copies of non-exempt public records. Today, regardless of the technical requirements of the Act, I am asking all state agency public records officers to work with people who request electronic copies of non-exempt public records and, whenever possible, to satisfy these requests.

I know this will be new work, and in some cases, a new challenge for state agencies. To provide support, I am asking that the Department of Information Services designate a team to serve as a resource for state agency records officers and information technology departments, as they work to response to requests in the coming year.

## **B. Requesting Electronic Records**

There is no difference in making a request for a paper record or an electronic record—if it is a valid request for an identifiable public record, the agency must comply with the PRA. *See* WAC 44-14-050(1). Requests can be made in person or by fax, phone, mail or e-mail. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 497, 90 P.3d 26 (2004); *see also* WAC 44-14-03006. However, if the requestor specifically requests an electronic record in electronic format, the agency should generally provide it as requested. *See* WAC 44-14-05001.

As with regular printed records, it is highly advisable that requestors put their requests for electronic records in writing, specifically reference the PRA, and reference to the best extent possible what records they seek. *See Beal*, 150 Wn. App. at 876-77 (recognizing that oral PRA requests are “problematic” and can make it more difficult for a requestor to show “that they in fact requested public records”); *see also* Att’y Gen. Manual Chapter 1, §1.5(C) (written requests are advisable because they “confirm the date on which the record is requested, and it also clarifies what is being requested. Identification of the requesting party, with address and telephone number, will also facilitate a request for clarification by the agency of any ambiguous request or allow the agency to determine if a person has the right to a record that would normally be exempt”); WAC 44-14-03006 (indicating that larger public records requests should be made in writing and that requestors are therefore “strongly encouraged to make written requests); DESKBOOK, §5.3(2)(b). There is no requirement that PRA requests be in writing, and the Model Rules indicate that “[s]ome agencies find oral request to be the best way to provide certain kinds of records”). WAC 44-14-03006.

## C. Agency Providing Electronic Records

As stated previously, because the PRA applies to electronic public records, an agency has the same duties under the PRA in responding to an electronic records request as it does for paper records. The following is a short summary of some of the duties the PRA places on agencies in responding to a PRA request.

### 1. General agency duties under the PRA

Since July 2005 agencies have been required to **designate a Public Records Officer**.

(1) Each state and local 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. A state or local agency's public records officer may appoint an employee or official of another agency as its public records officer.

(2) For state agencies, the name and contact information of the agency's public records officer to whom members of the public may direct requests for disclosure of public records and who will oversee the agency's compliance with the public records disclosure requirements of this chapter shall be published in the state register at the time of designation and annually every year thereafter.

(3) For local agencies, the name and contact information of the agency's public records officer to whom members of the public may direct requests for disclosure of public records and who will oversee the agency's compliance within the public records disclosure requirements of this chapter shall be made in a way reasonably calculated to provide notice to the public, including posting at the local agency's place of business, posting on its internet site, or including in its publications.

RCW 42.56.580(1).

Agencies are allowed to adopt reasonable procedures relating to records requests, but those procedures must “provide for **the fullest assistance** to inquirers and the **most timely possible action** on requests for information.” RCW 42.56.100; *see also* WAC 44-14-040(1). Public records must be available for inspection during the agency’s regular office hours. RCW 42.56.090. If an agency is not regularly open at least 30 hours a week, the records must be made available from 9 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday. *Id.*

Agencies are required to maintain an index of public records and provide this index upon request. RCW 42.56.070. It is the agency’s responsibility to determine which records can be legally withheld. RCW 42.56.550.

Once an agency receives a request for a public record, the agency has **five business days to produce the record, deny the request, request clarification if the request is truly unclear, or provide a reasonable estimate of the additional time it will need to respond to**

**the request.** RCW 42.56.520; WAC 44-14-040(2). Records are to be produced “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. Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad.” RCW 42.56.080.

## **2. Responding to PRA requests for electronic records**

### **a) Threshold inquiry of whether requested electronic record is a public record**

The “threshold inquiry” described above of whether the requested record is in fact a public record also applies to cases involving electronic records. For instance, in *O’Neill*, Division I of the Court of Appeals addressed a growing controversy related to whether emails in their native electronic form and their attendant metadata are public records subject to disclosure. The email in question in *O’Neill* was referenced by the city’s deputy mayor at a city council meeting. 145 Wn. App at 919-20. The email, which alleged improprieties by the city council, was attributed to a woman in attendance at the meeting, who made an oral request during the meeting for the email—the woman later made several PRA requests related to the email, one of which explicitly requested the “metadata” of the email. *Id.* at 924-25. The agency—and the deputy mayor who was sued in her official capacity—argued that the email and its metadata were not public records.

The central issue as to the metadata in *O’Neill* was whether the metadata of the requested email met the second prong of the “public record” definition. *See* RCW 42.56.010(2). This analysis necessarily presumed that the metadata embedded in the email is a separate record that must comply with the 3-part public record definition apart from the email. The court first defined “metadata” by stating:

“Metadata” is not defined in standard English dictionaries. But other sources generally describe the terms as “data about data,” or more specifically, “information describing the history, tracking, or management of an electronic document.”

*Id.* at 919 n.2 (citation omitted). On the second element of the “public record” test, the court concluded:

[O]n this record, the metadata contains information that “relates to” the conduct of government or the performance of a governmental function. For example, it shows the e-mail addresses of persons who may have knowledge of alleged government improprieties in dealing with a zoning matter. This falls squarely within the statute’s definition of “public record,” as we must liberally construe the PRA.

*Id.* at 925. Ultimately, the Court concluded that the metadata, “or some portion of it,” is a public record subject to the PRA disclosure provisions and remanded to the trial court. *Id.*

This issue has been addressed by other jurisdictions as well, and is likely to be a contentious problem between public record requestors and responding agencies in the future as agency emails are commonly requested electronic records. *See Lake v. City of Phoenix*, 220 Ariz. 472, 207 P.3d 725, 731 (2009) (Arizona appellate court concluding that under its public records law with different record definitions metadata is not a public record). Indeed, the State Supreme Court granted review of *O’Neill* on April 28, 2009, presumably to address some of these issues.

**b) Providing electronic records when requested in electronic form**

The lack of published case law on the myriad of issues related to an agency responding to a request for electronic records necessarily requires disproportionate reliance on the Model Rules of the PRA. The Model Rules for the PRA explicitly state that if a requestor makes a request for records in electronic format,

[T]he 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 this **reasonably translatable** from the format in which the agency keeps the record.

WAC 44-14-050(2).

In many circumstances, the agency’s duties—and potential liability in failing to adequately respond—is dictated by what is “**technically feasible**.” *Id.* What is “technically feasible,” however, is dependent upon whether the records are “**reasonably locatable**” and “**reasonably transferrable**.” *See id.* This determination necessarily depends on the particular facts and circumstances of a given request and what agency it is directed at. *Id.*

Whether the records are “reasonably locatable” is intertwined with the aforementioned “identifiable record” requirement for a valid PRA request. *See* WAC 44-14-04002(2) (defining “identifiable records” as one that agency staff can “reasonably locate”). In the context of electronic records, 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.” WAC 44-14-05002.

For instance, one of the most commonly requested electronic records are emails of government employees; locating responsive records may include the utilization of the internal “search” function of an email system, such as Microsoft Outlook, or Gmail, which could allow an agency to sort through emails by topic, date, or persons sent to or received from. *Id.* Or if the records are stored in a database organized by tables with certain fields, an agency may segregate certain fields and provide records specifically responsive to the PRA request with simple inquiries made by agency staff. Again, what is reasonably locatable is usually dependent on the particular circumstances of a given request—*i.e.*, what is reasonably locatable to one agency might be argued by an agency to not be reasonable for another because of the particular manner or location in which the responsive records are stored, or because of limitations on an

agency's resources. *See* WAC 44-14-05002(1). This situation creates several problems, addressed below.

“Reasonably translatable” involves a different analysis, and becomes an issue in usually three distinct scenarios articulated within the comments to the Model Rules: (1) when the agency only has a paper record of records requested in electronic format; (2) when the agency has a responsive record in a commercially available format; or (3) when the agency has an electronic record but the requestor seeks a copy of that record in a different electronic format.

In the first scenario, “reasonably translatable” is not likely to be problematic, as the agency could scan the responsive paper records into a widely-used format such as Adobe PDF or convert it to commonly used program format like Excel or Word or the like. *See* WAC 44-14-05002(2)(i). As stated above, the agency would be able to recover the cost of scanning the paper records into an electronic format or converting them to a different program. *See id.* However, some cases have directly addressed whether an agency is obligated by the PRA to provide electronic copies of responsive public records that are in paper form.

**Case Illustration:** *Moore v. Washington State Dept. of Corrections*, Thurston County, No. 06-2-1040-7 (2007)

**Relevant facts:** Requestor made a PRA request to the State Department of Corrections for identifiable public pay records in an electronic format. The records were held by the agency in paper form, and not in the format requested by the requestor. The agency argued that it was under no duty to provide paper records in electronic format, but if it was, the requestor should pay a fee of almost \$9,000 to respond to the request.

**Result:** The parties ultimately settled when the requestor appealed, with the agency agreeing to pay the requestor \$65,000. At the summary judgment hearing, the trial court largely agreed with the agency. Judge Christine Pomeroy stated that “any agency that who maintains the record in electronic format still has the duty to disclose them upon request.” *See* Verbatim Report of Proceedings, June 29, 2007, at 33. However, Judge Pomeroy ruled that whether an agency has a duty to provide non-electronic records in electronic form was better left to the Legislature, specifically stating that she believed there to be no clear right for requestors to electronic copies of paper records.

In the second scenario, there is also no likely issue over whether the record is “reasonably translatable” because the requestor probably wishes to have the record in the same format as it is stored by the agency—meaning there is no “translation” necessary. *See* WAC 44-14-05002(2)(ii). This means also that an agency cannot store its records in Word, for instance, receive a public records request for the record in Word, and then “translate” the record into another program such as WordPerfect. *See id.*

The third scenario, however, presents several problems. If the requestor seeks a copy of a public record in Word and that record is stored by the agency in another program, it would be “reasonably translatable” if the agency could simply open the public record and “save as” a word version—assuming that the substance of the record is unchanged. *See* WAC 44-14-

05002(iii). Another circumstance addressed in the comments to the Model Rules is where the agency stores the public records in a database that is unique and not easily translatable to any other database form. In that case, the agency could convert the database into a universal (and less sophisticated) format, such as comma-delimited or tab-delimited, so the requestor could then convert the provided records with their own program (such as Access) into a usable format. *Id.* This procedure would also apply if the requestor wants the public records in a different word processing format, where the agency could reduce the records into a text file that the requestor can then implement the records into a program of their choosing. *Id.*

### **3. Redacting electronic records**

Agencies are required to make all public records available for inspection or copying unless the record falls within the specific exemptions of title 42.56 or some other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070. These exemptions are for the most part permissive and not mandatory, thus in many cases an agency may waive an exemption if it chooses to do so as long as no person's privacy is violated by the disclosure. *See* Op. Att'y Gen. No. 1 (1980). Moreover, an agency cannot be held liable "for any loss or damage based upon the release of a public record if the [agency] acted in good faith." RCW 42.56.060.

Because the public policy behind the PRA is to favor disclosure, all exemptions are to be narrowly construed. RCW 42.56.030; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). The agency bears the burden of proof to show that its refusal to allow access to public records "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550.

If an agency refuses to allow access to a public record, in whole or in part, the agency's response must point to the specific exemption that authorizes withholding the record and must include an explanation of how the exemption applies to the record. RCW 42.56.210(3). None of the exemptions allows an agency to withhold any statistical information that is "not descriptive of any readily identifiable person or persons." RCW 42.56.210(1). Furthermore, if information, "the disclosure of which would violate personal privacy or vital governmental interests," can be redacted from a public record, then the agency must release the rest of the record after redacting that information. *Id.*; *Hearst*, 90 Wn.2d at 132.

In the context of electronic public records, the general principles of how and under what circumstances an agency can claim an exemption apply, but the nature of the records themselves can raise technical issues not present with paper records. Specifically, information that is stored in electronic format obviously cannot be redacted with a black marker, copied, and then printed to a requestor, as would be appropriate with paper records. However, redacting electronic records in many instances can be much faster and more efficient than the previous norm of redacting by hand—making the transition from paper to electronic records even more of an incentive to large and small agencies wary of expending resources on the redaction of paper records.

The comments to the Model Rules state that it is possible for an agency to redact electronic records by eliminating certain fields of exempt information—as in the case where

records are stored in a database—and then provide the records to the requestor on an electronic disc. For instance, if the agency keeps its real estate tax assessment records in a database, and that database contains a field of information that specifies exempt material—such as social security numbers of home owners—the agency’s software would almost certainly allow it to simply click on that field eliminate it, thereby protecting private information and also facilitating a timely response to the requestor.

However, the same requirements for actually claiming an exemption apply to electronic records as they do for paper records. Specifically, the agency cannot simply withhold entire electronic records, or redact any portions of them without providing the requestor an adequate basis for doing so. *See* WAC 44-14-04004(3)(b)(i). As clarified by the State Supreme Court in *RHA*, “a valid claim of exemption under the PRA should include the sort of ‘identifying information’ a privilege log provides.” 165 Wn.2d at 538. Citing the Model Rules, the Court elaborated by stating that this standard entails the particular statute providing the claimed exemption, the name of the record, and also “the type of record, its date and number of pages, and the author or recipient of the record.” *Id.* at 539.

The redaction of electronic records raises interesting and unanswered questions. For instance, when redacting an electronic record, is an agency “creating” a new record that does not previously exist—not required by the PRA—or is it directly analogous to the redaction of paper records? Or what is the potential liability of an agency for electronically storing exempt public records with exempt public record in an inexorable manner that makes redaction technically infeasible? Can a court order that the agency changes the technical manner in which it stores its information to prevent technical issues from occurring again? Should the court provide an independent technical expert to remedy such issues? If so, who should subsidize it? As technological advances continue amongst government agencies of all sizes, these issues are likely to become the subject of contentious litigation in the near future.

There is no indication that the Court in *RHA* limited its holding to the claims of exemptions in only paper records. However, there is no published appellate decision yet analyzing the sufficiency of an agency’s claim of exemption within the context of electronic records after the Court’s ruling and many of the above questions may not be answered any time soon.

## **D. Charging Costs for Providing Electronic Records**

### **1. General prohibition on agencies charging requestors fees**

The PRA contains an express prohibition on an agency from charging fees for the inspection of public records: “No fee shall be charged for the inspection of public records. No fee shall be charged for locating public documents and making them available for copying.” RCW 42.56.120. *See also* WAC 44-14-07001(1) (“An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying”) (citation omitted) (emphasis added); MRSC Report at 41 (“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.”) (emphasis added).

As one type of an inspection fee, a “redaction fee” is also unlawful under the PRA:

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 off-site. These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

WAC 44-14-07001(1) (citing RCW 42.56.120); *see also* Att’y Gen. Manual, Chapter 1, §1.6(D). “Agencies undoubtedly incur substantial costs when disclosing public records. However, the Legislature has not authorized agencies to recover the costs associated with the [Public Records Act], except for a reasonable charge for providing copies of public records.” Op. Att’y Gen. No. 6 (1991) at 6. The process of redaction is a cost associated with preparation of responsive public records and thus the agency must bear those costs.

In fact, there are only a few instances where an agency can charge a fee to a requestor. For instance, a copying charge is allowed for copies of records selected by, and provided to, requestors. *See* DESKBOOK, §5.3(3)(c), at 5-30 (copying charge allowed for a copy only “if the persons inspecting a public record requests a copy of it.”).

With electronic records, an agency’s ability to charge requestors is generally limited only to the charging a requestor for the amount of the CD or DVD or whatever electronic media an agency utilizes in responding. *See* WAC 44-14-070(2). An agency would also be allowed to charge the actual cost involved in scanning a paper record into a requested electronic format (assuming the records are not already stored electronically). *See* WAC 44-14-07003. An agency, however, cannot charge for emailing the responsive electronic records to a requestor. *See id.* Likewise, an agency should not charge for the likely de minimus cost of electronically copying the electronic records onto digital media, nor can it charge a “per-page” amount for a paper copy when it has the records stored in an electronic format. *Id.*

## **2. Exception to the rule: “Customized Access” to electronic records**

An exception to the general prohibitions against charging fees to a requestor exists that is unique to electronic records. Where the records requested are not “reasonably locatable,” or are not stored by the agency in a “reasonably translatable” format (such as Word, Adobe PDF, etc.—see above discussion), one solution is for the agency to provide “customized access” to the requestor. WAC 44-14-05001.

“Customized access” is essentially an option of last resort, appropriate for the rare situations where the agency stores its public records in a manner that prevents it from translating it into another commercially available format, or even reducing it to raw data as in the scenarios presented above. The comments to the Model Rules make clear, as does the controlling statute, that customized access “should not be the norm.” WAC 44-14-05004. Customized access is appropriate in the limited circumstances where an agency programmer would be required to write new code to extract the responsive public records from the agency’s system and provide it a mutually agreeable format. *Id.*

Important within this context, however, is that an agency may charge a requestor for this customized access. RCW 43.105.280 states

Funding to meet the costs of providing access, including the building of the necessary information systems, the digitizing of information, developing the ability to mask nondisclosable information, and maintenance and upgrade of information access systems should come primarily from state and local appropriations, federal dollars, grants, private funds, cooperative ventures among governments, nonexclusive licensing, and public/private partnerships. Agencies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue. Fees for staff time to respond to requests, and other direct costs may be included in costs of providing customized [.]”)

*See also* WAC 44-14-05004. The Model Rules also indicate that this access option is at the discretion of the requestor—*i.e.*, the agency would have to show that the electronic records sought were not reasonably locatable or translatable, and that customized access was truly the only option. *See* WAC 44-14-050(3).

In keeping with the understanding that customized access should be a last resort, the comments to the Model Rules also state that in a situation where some of the technical issues specified above have arisen, the requestor and the agency should confer to try to ameliorate any conflicts. *See* WAC 44-14-05003. This recommendation is designed to help both parties, as it aids the agency in fulfilling its mandated duty to provide the “fullest assistance” to requestors, and can likewise help the requestor in understanding the technical limitations of the agency. *Id.* An open channel of communication can resolve technical problems and help facilitate a quick response to a PRA request, and thus help avoid needless litigation between parties that do not quite understand what the other side is arguing.

## **E. Electronic Records and Agency Retention Schedules**

### **1. General retention requirements**

Agencies are required by statute to retain copies of public records, with longer periods of retention for certain kinds of records. *See* RCW 40.14 *et. seq.* For their public records management issues, agencies rely on the Records Management Guidelines, which are approved and issued by the Secretary of State, implemented by the Washington State Archives and Records Management Division and the Washington State Local Records Retention Committee for use by all local and state government agencies in Washington. A retention schedule is a listing of particular categories of records by their function, and the minimum amount of time that that particular category must be retained by agencies. *See* Secretary of State FAQ, at 1. How long the record is kept is dependent on the type of record and is determined by the State Records Committee (for State agencies) and the Local Records Committee (for local agencies), who authorize the schedules. *See id.* The two most common dispositions of agency records after their designated period of retention has expired is to either dispose of the record or to transfer the records into a permanent archive. *See id.*

For electronic records, the retention schedules generally address multiple issues, including: the creation of records; proper internet and email use; privacy and confidentiality issues; record retention requirements; the maintenance and retrieval of records; the monitoring of records; and security issues. See MRSC Featured Inquiry (08/16/09), available at <http://www.mrsc.org/askmrsc/featuredinq.aspx?inq=419>.

## **2. Updated retention requirements for electronic records**

In 2008, a new WAC was promulgated designed to clarify the existing requirements for State and local agencies for the retention and management of electronic records as required by RCW 40.14.010 (any record made or received in the course of business is a public record and must be managed accordingly). See *id.* at 2. This WAC is located at WAC 434-662, and all but two provisions within it have been effective since January 1, 2009. See Secretary of State, WSR 08-21-073 (Washington State Register—Permanent Rules) (Filed October 13, 2008) (“WSR 08-21-073”). The rule was adopted pursuant to RCW 40.14.020(6).

The new WAC contains explicit provisions related to its purpose, what records it applies to, the duties of agencies, the required components of transmittal agreements between agencies and the digital archives in transferring records, and also provisions related to the management of metadata, web sites, and e-mails. See WAC 434-662. The provisions related to website and e-mail management do not take effect until January 1, 2010. See WSR 08-21-073.

As one of the more commonly requested public records, the provision related to the retention of agency emails is one of the more important in the new WAC. WAC 434-662-150 specifies that

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[.]

This is also supported by the Secretary of State FAQ, which states that the breadth of RCW 40.14 encompasses email, including phone systems that convert messages to emails. *Id.* at 2. The FAQ also makes note that emails meet the definition of a public record under the PRA (see above). *Id.* The specific issue of to what extent emails and their metadata must be retained was addressed in recent case law—see below.

**Case Illustration:** *O’Neill v. City of Shoreline*, 144 Wn. App. 913, 187 P.3d 822 (2008)

**Relevant facts:** The public record at issue in *O’Neill* was an email received by the then-Deputy Mayor of the City of Shoreline that allegedly made accusations that the City Council was exerting its influence over an ongoing zoning issue. The Deputy Mayor referenced the email during an open city council meeting, and stated that it came from a certain citizen. The citizen was present at the meeting and made several PRA requests for the email including its full header and other metadata.

The citizen was first given an altered, paper-printout of the email. The citizen wanted to know where the email originated, and to whom it was sent. She made progressively more specific and explicit requests, including requests for the email in its electronic form with all of its metadata intact. The agency never provided the electronic version of the requested email with its metadata. Moreover, the deputy mayor claimed that she deleted the original email accidentally, and that she believed she had provided what was asked. The defendants later argued that the destruction of the email was proper under its then existing retention policy. Specifically, the defendants claimed that the policy as it existed allowed it to treat the electronic copy of an email as transitory and to delete it after it has been printed—even if a public record.

The citizen argued that the local government retention policy did not allow for the destruction of a public record that was the subject of an explicit PRA request for the records—nor did the PRA.

**Result:** The Court of Appeals at Division I concluded that “[t]he City’s actions in this case appear to have complied with [the Retention Guidelines].” 145 Wn. App. at 934. However, the court also relied upon the fact that the court’s review of agency’s action is reviewed *de novo*, *i.e.*, giving no deference to the agency’s decisions, and that the Retention Guidelines “in effect do not inform the questions presented in this case,” because the PRA controls whenever there is a conflict in law. *Id.* This conclusion implies that there is a conflict between the PRA and the Retention Guidelines as they existed in 2006. The case is on appeal to the State Supreme Court.

It is unclear whether the existence of the new regulation would have changed the *O’Neill* court’s analysis in that case. However, the new WAC expressly addresses the retention of metadata, requiring that all electronic records transferred to the archives maintain a specified amount of metadata—including the “name of the originating agency, the date of transfer, the records series, and other appropriate metadata as specified in the transmittal agreement.” WAC 434-662-110. In fact, the WAC specifies that the archives will not accept electronic records without this metadata. *See id.*