From WCOG to Marsha Reilly, counsel to the House State Government and Tribal Affairs Committee, regarding Toby Nixon's request to have WCOG participate in the committee work session on the afternoon of December 10.

Hi, Marsha. Thanks for your call today regarding the work session of the State Government and Tribal Affairs Committee on December 10 regarding high-volume public records requests. Please convey to Chairman Hunt our appreciation for his consideration of our offer to participate in the meeting.

As I explained, Washington Coalition for Open Government is concerned that agencies around the state that are targets of high-volume requesters will demand legislative action to give them the ability to charge for search, review, and redaction time, to get injunctions to block "harassing" requests, or to otherwise limit the people's right to access public records. I believe this to be the greatest imminent threat to access to public records in Washington that we face at this time.

In our opinion, part of the reason agencies desire such measures is that they feel helpless in the face of large or numerous requests, given the *Zink v. City of Mesa* decision and its mandate to fully comply with the law. They seem unaware that the court in *Zink* said that one of Mesa's major problems was that the city had failed to comply with RCW 42.56.100, which *requires* all agencies to have in place "reasonable rules and regulations… to prevent excessive interference with other essential functions of the agency" (see section D, paragraphs 24-27, of the decision). Because it had no written procedures in place, Mesa's handling of Donna Zink's requests was determined to be arbitrary and discriminatory, and they were assessed large penalties as a result. Without objective written procedures, established in advance, for dealing with a high volume of requests, agencies expose themselves to litigation and penalties as happened to Mesa. Despite this clear guidance, I have yet to find *any* agency that has actually fulfilled this *mandate* in RCW 42.56.100.

I've looked through various resources, and don't find any examples of "reasonable rules and regulations" that agencies can use as a model. MRSC doesn't publish anything on their web site (e.g., best practices), and the attorney general's model rules only lightly touch on the subject, basically just saying that large requests should not be allowed to crowd out small requests (see WAC 44-14-04003(1)).

I believe that the best solution to this problem would be to develop an extension to the model rules or to the PRA that would address the following topics:

- **Resource Allocation:** Recognizing that responding to public records requests is a core essential function that *every* agency must provide, but that the PRA requires agencies to balance it against their other essential functions to prevent excessive interference, what is a reasonable level of resources – money and man-hours – that an agency must make available for handling PRA requests? What combination of factors, such as population, clients, FTEs, volume of records maintained or generated, budget, etc., can be used to determine a level of resources for handling PRA requests that would be presumed "reasonable" under the law?

- **Queue Management**: When the total number or size of PRA requests exceed the capacity of an agency to respond to them in a timely manner, how should the agency fairly manage the queue of requests so that all requesters receive a reasonable level of service, ensure that high-volume requesters do not crowd out or unreasonably delay requests by others, and produce reasonable estimates of the time it will take to respond to each request as required by RCW 42.56.520?

- **Paying for Queue Jumping:** If a requester receives the reasonable estimate of time required to respond and decides that they would like to have their request handled more quickly, rather than simply complaining to the courts under RCW 42.56.550(2), should they be allowed to accelerate the handling of their request by voluntarily paying the agency the actual cost of labor needed for searching, reviewing, and redacting some or all of their desired records, so long as the response time of other requesters is not affected? Such voluntary payments to speed up processing of work is common in other areas, such as processing of building permits.

- **Auditing**: How do the people ensure that each agency is allocating a reasonable level of resources for handling public records requests in their base budget, fairly managing their request queues, producing reasonable estimates of response time, and not abusing the ability to accept payment for more rapid responses such as by intentionally delaying the requests of deep-pocket requesters? Should the state auditor be assigned the duty of auditing these policies and procedures and their implementation?

Of course, it would be possible for one or more agencies to attempt to determine these things for themselves, and those agencies and the requester community could spend many years in litigation while the courts work out what is "reasonable" in each of these areas (a protracted series of cases such as *Yousoufian* would be likely). Wouldn't it be better for all the stakeholders to come together and agree on what would be reasonable, take it to the legislature or attorney general as an agreed proposal, and have this embedded in statute or rule with some sort of "safe harbor" provision (i.e., certain levels of resources or queue management practices are presumed to be reasonable)? That's why I've been trying to form a stakeholder group to address these questions.

Whatever solution we arrive at, fundamental principles of open government must be preserved – the sovereignty of the public (42.56.030, Article 1 Section 1); no charging for searching, reviewing, or redacting records or for copies made for the agency's convenience that are not requested by the requester (42.56.120); no discrimination amongst requesters or on the basis of the purpose of the request (42.56.080); responses must be timely and estimates reasonable (42.56.100), etc. We should not allow these fundamental principles, which were approved by a vote of over 72% of the people, to be infringed in a reactive attempt to deal with a few challenging requesters.

I firmly believe that if agencies receive guidance in this area so that they can fully comply with 42.56.100, coupled with existing mechanisms such as working with requesters to clarify requests (and rejecting requests that requesters refuse to clarify), installment production of large requests, and requiring advance deposits for copies, they will be able to manage large requests from single or multiple requesters without the onerous provisions they seem poised to demand.