

FEATURE STORY

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BROKEN RECORDS

While it may work for radio stations, cities need a different formula than all requests, all the time.

By Ted Katauskas

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The City of Prosser's chronic Public Records Act hangover began more than four years ago with two empty wine barrels and a naked blow-up doll.

As long as anybody in the present administration can remember, Larry Loges, an irascible property owner whose father was mayor of Zillah in the 1960s, has been a very vocal and public critic of city government, using the unapologetically downscale trailer parks he owns on both sides of Wine Country Road, Prosser's gentrifying main arterial, as his personal soapbox. A dilapidated trailer on his property served as a billboard, its boarded-up facade spray-painted with often misspelled political graffiti ("ARROGANCE, BIGOTORY, CORRUPTION"). Motorists exiting the freeway gawked at his reader boards, especially the homemade (un)welcome sign mocking the city motto ("PROSSER: AN UNPLEASANT PLACE WITH UNPLEASANT PEOPLE").

His feud with Prosser, long simmering, reached a rolling boil in September 2006. After then-mayor Linda Lusk unveiled a proposal to promote local wineries by building a water tower shaped like a wine glass, Loges hoisted two wine barrels onto the roof of his trailer and, for effect, lashed on a blow-up doll as a crude effigy of Lusk. Already fielding complaints from the Chamber of Commerce that Loges's nose-thumbing at the city had been turn-

ing Prosser into "the laughingstock of the Lower Valley," the city administrator deemed the effigy an unpermitted sign in violation of municipal public decency code and dispatched police officers to tow away the trailer and impound it.

"That's the entryway into our city," explains Mayor Paul Warden, who was then a councilmember. "People were upset. He does these things just to see how far he can go,

and if he thinks he can get away with it, he will. He makes the community look bad."

In response, Loges sent a letter to the council protesting that the city had "illegally removed [his] personal property" and that he was being punished for making a "political statement against the city administration." The city scheduled a hearing. And Loges started filing public records requests.

At first, he requested just a few items: a copy of the police report related to the impoundment, a list of city personnel involved, and other related documents. But then the trickle became a deluge. Loges filed 43 of the 54 public records requests the city received in October and November that year. In December, after receiving a water bill for one of his trailer parks that he reckoned was more than three times the usual amount, Loges spray-painted a public service announcement ("✓ YOUR WATER BILL") on his trailer (which by then he had towed back to its place) and began requesting the utility bills of Prosser's 4,838 residents, seeking evidence that he was being overcharged.

Loges then began appearing in person at city hall practically every day, sometimes multiple times, in pursuit of

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—CHARLIE BUSH, PROSSER CITY ADMINISTRATOR

thousands upon thousands of pages of documents, anything that would help prove his contention that other property owners weren’t being held to the same standards as he was. Sometimes he made requests for his own records: in one notorious instance chronicled in the Yakima *Herald-Republic*, Loges came to city hall with a letter asking the clerk for a sign permit application—which he could have grabbed from a rotating kiosk himself—then minutes later returned and filed a public records request for his original letter. Cathleen Koch, who was both finance director and city clerk at the time, says there were days when she did nothing but attend to Loges’s requests. Of the 198 general government records requests filed in Prosser in 2007, 69 were filed by Loges alone, requiring 52 working days of the city clerk’s time and nearly as many from the city attorney to vet the requests, plus contributions from a half-dozen employees from various departments to track down documents. That translates to about \$75,000 worth of payroll, or the equivalent of nearly a mile of new sidewalks. Ultimately, to free up Koch to handle the city’s finances, the city would spend \$150,000 to recruit and hire a clerk and a deputy clerk to stay on top of Loges’s unrelenting requests.

“It was overwhelming,” says Koch, now Prosser’s deputy city administrator and finance director. “When it was time to do the city’s annual report, it was like, do I get the annual report done or Mr. Loges’s requests? I reasoned that it would be more costly not to do the requests and get sued than it would be to get zapped by the state auditor for not filing my report on time.”

But Loges sued anyway, in January 2007, alleging that the city had delayed, denied, or improperly processed 44 of his original requests. In July 2009, nine months after Benton County Superior Court Judge Cameron Mitchell ruled that the city had improperly handled 11 of 22 requests, the city reached a settlement, paying Loges \$175,000. That money came out of the city’s general reserves, cutting Prosser’s fiscal safety net in half.



Charlie Bush and Prosser have weathered a deluge of records requests.

“Mr. Loges has made it difficult for this city to function,” says city administrator Charlie Bush, who notes that the city devotes close to 4 percent of its general fund expenditures to Loges’s requests. “What hits me hardest is when I think about all of the things we could accomplish if we weren’t working on his wild-goose chases. Filing records requests is Larry Loges’s reason for living. It’s his purpose in life.”

Loges sees it another way: “They’re just trying to embarrass me. They’d like to see me leave the community. ... It’s my right as a citizen to ask for documents. All I’m asking for is compliance with the law.”

AND THAT LAW is a huge part of the problem. Washington’s Public Records Act was groundbreaking at its origin and is universally praised by fans of good government. But as written, it creates the conditions for struggles like Prosser’s across the state.

“I don’t want to be the Prosser model,” says Dennis Johnson, mayor of Wenatchee, where the city hall conference room is off-limits to meetings for weeks at a time, filled as it is with records that must be made available for inspection by requestors who don’t want to pay the 15-cent-per-page copy fee. “But that prospect is always on the horizon. When the records act is abused—and even when it’s not—it takes so much productivity away from city employees.

“The dilemma is that you want to be transparent, but at the same time you’re trying to manage the resources of the city, which



are already stretched pretty thin. You can't do that if you're spending all of this time and money on records requests. There's got to be a happy medium. . . . It's a concern of many municipalities."

Such as the City of Yakima, which hired its first public records officer in 2006 and now spends \$500,000 a year processing records requests. And Lakewood, whose city clerk responded to nearly a thousand records requests in 2009, including a query from a single requestor that yielded 65,000 pages of material (a stack of paper 22 feet tall) and cost the city \$15,000 to process, for which the requestor, who ultimately was interested in only 500 of those pages, was charged \$75. And the City of Sumner, which last year marshaled no fewer than 17 employees who worked over the course of several months to process two requests—one seeking all records concerning the city's sidewalks, yielding 8,000 pages of documents, and the other asking for all e-mails, cell phone records, voice mails, and computer files on record for four city officials, yielding 24,000 pages.

Washington's Public Records Act dates to 1972, when a grassroots movement of political activists, in the shadow of the Watergate scandal, drafted Initiative Measure 276. In the 1972 voter's pamphlet, the measure's official "statement for" begins, nobly, "Our whole concept of democracy is based on an involved citizenry. Trust and confidence in government institutions is at an all-time low. High on the list of causes of this citizen distrust are secrecy in government and the influence of private money on governmental decision-making. . . . Initiative 276 brings all of this out into the open for citizens and voters to judge for themselves." That sounded reasonable to 72 percent of voters that year, the share who approved the measure, which became known as the Public Disclosure Law, one of the strongest open-government laws in the nation.

But by making "all public records and documents in state and local agencies available for public inspection and copying," the authors of the state's original act couldn't have foreseen the burden that their law would create for cities in an age of e-mail and digital records. Now, a request to review electronic correspondence can yield a million pages of documents and require hundreds of hours of staff time to fulfill. Even subsequent revisions of the law—which was rechristened in 2005 as the Public Records Act, or PRA—did little to ease the strain.

The intentions of the act's authors are noble, says Everett assistant city attorney Ramsey Ramerman, who helped found the Washington Association of Public Records Officers, a statewide organization dedicated to providing PRA education and promoting best practices to increase transparency and PRA compliance for state, county, and local governments. But because the act is so strong, he asserts, it can be used to place an untenable burden on already financially strapped cities.

APP APOSTLE Q&A WITH MAX OGDEN

Portland-based web developer and open data guru Max Ogden talks about how cities can harness the power of the web—for free—to put useful digital government data into the hands of citizens.



You're best known for helping create CivicApps. How would you describe CivicApps?

CivicApps (www.civicapps.org) was the Portland metro area's regional data-release program, part of an open data initiative. It gives people like me raw access to city data sets so we can build civic applications that make it easier for citizens to get the most out of that data.

As it pertains to government transparency, what's the big idea?

In terms of public records requests, it's much easier to have a computer serve someone than it is to have a person sitting at the city who has to answer phone calls and do manual records and archive work.

Is that how did CivicApps got started?

It started on a city level. Instead of just dealing with these public records requests on a case-by-case

basis, waiting for people to ask for this stuff, the City of Portland said, "Let's see if we can make it available and get people to go to the data instead of having the data go through us." That was one of the goals. The other major goal was to release data so that citizens could build interesting civic applications based on those statistics and facts.

What's one example?

The city released a data set of the locations of heritage trees. A developer created PDX Trees, an iPhone application that finds your position in relation to the nearest heritage tree and gives the whole back story behind that tree. Because that app worked so well, I got the developer hooked up with the director of the city's public art program, and he's using the same platform to develop a similar application for public art, with locations and descriptions and links to artists' websites for all of the art the city has purchased.

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Ramsey Ramerman helped found the Washington Association of Public Records Officers in part to help cities stay transparent and in compliance with the law.

Because the PRA places no limits on the number of records a person may request, a single requestor can bring the machinery of government to a screeching halt, particularly in a city hall staffed by one or two employees. The smallest cities are held to the same “strict compliance” standard as bigger cities that can afford dedicated records request managers—and are assessed the same maximum penalty of \$100 per day per request, an amount revised upward in a 1992 amendment to the act. And in a response to a large request, even a seemingly insignificant clerical error can generate hundreds of thousands of dollars in legal bills and fines.

Or as Ramerman put it in a white paper in 2009: “A handful of requestors from across the state have started using the PRA as an income-generating tool. They attempt to trip up municipalities, not for the purpose of accessing records, but for the primary purpose of generating mandatory penalties from state and local governments. . . . Washington’s PRA allows the law to be abused at taxpayer expense. The abuse harms transparency by wasting agency time and distracting agencies from complying with good-faith requests and otherwise doing the public’s work.”

Ramerman’s solutions—including in two Public Records Act

inadvertent errors, such as when two pages out of a thousand get stuck together in a copy machine.

And perhaps most critically, the second bill’s “cost recovery” clause, modeled after provisions in other states, would provide requestors with five hours of free search time per request per month but then allow cities to recover additional costs, which will promote reasonable requests that don’t overwhelm a city’s staff with sheer volume.

“Our Public Records Act is essential to having a functioning democracy,” says Ramerman. “The federal government has weak transparency laws that make you think something’s kind of broken. On the flip side, Washington has a very strong law that puts a high burden on local government to give full assistance to any requestor, with no limit on the number of requests, and the cost to the requestor is nil. . . . The huge weakness of the Public Records Act is that it can be abused by someone who has a grudge against government. It’s a breeding ground for abuse.”

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—RAMSEY RAMERMAN, EVERETT ASSISTANT CITY ATTORNEY

reform bills to be considered by the Legislature this year—include an AWC-backed “meet and confer” provision that would encourage requestors, before filing a suit, to meet with cities to address mistakes made in good faith; Attorney General Rob McKenna has proposed a similar remedy that would only require requestors to submit a written notice. Both versions of the provision address games of “gotcha” that abusers play, taking advantage of the act’s “strict compliance” mandate to collect enormous fines for

CASE IN POINT: *Zink v. City of Mesa*, which Ramerman represented on appeal, a case that’s become a rallying cry for the need for legislative reform of the Public Records Act.



In August 2002, after the City of Mesa voided a building permit on her fire-damaged home, Donna Zink, who had served as Mesa's mayor in the early 1990s and had been a councilmember as recently as 2001, began spending a lot of time at city hall. Only instead of governing, she was submitting public records requests, demanding phone and fax logs and correspondence. In a busy year, the tiny town of 440 in the wheat fields of eastern Washington might receive 12 records requests; over the next two and a half years, Zink alone would file 172. For months, city clerk Teresa Standridge says she spent half of her time and an assistant spent all of her time doing little else but responding to Zink's requests.

"She'd come in up to three or four times a day with requests—not just one page, but hundreds of pages—then she'd go home and think of something else she could request," says Standridge, who happens to be Zink's sister-in-law. "If we didn't do everything just perfect, she was on us all the time. I was physically shaking every time I saw her because I knew she was waiting for me to make a mistake. All through it she threatened to sue the city. We were trying to do everything she wanted, and we were trying to get our jobs done."

To that end, Standridge limited Zink's time to inspect records to an hour a day.

In 2003, Zink and her husband filed a lawsuit, arguing that the city had improperly redacted, denied, or failed to respond to 37 requests. Initially, Franklin County Superior Court Judge William Acey ruled in the city's favor, finding that the city had fulfilled its PRA obligation by acting in good faith, and that strict compliance with the act was a "practical impossibility" for a city of Mesa's size, given the city's limited resources. He also determined that Zink's requests amounted to unlawful harassment, an attempt "to make the city look bad."

Zink appealed the decision, and in 2007, the Court of Appeals overturned Acey's ruling. In its opinion, the Appeals Court states, "We do not doubt that the impact of the Zinks' requests on the clerk's office was significant. . . . However . . . The reasonableness of the city's actions does not excuse noncompliance." The case was remanded to Acey, who imposed a fine that amounted to

So what's the takeaway for Washington cities?

It's hard for cities to be competitive in building immersive user experiences and applications that look modern and make people want to use them. What cities are really good at is compiling data. So why not have the community come in and help cities release the data and present it in really interesting ways?

What's in it for developers?

That's the interesting part. Data from government agencies is unlicensed and in the public domain, so developers are free to sell or charge users a fee for applications that interpret that unlicensed data. If you take the time to make a really beautiful interface for government data, legally there's nothing stopping you from building a business around it.

How does a city that wants to explore this sort of data sharing get started?

There's an initiative called Civic Commons (www.civiccommons.com) that just launched a few months ago, started by the chief technical officer of Washington, D.C., and a couple of nonprofits. Together, they are maintaining a wiki that lists applications cities have developed as part of their open data initiatives. A wiki is a really good resource because it can host detailed descriptions of every city's applications, including perspectives on what kinds of hurdles

cities have had to overcome and what worked for them. The applications that the City of Portland developed are even on the wiki, so any other city that wants to use them can do so, instead of having to pay a company to develop them.

Do you have any simple advice for electeds?

Get involved with Civic Commons: find out what other cities are doing and whether there are any tools that might fit your city. Adding your city to the Civic Commons wiki is a huge first step, because software developers out there will see that your city is interested. If you're a small rural city without an IT department but you want to open your data up to the public, you can add your name to the Civic Commons wiki right next to Seattle or Philadelphia. It doesn't matter how big or how small you are.

What's the overarching vision that drives you in this work?

That people will know what government is doing because they have applications that can work through all the madness and the noise and tell us what's relevant to every one of us individually. Suddenly, your government becomes more relevant to you. That's my dream.

RECORDS RESOURCE

With bills under consideration, court cases ongoing, and rulings and regulations constantly adjusting the public records landscape, the state archives office has taken a proactive approach to helping cities understand their obligations. At www.sos.wa.gov/archives/RecordsManagement/records_local.aspx, cities can sign up to receive automatic updates and advice on best practices for public records, as well as access a wealth of up-to-date information on topics including:

- The basics of records management
- Educational and training opportunities
- Schedules for records retention
- Management of electronic records
- Digital archiving
- Records inventories
- Disaster preparedness and response
- The state archives' local records grant programs

\$559 per citizen—\$246,000, or twice the city's annual revenue and a quarter of its entire general fund budget. Zink subsequently appealed, arguing for the full penalty of \$100 per day. While the suit remains stuck in appellate court, the city continues to accrue interest on the unpaid fine, already in excess of \$50,000. Meanwhile, the city's future is on hold; in April 2009, Mesa's mayor announced that the city was considering bankruptcy or disincorporation, then resigned a few months later.

"That's still an option," says David Ferguson, a door salesman who took over the role of mayor after a 10-month vacancy because nobody else wanted the job. "Everything's on hold. If they don't like the ruling, they can appeal this all the way to the Supreme Court. As mayor, I don't see an end to the lawsuit."

But the lawsuit may have a silver lining for other Washington cities: the Appeals Court ruling faulted Mesa for failing to act on an obscure Public Records Act provision that helps cities to "cope with records requests that become so time consuming that other work is impacted" by allowing them "to adopt rules to prevent... excessive interference with other essential functions of the agency." That situation certainly seemed to apply to the City of Gold Bar, which spent \$70,000—10 percent of its annual revenue—on public records requests in 2010, requiring the city to eliminate one public safety position, cut its office staff in half, eliminate maintenance in public parks, limit snow removal, and rely on citizens to "bring captured dogs to City Hall during office hours for impoundment."

After studying the Public Records Act and noticing the "excessive interference" provision, in November Gold Bar's council enacted Resolution 10-14, adopting a rule to devote no more than 12 hours a month to the handling and processing of public records requests "in order not to interfere with essential functions," giving priority to the most manageable requests for

easily retrieved documents.

It's the first remedy of its kind in Washington. And it's likely to be challenged in court by open government activists. Mayor Joe Beavers, who spends 20 hours a week himself processing "litigation sensitive" records requests, sees the resolution as only a stopgap solution.

"I should be planning for new sidewalks and culverts, coming up with a snow removal plan, working with businesses to improve the business climate—all that doesn't get done so I can copy three-year-old e-mails onto DVDs. Every mayor in the state of Washington needs to call up their representative and their senator and say, 'There are changes to the public records proposed by the attorney general and AWC, and we need to get those done this year.' What's at stake is your budget."

If you doubt that, just ask the Benton County Clean Air Authority, which, after citing Larry Loges for failing to obtain an asbestos removal permit for a trailer demolition, agreed to pay \$30,000 to settle a lawsuit Loges filed in 2009 claiming that the county hadn't properly handled three requests he had filed related to the citation. And then there's Prosser. Loges, who has a civil suit against Prosser pending in U.S. District Court and is still trying to resolve his water bill, filed no fewer than 99 public records requests in 2010, accounting for 73 percent of the requests filed at city hall last year. City administrator Charlie Bush even met with Loges over coffee to try to broker a truce, but he says Loges wasn't interested.

"He said to me, 'I'm out to bankrupt the city,'" says Bush, a comment Loges denies making. And if that result seems far-fetched, just spend a day in David Ferguson's shoes, wondering whether his wheat-dependent town will succumb not to prolonged drought or to invasive pestilence, but to a citizen with a public records scythe. 