

# *OPEN PUBLIC RECORDS*

Washington State  
Attorney General's  
Office

June 2011

**Timothy D. Ford**

Open Government  
Ombudsman

Assistant Attorney General  
for Government  
Accountability



# WHAT IS AN OPEN GOVERNMENT OMBUDSMAN?

- Ombudsman Position Created by AG Rob McKenna
- Provides Assistance to the Public and Agencies
  - Training on Compliance with the Public Records Act and Open Public Meetings Act
  - Provides Informal Advice Letters interpreting those Laws
  - Advocates for Greater Transparency and Governmental Accountability
  - Promotes Legislative Reform & serves on the Sunshine Committee
- Contact info: [timf@atg.wa.gov](mailto:timf@atg.wa.gov) or (360) 586-4802

# ***TRAINING OBJECTIVES***

Learn and Discuss the following:

1. History & Purpose of the Public Records Act
2. General Agency Obligations under the PRA
3. Construing the PRA
4. What is a “public record”?
5. Valid requests, Managing Resources, & Initial responses
6. Exemptions and how they apply
7. Legislative updates
8. Electronic records and disclosure
9. Fees an Agency may charge
10. Agency and Employee Liability
11. Attorney General’s model rules
12. Case law updates
13. Tips & Resources

# ***HISTORY OF THE PUBLIC RECORDS ACT***

- ⦿ Passed in 1972 as part of Public Disclosure Initiative (I-276) with a voter approval of 72%
- ⦿ All state and local agencies must comply with the Public Records Act
- ⦿ All public records must be disclosed unless there is a statutory exemption
- ⦿ Only 10 exemptions in I-276; now over 300 exemptions exist throughout RCW's

## ***PURPOSE OF THE PUBLIC RECORDS ACT***

- ⦿ The People do not yield their sovereignty to the agencies which serve them.
- ⦿ They do not give public servants the right to decide what is good for the people to know and what is not good for them to know.
- ⦿ Remain informed so they may maintain control over the instruments they have created.

# ***GENERAL OBLIGATIONS UNDER THE PRA***

- Agencies shall appoint a public records officer. RCW 42.56.580.
  
- Duty to Publish -
  - Name & contact info of public records officer. RCW 42.56.580.
  - How to submit requests for information. RCW 42.56.040.
  - Agency organization, rules, and procedures. RCW 42.56.040.
  - Index of specified categories of records. RCW 42.56.070.
  - Customary business hours posted on website. RCW 42.56.090.
  
- Records shall be available for inspection and copying during customary business hours. RCW 42.56.090.

# GENERAL OBLIGATIONS CONTINUED

Agencies shall adopt reasonable rules. RCW 42.56.100.

- ⦿ Provide full public access to public records
- ⦿ Protect public records from damage or disorganization
- ⦿ Prevent excessive interference with other essential functions
- ⦿ Provide fullest assistance to requester, and most timely possible action
  - *Parmelee v. Clarke*, 147 Wn. App. 1035 (2009)

## ***“BROAD MANDATE” FOR OPEN GOVERNMENT***

- Agencies “shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions” of the PRA or other law. RCW 42.56.070(1).
- Construe exemptions narrowly in favor of disclosure. RCW 42.56.030; WAC 44-14-06002(1).
- Redact exempt information and disclose non-exempt information. WAC 44-14-04004(4)(b)(i).
- Denials must include the specific statutory exemption and a brief explanation. RCW 42.56.210(3).
- When in doubt, give it out.

# ***WHAT IS A PUBLIC RECORD?***

RCW 42.56.010(2):

1. Any writing
2. which contains information relating to the conduct of government or the performance of any governmental or propriety function
3. prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

*Concerned Ratepayers Ass'n v. PUD No. 1*, 138 Wn.2d 950 (1999).

# **“WRITING” MEANS...**

- ① 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.

# WHAT IS A VALID REQUEST?

- ⦿ Request must be for “identifiable” records
  - Not a request for general information. There must be a reasonable description of the record. *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410 (1998)
  - No duty to create records. *Smith v. Okanogan County*, 100 Wn. App. 7, 14 (2000)
- ⦿ An “identifiable record” is one that agency staff can reasonably locate. WAC 44-14-04002.
- ⦿ Agency forms should be encouraged, but are not required. “No official format for a valid request”. *Hangartner v. City of Seattle*, 151 Wn.2d 439 (2004).
- ⦿ Must not deny overbroad requests. RCW 42.56.080 .

# MANAGING RESOURCES

- ⦿ *Zink v. City of Mesa*, 140 Wn. App. 328 (2007)
  - City of Mesa - Population of 440
  - 172 requests over 2.5 years; City limits access to inspect public records to one hour per day; claims harassment
  - “Administrative difficulty does not excuse strict compliance.”
- ⦿ Copies may be provided in batches
- ⦿ 10% Deposit may be charged for copy costs

*No insurance coverage - municipal bankruptcy??*

# ***FAILED LEGISLATIVE EFFORTS AT MANAGING AGENCY RESOURCES***

- HB 1300 - Recovering personnel costs
  - Provides a requester five free hours per month of agency personnel time to search and copy records.
  - An agency may charge a requester for staff time beyond five free hours per month.
  - A requester choosing not to pay will have their request completed, but at a rate of five hours per month.
- HB 1316 - Enjoining any harassing request
  - Defines harassment to include requests which intend to interrupt or impair government services, or intend to annoy, torment, or terrorize agency employees.
- Local Resolution allocating resources?

## ***HOW SHOULD AN AGENCY INITIALLY RESPOND?***

Within five (5) business days an agency must:

1. Provide the record(s)\*\* , or
2. Acknowledge receipt and provide a reasonable estimate of response time, or
  - Reasonable estimate should be based on complexity and number of requests, agency resources, and other essential functions.
3. Deny the request and explain why, or
4. Seek clarification.

\*\* You may also fulfill disclosure by providing an internet address and link to the agency website. RCW 42.56.520.

# COMMON EXEMPTIONS

- Personal information in files maintained for clients of public institutions. RCW 42.56.230(1).
- Personal information in files maintained for employees, if private. RCW 42.56.230(2).
- Investigative files of law enforcement. RCW 42.56.240.
- Preliminary drafts or recommendations in which opinions are expressed or policies formulated. RCW 42.56.280.
- Attorney advice or work. RCW 5.60.060(2)(a); RCW 42.56.290.
- Other exemptions in law (FERPA, Trade Secrets Act, HIPAA & health care information, etc.)

# IS THERE A “PRIVACY” EXEMPTION?

- No general privacy exemption. See AGO 1988 No 12
- Privacy must be incorporated into an element of a specific exemption. For example: Personal information in files maintained for employees, if private. RCW 42.56.230(2).
- Privacy is invaded if disclosure is 1) Highly offensive to a reasonable person; AND 2) not of legitimate concern to the public. RCW 42.56.255.
- *Tiberino v. Spokane County*, 103 Wn. App. 680 (2000)
  - Excessive personal emails - employee discharged
  - Emails an exhibit for legal defense in lawsuit
  - Email usage a public record but exempt (violates privacy)
- Check your agency computer/email policy!

# EXEMPTION LOG REQUIREMENT

Log required when an agency redacts or denies public records.

Identify the type of record, date, pages, author, recipients, statutory exemption and a brief explanation. WAC 44-14-04004(4)(b)(ii).

*Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525 (2009).

- City adopted a “Crime free rental housing program” with a \$105 fee per rental unit. RHA requested records and the City Attorney’s cover letter generally characterized withheld documents without providing individual descriptions.
- No log? - Statute of Limitations unenforceable.

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

- Mere identifying info fails to provide the required explanation.
- Increases penalty amounts where a violation is found.

# SAMPLE EXEMPTION LOG

## *Broad Subject Matter v. Brief Explanation*

Page No.	Date	Doc. Type	Author	Recipient	Basis of exemption
13	4/1/11	Email	Tim Ford	Joe Smith	Controversy - RCW 42.56.290
44	4/1/11	Memo	Tim Ford	Sue Brown	Atty/Client Priv. - RCW 42.56.070(1) and RCW 5.60.060(2)(a)

Page No.	Date	Doc. Type	Auth	Recip	Exemption	Brief Explanatory Description
13	4/1/11	Email	Tim Ford	Joe Smith	Attorney Work Product Privilege - RCW 42.56.290	Drafts, notes, memoranda, or research reflecting the opinions or mental impressions of an attorney or attorney's agent prepared, collected, or assembled in litigation or in anticipation of litigation
44	4/1/11	Memo	Tim Ford	Sue Brown	Atty-Client Priv. RCW 5.60.060(2)(a); RCW 42.56.070(1)	Communication between attorneys that reflect attorney-client communications regarding litigation

# ***NEW LEGISLATIVE ENACTMENTS***

- RCW 42.56.565 - Enjoining harassing inmate requests (2009)
  - made to harass or threaten safety and security
- RCW 42.56.250(8) - Exempting photos and dates of birth for criminal justice agency workers (2010)
- RCW 42.56.520 - Allowing disclosure by providing an internet address on the agency's website for the public record (2010)

New changes effective on July 22, 2011:

- SHB 1899 - Changing penalty amounts for PRA violations
  - Penalty range of \$5 - \$100 per day; now \$0 - \$100
- SSB 5025 - Requests by inmates ineligible for penalties.
  - Except for bad faith violations
- ESSB 5098 - Exempting personal info of minors in programs.
  - Includes programs such as early learning, child care, parks & recreation, youth development, after-school.

# ***ELECTRONIC RECORDS & DISCLOSURE***

- ◉ Agencies should develop, store, manage, and make public records widely available electronically. RCW 43.105.250.
  
- ◉ Agencies should provide electronic records in an electronic format when requested. Use a commercially available format or translatable format. WAC 44-14-05001;
  
- ◉ *Moore v. DOC* (June 2006)
  - State worker seeking information on “how the Department implements state law governing public employees’ eligibility for health insurance.”
  - DOC refused to give info on a CD (estimated cost of \$1.04).
  - \$5,700 for some 38,000 pages of documents.
  - Contradicts AG’s model rules. WAC 44-14-05001.
  - <http://www.theolympian.com/2006/06/09/44754/what-is-this-paper.html#ixzz13P1kM2bt>

# EMAILS

- ◉ *Mechling v. City of Monroe*, 152 Wn. App. 830 (2009).
  - Requester wanted emails of councilmember in electronic format. Some emails were exempt and required redaction.
  - No provision of the PRA expressly requires a governmental agency to provide records in electronic form.
  - Consistent with “fullest assistance” requirement (RCW 42.56.100) and the model rules, on remand the trial court shall determine whether it is reasonable and feasible for the City to do so.
  - City need not scan printed emails redacted by hand. Total charges paid for redacted paper copies was \$76.20 at 15 cents/page.
  - On remand, the city paid \$157,000 to settle the case and disclosed all records in an electronic form.

# META-DATA

- *O’Neill v. City of Shoreline*, 170 Wn.2d 138 (2010).
  - Oral public records request for copy of email related to a zoning matter. Email was on a personal account on a personal laptop - Public record?
  - Case of first impression - is meta-data a public record?
    - Meta-data is “data about data” or hidden information about electronic doc’s created by software programs.
    - Meta-data “embedded” in a public record must be disclosed but only when specifically requested.
  - An agency must conduct an objectively reasonable search for responsive records. WAC 44-14-04003(9).
    - Cost of purchasing software to search MAC laptop = \$500 to \$1,000.

# META-DATA

- *O'Neill* continued
  - Records retention implications:
    - Use agency email servers!! Emails of elected official are subject to retention and disclosure. WAC 434-662-150.
    - How do you retain meta-data without destroying it?
  - Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period. WAC 434-662-040.
    - Paper is not a substitute unless approved.
    - Retain all web content. WAC 434-662-040.
    - An agency is responsible for a security backup of active records.

# ***WHAT FEES MAY BE CHARGED?***

- Any person may inspect public records for free.
- No fees may be charged for agency time to search, review or redact public records.
- Copying fees may not exceed 15 cents per page unless an agency determines its actual per page costs.
- Actual costs may include staff time if directly related to copying and shipping.
- Electronic copies cost practically nothing.
- Actual staff time for scanning may be charged if established pursuant to RCW 42.56.070(7).
- Agencies should send a scanning/copying project to an outside vendor if quicker and less expensive. WAC 44-14-07001(5).

# AGENCY LIABILITY

- ⦿ Citizen lawsuit may be filed in court within 1 year of claim of exemption or last production on an installment basis. RCW 42.56.550
- ⦿ Agency has the burden of proof. Payment of court costs and attorney fees. RCW 42.56.550.
- ⦿ Payment of mandatory penalties:
  - \$0 to \$100 per day for unlawful delay or denial (SHB 1899)
- ⦿ *Yousoufian v. King County*, 168 Wn.2d 444 (2010)
- ⦿ Seven mitigating factors:
  1. Unclear request,
  2. Prompt response, or legitimate clarification inquiry,
  3. Good faith\*\*, honest, timely, and strict compliance with all PRA procedural requirements and exceptions,
  4. Proper training and supervision of the agency's personnel,
  5. Reasonableness of any explanation for noncompliance,
  6. Helpfulness\*\* of the agency to the requestor,
  7. Existence of agency systems to track and retrieve.

# ***AGENCY LIABILITY CONTINUED***

## ◎ Nine aggravating factors:

1. Delayed response (especially where time is of the essence\*\*),
2. Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions,
3. Lack of proper training and supervision of the agency's personnel,
4. Unreasonableness of any explanation for noncompliance by the agency,
5. Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency,
6. Agency dishonesty,
7. Public importance of the issue related to the request (where foreseeable to the agency\*\*)
8. Actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency
9. Amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.

**Yousoufian award = \$45/day for 8,252 days totals \$371,340**

# ***EMPLOYEE CIVIL LIABILITY***

- ⦿ Violation of the Ethics in Public Service Act, RCW 42.52.050(4)
  - Intentionally conceal a public record;
  - Required to be released under the Public Records Act; and
  - Employee was under a personal obligation to release the record.
  - Applies primarily to state employees.
- ⦿ Enforcement by state ethics board for state employees
  - Up to \$5,000 per violation
  - Payment of damages sustained by the state
  - Payment of costs, including investigation

# ***EMPLOYEE CRIMINAL LIABILITY***

## **RCW 40.16.020 - Injury to and misappropriation of record.**

- Every officer who shall mutilate, destroy, conceal, erase, obliterate, or falsify any record or paper appertaining to the officer's office, . . . . . is guilty of a class B felony and shall be punished by imprisonment in a state correctional facility for not more than ten years, or by a fine of not more than five thousand dollars, or by both.
- *State v. Norgard*, 183 Wash. 208 (1935) (upholding 17 criminal convictions of Mr. Norgard, Snohomish County Clerk for falsifying public receipts and converting public money for personal use.)
- *State v. Korba*, 66 Wn. App. 666 (1992) (employee guilty on 5 counts of injury or misappropriation of a public record for discarding applications for copies of birth certificates and keeping the copying fee).

# ***ATTORNEY GENERAL'S MODEL RULES***

- ◉ Provides “best practices” for compliance
- ◉ Any part of the model rules may be adopted
- ◉ Rules contain advisory comments
- ◉ Rules are non-binding, but they are based on extensive outreach and court decisions
- ◉ A resource for training
- ◉ Ch 44-14 WAC

## ***CASES CITING THE AG'S MODEL RULES***

- ◉ *Mechling v. City of Monroe*, 152 Wn. App. 830, 849 (2009).  
“Consistent with the statutory duty to provide the fullest assistance and the model rules . . .”. Remand to determine if it is reasonable and feasible to provide copies in an electronic format. WAC 44-14-05001.
- ◉ *Koenig v. Pierce County*, 151 Wn. App. 221, 223 (2009).  
Model rules are nonbinding, and the PRA does not require an agency to coordinate across departmental lines. WAC 44-14-01001.
- ◉ *Beal v. City of Seattle*, 150 Wn. App. 865, 874-875 (2009)  
AG's rules are non-binding but contain persuasive reasoning. WAC 44-14-03006 (Requestors are strongly encouraged to make written requests).

## ***CASES CITING THE AG'S MODEL RULES***

- *Rental Housing Association of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 539 (2009) (Attorney General's model rules require an agency to create a withholding index or privilege log when claiming an exemption from disclosure. WAC 44-14-04004(4)(b)(ii).)
- *Soter v. Cowles*, 162 Wn.2d 716, 753-754 (2007) (The Attorney General's model rules on public disclosure explain that agencies can seek injunctive relief. WAC 44-14-08004(5)(c).)
- *Burt v. Dept. of Corr.*, 168 Wn.2d 828 (2010) (“[i]f 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.” WAC 44-14-04003(11))

# *RESOURCES*

- ◉ AG's Open Government Ombudsman
  - [timf@atg.wa.gov](mailto:timf@atg.wa.gov) (360) 586-4802
- ◉ Municipal Research & Services Corp.
  - [www.mrsc.org](http://www.mrsc.org) (206) 625-1300
- ◉ Model Rules on Public Disclosure
  - [www.atg.wa.gov/ModelRules.aspx](http://www.atg.wa.gov/ModelRules.aspx)
- ◉ Secretary of State (retention of records)
  - [www.secstate.wa.gov/archives/RecordsManagement/](http://www.secstate.wa.gov/archives/RecordsManagement/)

# QUESTIONS?

