

YOUR RIGHT TO KNOW

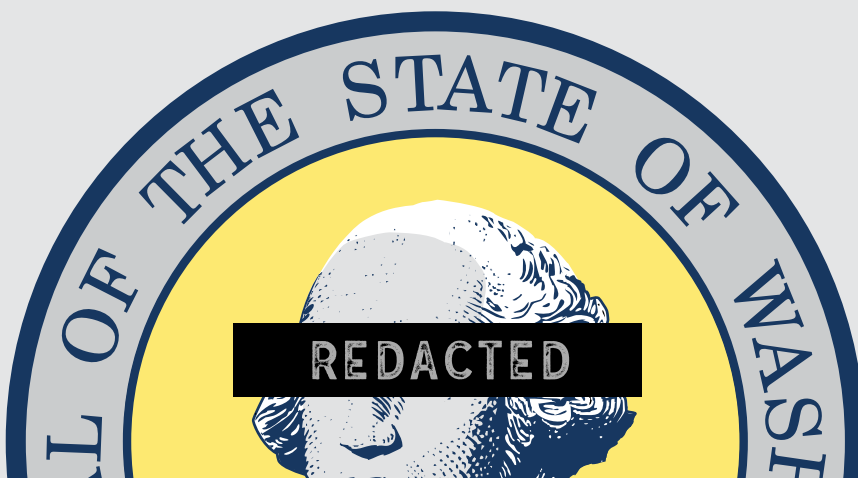
A special report on the erosion of public access
to government information in Washington state



Washington *Coalition for*
Open Government

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FOREWORD

The people have a right to know.

That was the idea in 1972, when a citizen's Coalition for Open Government in Washington State successfully worked to pass Initiative 276, the Washington Public Disclosure Act, a portion of which became the Public Records Act (PRA). The new PRA passed overwhelmingly and resulted in laws requiring broad access to public records. Some 50 years later, the people's right to access government information is eroding at the state and local levels. Often with good intentions, sometimes with bad intentions, governments have moved toward secrecy and withholding information that legitimately should be public.

For example, the state Legislature since 1972 has made hundreds of exceptions to the general rule that all government records must be open to the public. In the past 11 years alone – since 2012 – state lawmakers have added nearly 200 exemptions. The number of accumulated PRA exceptions will likely exceed 700 in two or three years.

This erosion in openness is why WashCOG formed in 2002 as an independent, nonpartisan, nonprofit organization that works through the courts and the Legislature to defend and strengthen Washington's open government laws.

Open government advocates like WashCOG have been winning many battles but losing the war. We believe the situation for open government has become as bad as it was in 1972, when voters passed Initiative 276. Clearly, Washington needs stronger protections – perhaps a constitutional amendment – to keep government open and accountable.

This is a pivotal moment. The erosion of the people's right to know must be stopped. It is also a moment of opportunity to alert the public and inspire you to act.

In that spirit, WashCOG is launching **Your Right to Know**, a movement to catalyze the public, media and politicians on behalf of open government.

This report focuses on the status of Washington state's Public Records Act, which should be the bedrock of the people's right to know. Sadly, it has instead become a symbol of a broken system at all levels of government.

For many years Washington was considered among the most transparent states, but its Public Records Act has been steadily weakened by lawmakers and the courts. The state Legislature keeps exempting more information from public disclosure while finding new ways to withhold its own records. Requesters are waiting longer for agencies to disclose records.

Requesters rarely sue, and what agencies spend on records requests is a tiny piece of their total outlays. Nonetheless, critics often portray the PRA as the source of burdensome expenses and lawsuits.

Data compiled by the government show:



Requesters are waiting longer for “final disposition” of their records requests. In 2019 they waited an average of 15 days. **In 2022 their wait time had increased to nearly 23 days.**



Agencies’ performance varies widely. Requesters who sought records from **the city of Seattle in 2022 on average waited more than twice as long as their counterparts with the city of Tacoma.**



Between 2018 and 2022, an average of 0.03% of records requests resulted in the requester suing the agency. Yet legislators have considered **proposals to rein in “excessive” records lawsuits to the detriment of all requesters.**

Washington’s Legislature and many agencies are undermining the PRA. To change that, this report will provide a foundation for legislative and legal action, possible structural change and, if necessary, a constitutional amendment.

Seven states – California, Florida, Illinois, Louisiana, Montana, New Hampshire and North Dakota – explicitly assert the public’s right to know in their constitutions.¹

The essence of these state constitutional rights is that no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

That is also the essence of the WashCOG Your Right to Know movement. It will include increased WashCOG engagement in high schools, colleges, educational organizations, civic groups and the media – anywhere there are opportunities to spread the word about the importance of open government in a democracy.

We will also work collaboratively with the many public agencies and officials that strive for openness, despite inadequate funding and training. We are committed to helping them make Washington a model for the nation when it comes to transparency and accountability.

This report is a collection of analytical essays written by members of the WashCOG board of directors. The topics represent problems or “pain points” that we have identified in recent years. From these analyses we have identified a list of findings and recommendations for action.

The report concludes with a call to action by the public. You have a right to know and it’s time for you to be heard.

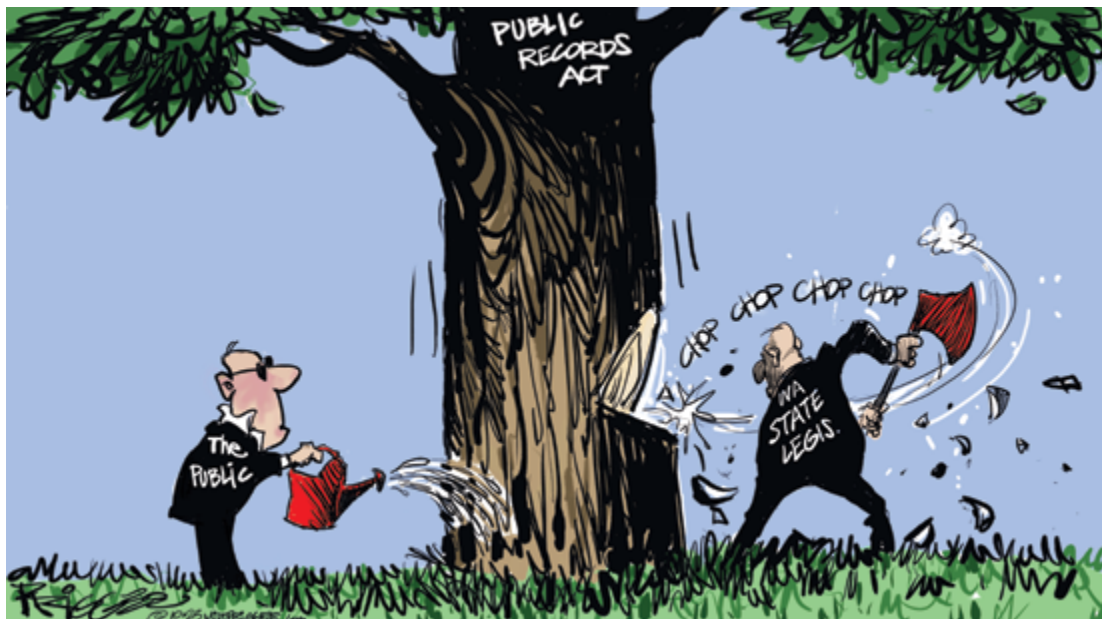
The Washington Coalition for Open Government is an independent, nonpartisan, nonprofit organization that was established in 2002 as a public advocate for open government.

1. Jessica Terkovich and Aryeh Frank, “Constitutionalizing Access: How Courts Weigh State Constitutional Claims in Open Government Litigation,” *The Journal of Civic Information*, June 2021. <https://journals.flvc.org/civic/article/view/129179/130785>.

OVERALL CONCLUSION AND RECOMMENDATIONS

The People’s Right to Know is Eroding. This Trend Must Be Stopped and Reversed.

For many years, Washington was considered among the nation’s most transparent states. But legislators and courts have steadily undermined Washington’s Public Records Act. This trend must be stopped and reversed. Public records don’t belong to the government; they belong to the people. Public trust in government depends on openness, transparency and accountability.



WashCOG Recommends:

- Despite the fact that government agencies and officials often complain the PRA is a burden that gets in the way of doing their job, they must uphold the PRA. It is an essential element of their job and should be treated as such.
- Government at all levels should be required to operate transparently, facilitate easy low-cost access to public information, and make data available in standardized formats that support public use of such data.
- Governments should fund transparency as a basic service. Information infrastructure should be regarded similarly to other infrastructure needs.
- Governments should use technologies to enhance transparency, not to evade it.
- Governments should provide for independent oversight of their transparency policies, procedures and practices.
- If the erosion isn’t reversed, voters should pass a constitutional amendment to protect the people’s right to know.

Findings

In examining why the people's right to know is eroding, WashCOG found these recurring problems regarding the Public Records Act:

1. The Washington Legislature Undermines the PRA
2. Public Officials and Agencies Obstruct Requesters
3. Agencies Fail to Properly Maintain, Organize and Disclose Records
4. Open Government Training Is Inadequate and Often Wrong
5. The Public Records Acts Needs to Hold Officials Accountable

FINDING 1

The Washington Legislature Undermines the PRA

Every legislative session involves a battle by the public to stop further erosion to open government laws. In recent years the Legislature has made several attempts to exempt itself from the PRA and routinely adds new exemptions. To close exemptions, lawmakers have rejected nearly all recommendations from the state's Sunshine Committee, which reviews exemptions from the Public Records Act's disclosure requirement. Most recently, some legislators have asserted a state Constitutional privilege allowing them to individually and personally withhold or redact records. WashCOG believes this is wrong.

WashCOG Recommends:

- Every legislator and legislative candidate should pledge to support open government in addition to pledging to defend and strengthen the PRA.
- The Legislature should enact all of the Sunshine Committee's pro-transparency recommendations that it has so far ignored.
- To ensure that legislators pay attention to recommendations of the Sunshine Committee, the Legislature should require presentation of the committee's annual reports in public meetings of the relevant House and Senate committees.
- And, most of all, legislators and legislative candidates should pledge never to try to exempt the Legislature itself from the PRA or claim a personal privilege to withhold or redact public records.

FINDING 2

Public Officials and Agencies Obstruct Requesters

State and local governments keep trying to put more bureaucratic obstacles in front of requesters. The stumbling blocks include lengthy administrative appeals and ambiguous dates for final installments. Such maneuvers discourage requesters from challenging agencies and deny them justice. These obstacles undermine the purpose of the PRA – the people's right to access government records.

Example: Officials Use Personal Technology to Evade Public Records Laws

More than a decade ago, the Washington Supreme Court ruled that documents created in the course of public employment are public records even when saved on personal cell phones and other private devices. But there are indications that some public employees and officials bypass disclosure laws by using their personal cell phones or email accounts. In other high-profile cases, agencies or individual officials have deleted text messages, which are disclosable public records. It is sometimes difficult to enforce the rule without lengthy and expensive investigations.

WashCOG Recommends:

- Agencies should prohibit their officials and employees from using private modes of communication and ban the use of disappearing-message apps such as Signal to conduct public business.
- Agencies should ensure that officially endorsed communications platforms such as Microsoft Teams are set to preserve public records in compliance with the PRA. This is not currently happening in all cases.
- Better and more training should be required for public officials; but training alone isn't enough. Public officials need to embrace the spirit, as well as the letter, of the PRA.
- The state's record retention statute should be reformed to provide realistic penalties and enforcement procedures for premature destruction of public records.

Example: Agencies Fail to Promptly Respond to Requests

The state Public Records Act and decades of case law say agencies must make records "promptly" available to requesters. But agencies use a variety of rationales for delaying disclosures.

WashCOG Recommends:

- Agencies should help the public get the records to which they are entitled, instead of operating in ways that make that more difficult.
- Agencies should default to disclosure of information rather than withholding, except when exemptions to disclosure are clear under the law.
- Agencies should notify requesters about the results of a records search to make sure the documents are what the requester wanted.
- Agencies should give requesters a specific calendar date for when a request will be unilaterally closed for failure to pay or pick up the records.
- Agencies should notify requesters that they are taking action that triggers the statute of limitations and tell requesters when the one-year statute of limitations begins to run after a request is closed. Any notice of failure to pay for or pick up records requires an opportunity to cure the default and continue the production of the installments without demanding the requester make a new request and start over.



Example: Agencies Delay Release of Records by Abusing the Ability to Notify Persons Named in a Record

Agencies are using the third party notice requirement not just as a delaying tactic, but as an attempt to shift responsibility for upholding the PRA away from the agency. Persons named in a record often sue the requesters, causing further delays.

WashCOG Recommends:

- The amount of time allowed for such parties to file for an injunction to block release should be limited to two weeks or less.
- Agencies should be required to identify the exemption under which the record could be withheld when providing notice to requesters.
- Requesters who successfully defend against a lawsuit filed by a third party to block release of records should be able to recover their attorney fees and court costs from that party or from the agency.

Example: Agencies are Prone to Escalating Records Disputes

Lawyers who represent agencies in records disputes too often lead their clients down legal paths that are needlessly time-consuming, costly and acrimonious.

WashCOG Recommends:

- Agencies should more freely waive PRA exemptions in the interest of transparency, especially when the information pertains to matters of public interest.
- This should include waiving PRA exemptions for attorney-client communications and work product to avoid excessively redacting attorney invoices and providing insufficient explanations for withholding information.
- Agencies sued for violating the PRA should first re-examine their initial response, then disclose any improperly withheld records, update their exemption logs, and/or revise any anti-transparency practices or procedures before defending the agency's conduct in litigation.

FINDING 3

Agencies Fail to Properly Maintain, Organize and Disclose Records

From its inception, the state Public Records Act required agencies to adopt rules for protecting and organizing their records. But many agencies have failed to do so, and others fell behind when the digital revolution unleashed a torrent of electronic documents. Agencies with poorly organized records spend more time and money searching for documents to fulfill records requests. The public is ill-served by lengthy, inefficient and incomplete searches of disorganized records.

WashCOG Recommends:

- State law should impose consequences on agencies that fail to adopt rules to ensure effective retention, organization and production of public records.
- The state Office of the Attorney General (OAG) should uphold the Public Records Act by making its own records management a model for best practices.
- Revised model rules should include specific provisions for organizing public records that would reduce the time spent on searches, reviews and redactions. WashCOG has proposed such rules in the past, and we are ready to work with public officials on future rulemaking.

FINDING 4

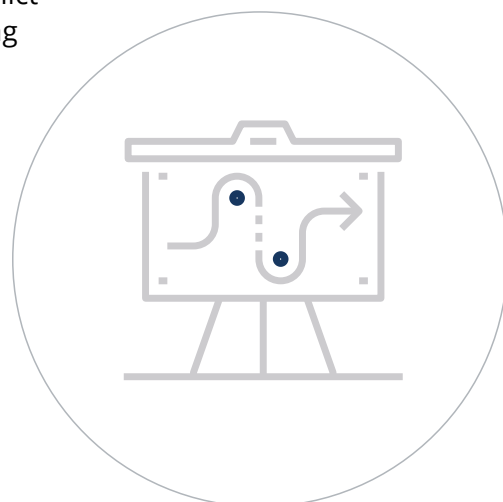
Open Government Training Is Inadequate and Often Wrong

Washington law requires state and local elected officials, as well as all agency-designated public records officers, to undergo training on the legal requirements governing record retention and record production.

The Legislature has found that “the implementation of simple, cost-effective training programs will greatly increase the likelihood that public officials and agencies will better serve the public by improving citizen access to public records and encouraging public participation in governmental deliberations. Such improvements in public service will, in turn, enhance the public’s trust in its government and result in significant cost savings by reducing the number of violations of the public records act and open public meetings act.”

Despite that, inadequate or incorrect training of officials and employees is often the cause when problems arise.

One reason is because the Attorney General’s office plays an oversized role in PRA advice and training, in conflict with its core mission to protect government agencies from liability. This inherent conflict biases the OAG’s understanding of records law, making the OAG’s training among government employees tilt in favor of nondisclosure, not transparency.



WashCOG Recommends:

- PRA training should encourage officials and employees to understand that they, as guardians of public records, are essential to public trust. Training should embrace the spirit of transparency to assure that the public interest will be fully protected.
- The state OAG should stop pretending it can defend agencies in PRA cases and impartially interpret open government laws. To that end, the PRA should be amended to clarify that the OAG's interpretations, whether through model rules, its own rules, or guidance publications, have no persuasive or precedential value. Only the courts are equipped to determine what the PRA requires. Furthermore, agencies may not defend themselves from liability by claiming reliance on the OAG.
- The public should consider transparency credentials when electing an Attorney General.

Example: The People Receive Little to No Guidance From State Government on Exercising Their Right to Know

The Public Records Act says, "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."

WashCOG Recommends:

- The people deserve help in using the PRA, including training. Transparency laws are only effective if they are used. WashCOG stands ready to lead this effort to democratize PRA use.
- There should be a movement to restore public sovereignty. The people's right to know must be defended and strengthened at all levels of government. WashCOG also stands ready to do that.



FINDING 5

The Public Records Act Needs to Hold Officials Accountable

Washington's Public Records Act is often heralded as one of the strongest, on paper, in the nation. But its strength is often paper-thin, due to lack of enforcement against those who violate provisions of the act.

While inadequate training may explain most problems, in some instances, agencies have interfered with records officers by directing the officers to deny disclosure or hide troubling and embarrassing information. In several recent high-profile cases where officials and politicians could expect close public scrutiny, text messages were deleted from their cellphones or other devices.

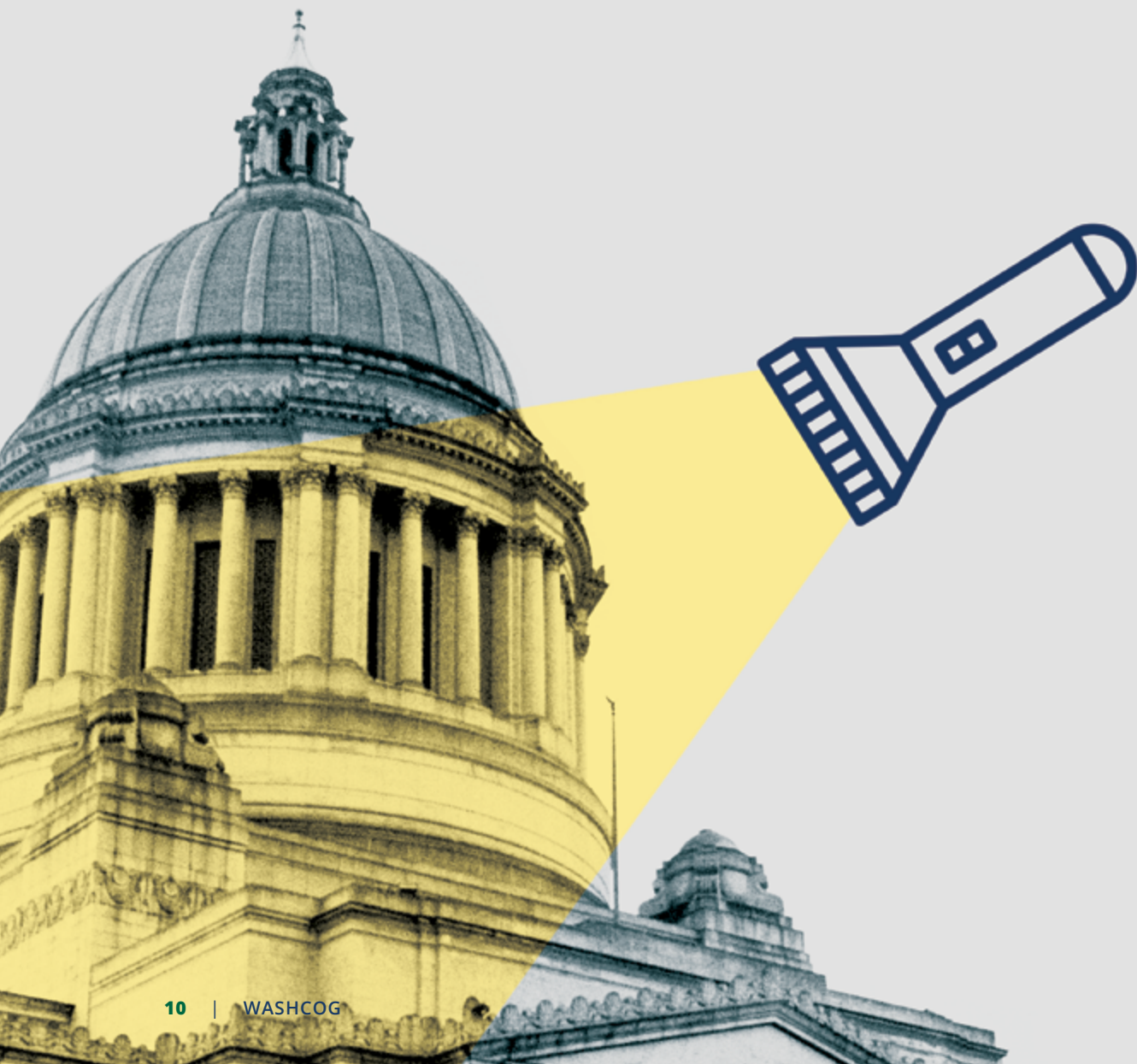
Though those actions stand in defiance of the Public Records Act, few, if any, officials have been held accountable for their actions. The frequency of agency interference with public records officers is unknown, but the cases that have come to light are troubling and almost certainly not solitary incidents.

WashCOG Recommends:

- The penalties currently in the PRA need to be applied to hold agencies accountable for failures to implement the law, especially for egregious violations. Often they are not.
- For Washington's PRA to have real strength, we need a law, like those adopted by some other states, in which individual officials and agency leaders are held personally accountable and residents can initiate litigations for deliberate violations of the act.
- The personal liability provisions of Open Public Meetings Act (OPMA), RCW 42.30.120, should be expanded to hold government officials personally liable for knowing violations of the PRA in the amount of \$500 for the first offense and \$1,000 for each subsequent offense. Any civil penalty would be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person.



Proposals that make it harder for requesters to sue and prevail weaken our enforcement of the PRA. Without effective enforcement, our open records laws are more easily evaded. Secrecy spreads.



Agency Performance on the Public Records Act

For many years Washington was considered among the most transparent states, but its Public Records Act has been steadily weakened by lawmakers and the courts. The state Legislature keeps exempting more information from public disclosure while finding new ways to withhold its own records. Requesters are waiting longer for agencies to disclose records.

Requesters rarely sue, and what agencies spend on records requests is a tiny piece of their total outlays. Nonetheless, critics often portray the PRA as the source of burdensome expenses and lawsuits.

Statutes and data compiled by state legislative agencies present an evidence-based picture of compliance with the Public Records Act that cuts through some of the rhetoric surrounding Washington state's embattled transparency law.

The data show:

- Every year requesters encounter more holes in the PRA, with legislative exemptions up nearly 40% since 2012.
- Requesters are generally waiting longer for records from state and local agencies.
- The number of reported records requests has recovered after falling with the onset of the pandemic in 2020.
- On average, fewer than 0.1% of records requests lead to court claims.
- Records requests account for 0.1% or less of state and local agencies' annual spending.
- State and local agencies' timeliness on fulfilling records requests varies widely.

For years, how agencies performed under the PRA was not easily measured by the metrics that our data-driven society has come to expect. That's no longer the case, thanks to two legislative offices.

The state Office of the Code Reviser for years has compiled the growing list of statutory exemptions to the PRA. The office delivers its annual list of exemption statutes to the state Sunshine Committee.

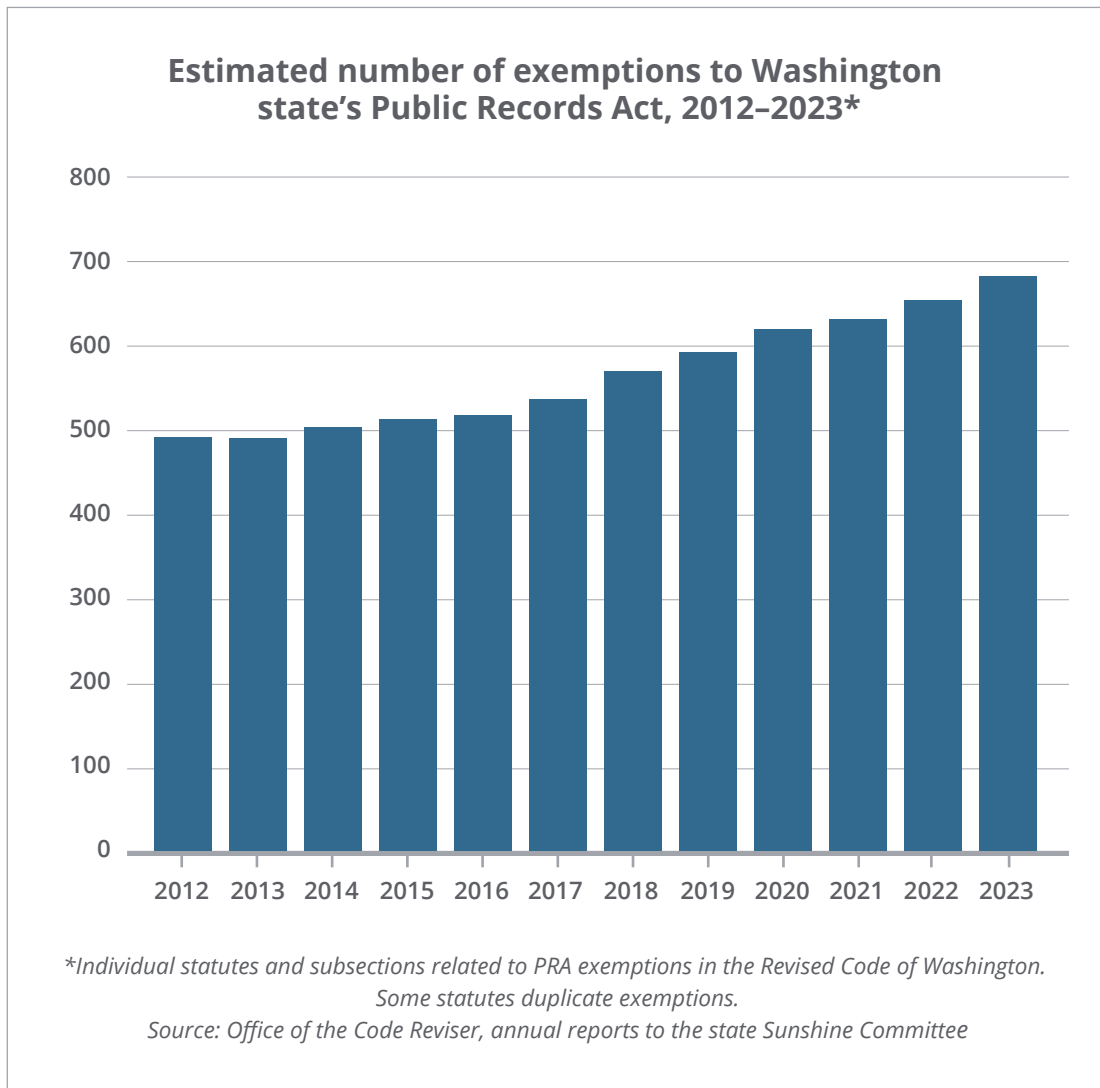
Since 2017, the Joint Legislative Audit and Review Committee (JLARC) has compiled performance data from agencies statewide. State and local agencies that spend \$100,000 or more fulfilling public records requests must submit data to the committee. With JLARC now in its fifth year of complete annual reports, patterns and trends are beginning to emerge from the accumulated data. The agency released its most recent annual report as our "Your Right to Know" report was in the late stages of production.

What follows are just a few of those data-based trendlines – and what they add up to:

Every Year, State Legislators Pass More PRA Exemptions

The preamble to the state Public Records Act says, in part, “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.”

Yet every year state legislators tell the public what is not good for them to know by passing exemptions to the Public Records Act. It has become routine. Since 2012, state lawmakers have adopted an average of 17 new exemption-related statutes and subsections a year.



The accumulation of PRA exemptions has ballooned in recent years. The Revised Code of Washington had more than 650 individual statutes and subsections pertaining to exemptions in 2023, according to the compilation by the state Office of the Code Reviser. The PRA has been on the books since 1972, but 40% of its exemption-related provisions were added in the last 11 years. At the current rate, individual PRA exemptions could exceed 700 within three years.

As a result, the PRA is increasingly riddled with exemptions that withhold information from the public and make records laws harder for everyone to navigate. The beneficiaries are often interest groups and public officials who want secrecy provisions tailor-made for them. State legislators often oblige.

For example, a PRA provision wisely blocks the disclosure of credit card and social security numbers. But the growing pile of exemptions also includes a statute that withholds a broad swath of information provided by holders of fireworks licenses. More recently, lawmakers have made more information about public employees off limits to records requests.

Agencies are Taking Longer to Fulfill Records Requests

The amount of time agencies take to complete and close records requests has marched steadily upward since 2019, statewide data show. Those who asked for records from reporting agencies in 2019 waited an average of 15 days before “final disposition” of their requests. By 2022 the average wait had increased by more than a week, to nearly 23 days.



Overall Records Requests are Recovering from a Pandemic Lull

Total reported records requests fell 13% with the onset of the pandemic in 2020 but recovered by 2022. The annual average number of requests filed with reporting agencies between 2018 and 2022 was 361,348.

Number of public records requests received from all reporting agencies, 2018–2022

Year	Total Records Requests	Year-Over-Year Absolute Change	Year-Over-Year % Change
2018	337,014		
2019	383,433	46,419	13.77
2020	332,775	(50,658)	-13.21
2021	357,075	24,300	7.30
2022	396,442	39,367	11.02
AVERAGE	361,348		

Source: Washington state Joint Legislative Audit and Review Committee

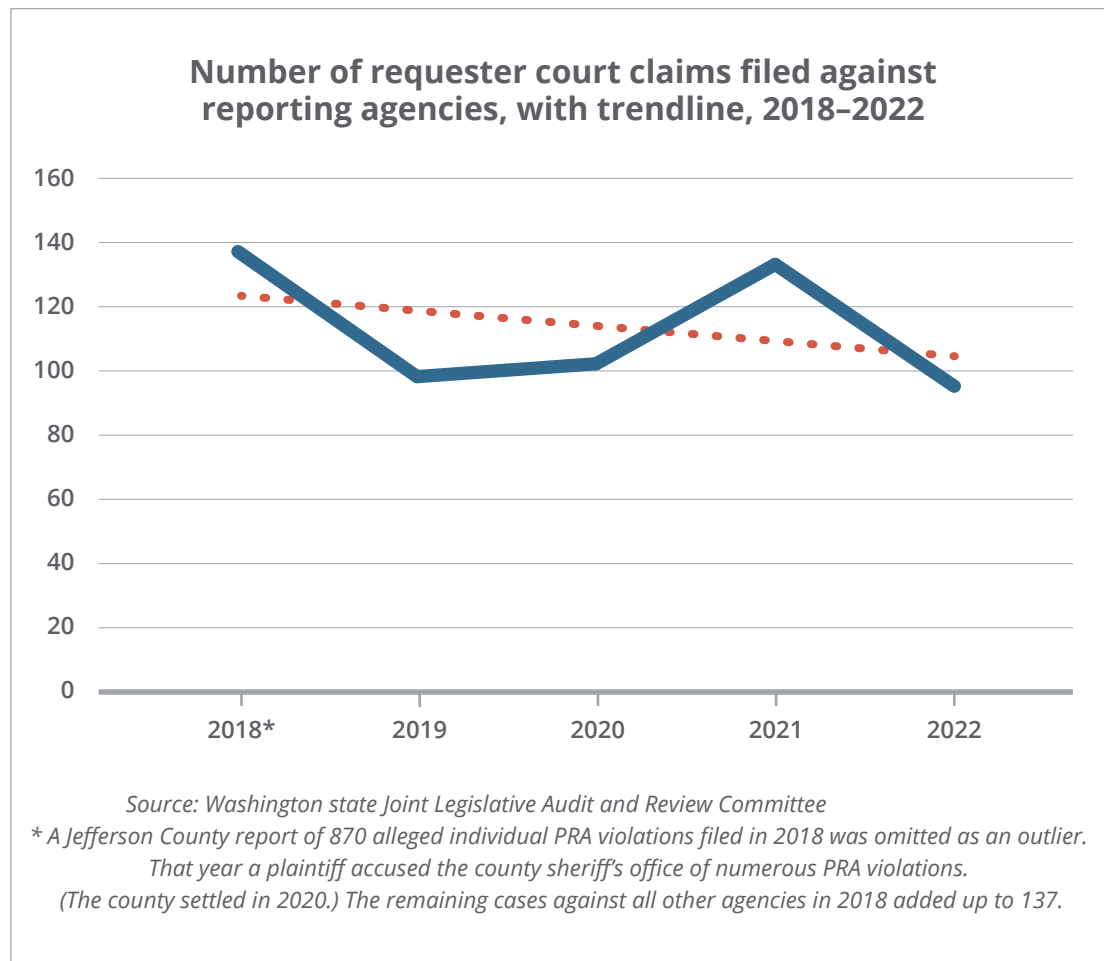
On Average, Fewer Than 0.1% of Records Requests Led to Court Claims

Agencies often complain about the burden of resolving records disputes in court, and their anecdotes frequently leave the impression that records lawsuits are numerous and increasing in number. The data show otherwise.

The annual number of claims that requesters have filed in court has been relatively flat since 2018, compiled data from reporting agencies show. The data also show requesters rarely go to court to challenge agency decisions.

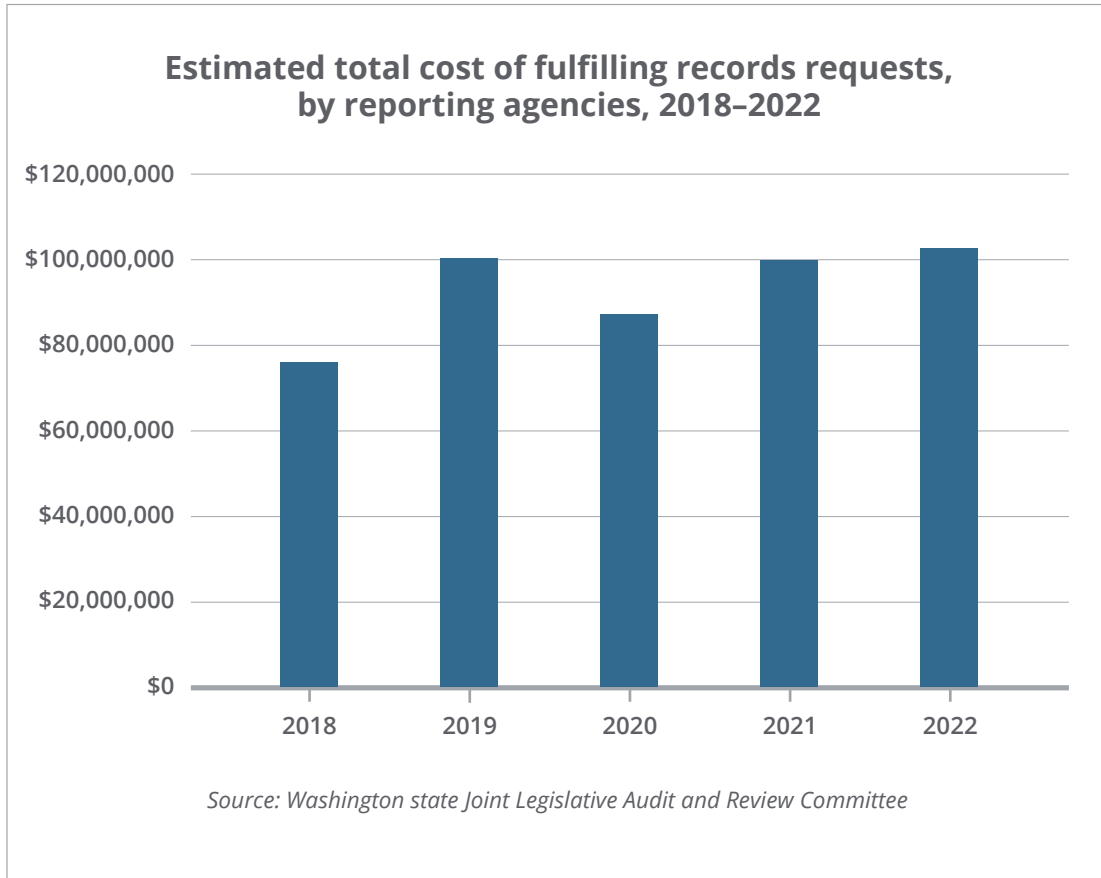
Reporting agencies received an average of 361,348 records requests a year between 2018 and 2022. During that time requesters filed an annual average of 113 court claims. On average, an estimated 0.03% of records requests led to a lawsuit.

Nonetheless, state legislators have repeatedly entertained proposals that would make it harder for requesters to challenge agency actions and prevail. Lawmakers often contend such steps are needed to curtail “excessive” public records lawsuits. But in Washington state we enforce the PRA with civil litigation. Proposals that make it harder for requesters to sue and prevail weaken our enforcement of the PRA. Without effective enforcement, our open records laws are more easily evaded. Secrecy spreads.

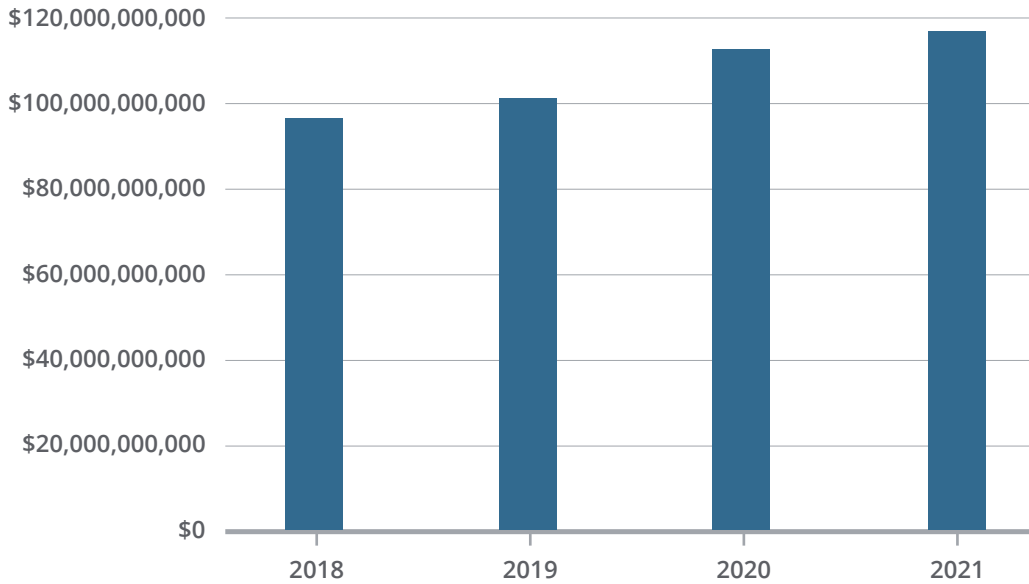


Records Requests Account for 0.1% or Less of State and Local Agencies' Annual Spending

Public Records Act critics often argue that the law is a growing financial burden for state and local governments. But data show spending on records requests accounted for 0.1% or less of total state and local agency outlays between 2018 and 2021. Spending on records is measured in millions of dollars. Total state and local agency spending is measured in billions.



**Estimated total state and local government expenditures.
Washington state 2018-2021**



Source: U.S. Census Bureau, Annual Surveys of State and Local Government Finances

**Estimated state and local government spending on records requests compared with total direct spending
Washington state, 2018-2022**

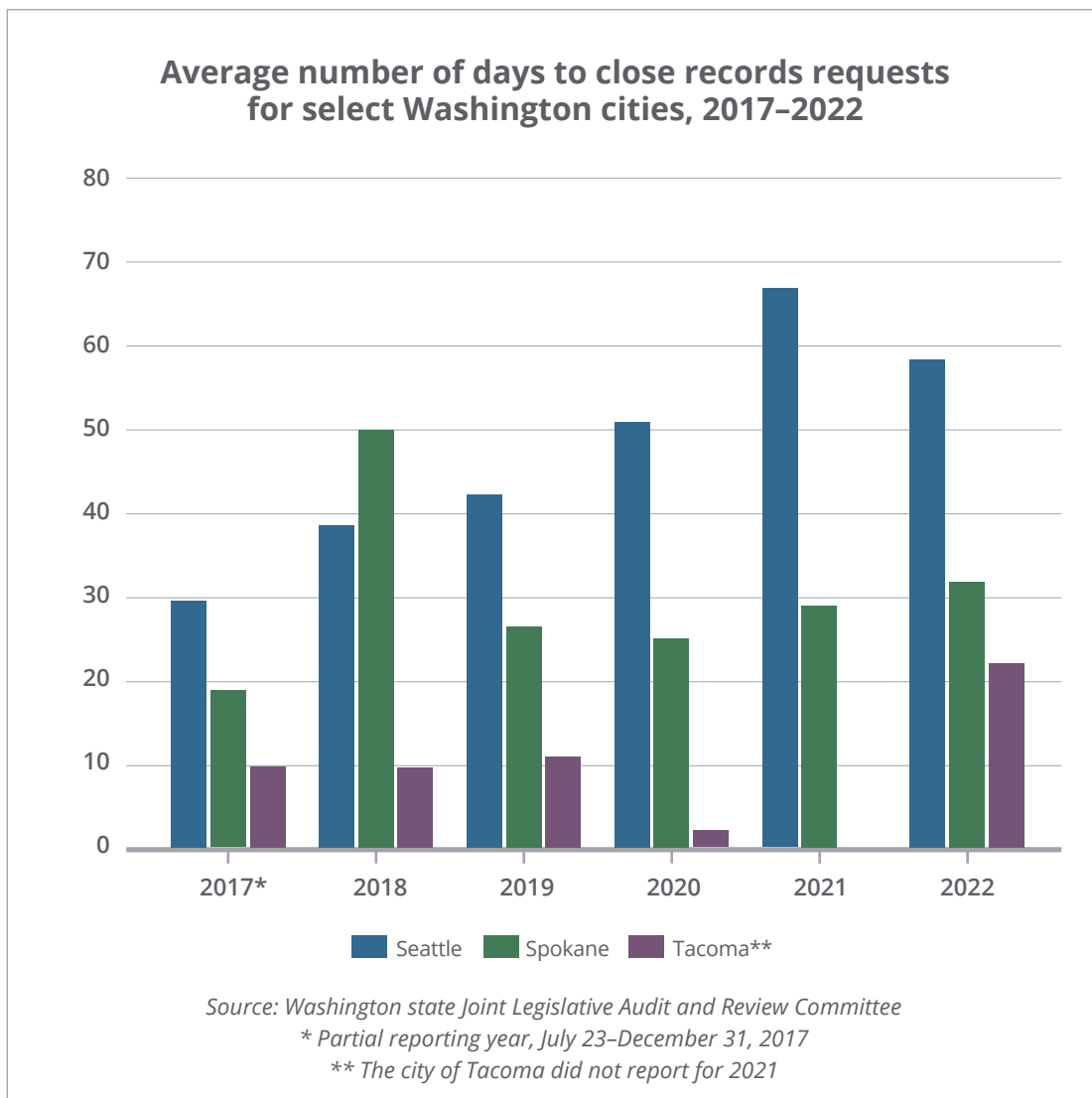
Year	Records Requests Costs	Total Spending	Records as % of Total
2018	\$76,127,814	\$96,380,824,000	0.079
2019	\$100,603,679	\$100,959,200,000	0.100
2020	\$87,351,025	\$112,426,877,000	0.078
2021	\$99,941,236	\$116,635,489,000	0.086

Sources: Washington state Legislative Audit and Review Committee, U.S. Census Bureau

Some Agencies are Prompt; Others Delay – and Delay Some More

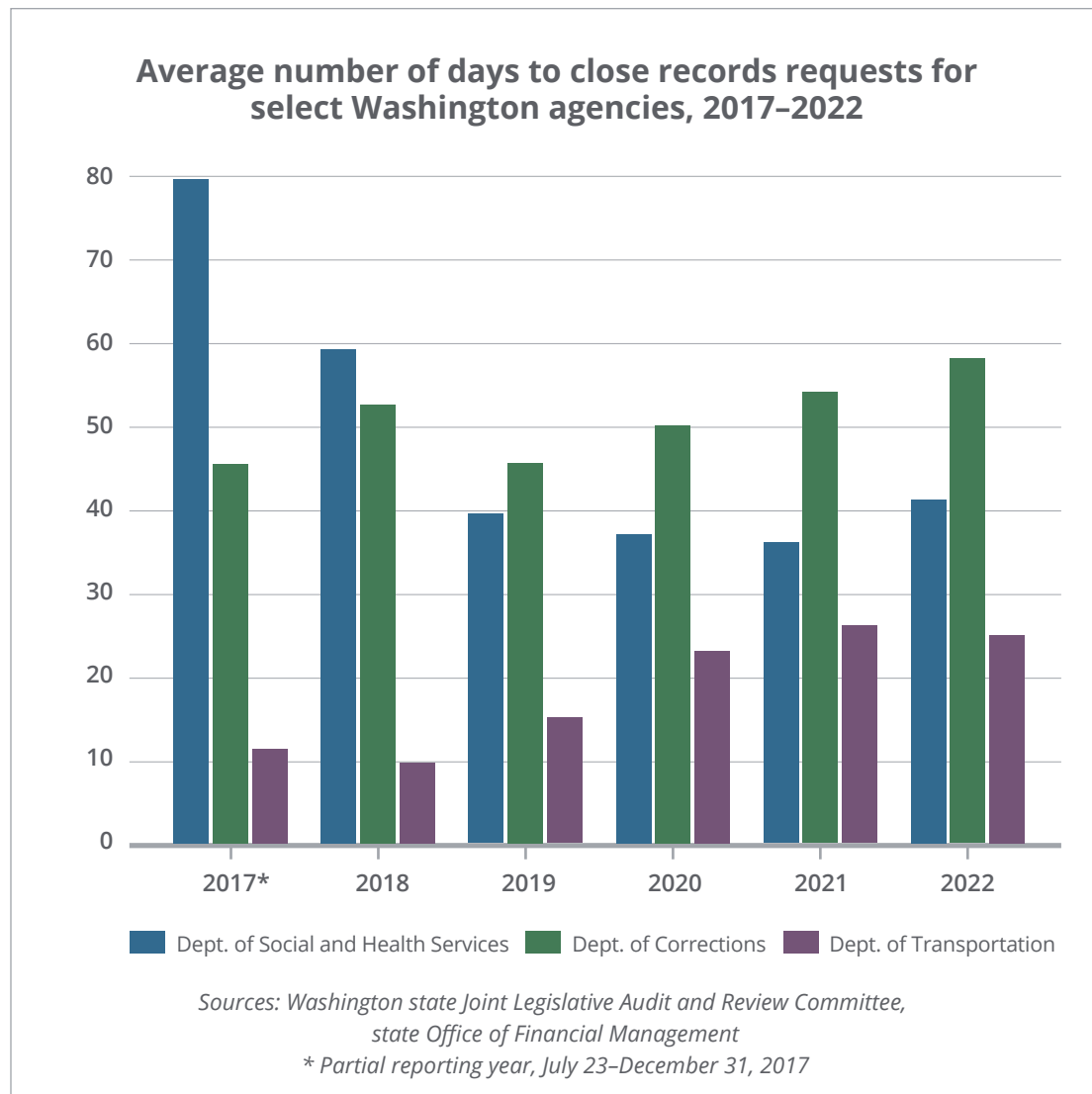
Some agencies make requesters wait longer – at times a lot longer – for records than other agencies, JLARC reports show. The performance of Washington state’s three largest cities is a case in point.

Those who asked the city of Seattle for records in 2022 on average waited more than twice as long for the documents than their counterparts at the city of Tacoma. Seattle has consistently exceeded the statewide average for closing records requests by increments of not days, but weeks. In 2021 requesters on average had to wait an additional 47 days – that’s more than six weeks – to get records from Seattle compared with all reporting agencies statewide.



Data reported by the three largest state agencies by headcount provides another example of how PRA performance varies widely.

Between 2017 and 2022, the state Department of Transportation took an average of 18.3 days to close a records request. In sharp contrast, the state Department of Corrections took nearly three times as long – 50.9 days – to close its records requests.



WashCOG Secretary George Erb is a retired news reporter, editor and university journalism instructor. He joined the coalition board in 2002.

Nothing is more important to keeping the government open and accountable than public activism. When the people speak, politicians listen. It is time for the people to speak resoundingly again. It is time for you to be heard.



BY MIKE FANCHER

Conclusion, and a Call to Action

It is Time for You to be Heard

Nothing is more important to keeping government open and accountable than public activism. When the people speak resoundingly enough, politicians listen.

That was evident in 1972, when civic activists launched an open government initiative campaign. Initiative 276 passed with 72 percent approval and led to sweeping changes in the laws governing public records, meetings and political campaigns.

The theme of that campaign was People Have a Right to Know. It was true then and it is now, but the pressures against transparent government are relentless—never more so than early in 2018.

That's when the Washington state Legislature passed a bill declaring the Public Records Act does not apply to the Legislature, its members, employees, and agencies.

Just 48 hours after the bill became public, without any open hearings or floor debate, and within minutes of each other, the House and Senate overwhelmingly approved the bill.

The people of Washington said, "NO!"

The bill passed on a Friday night. By Monday morning the governor's office had received hundreds of emails and phone calls urging calling for a veto. On Tuesday morning, 13 newspapers across the state published front-page editorials calling for a veto.

By Thursday, the governor had received more than 20,000 emails and calls. He vetoed the bill that evening, saying he applauded Washingtonians for making their voices heard.

Nothing is more important to keeping the government open and accountable than public activism. When the people speak, politicians listen.

It is time for the people to speak resoundingly again.
It is time for you to be heard.

Make Your Voice Heard

The Washington Coalition for Open Government is launching **Your Right to Know**, a movement to catalyze the public, media and politicians on behalf of open government.



The status of the Public Records Act is bad and getting worse.

As this report shows:

- The Washington Legislature undermines the PRA.
- Public officials and agencies obstruct requesters.
- Agencies fail to properly maintain, organize and disclose records.
- Open government training is inadequate and often wrong.
- The Public Records Act needs to hold officials accountable.

Please urge your elected state and local representatives to read this report, so the principles embodied in Initiative 276 can be maintained and strengthened.

Continue to follow our reporting and get involved with Your Right to Know.

Here is how:

- Go to our website to get updates on the project <https://www.washcog.org/>
- Alert us to problems you see or examples of failed openness and transparency <https://www.washcog.org/contact-us>
- Sign up for our citizens network. Anyone can do so. <https://www.washcog.org/citizens-network-sign-up>
- Join our movement by becoming a member <https://www.washcog.org/join-wcog>
- Make a donation to support the cause <https://www.washcog.org/donate>

Perspectives

The following essays represent the analysis and viewpoints of their authors



BY DAVID CUILLIER

‘Secrecy Creep’ Obscures Our View

Washingtonians are losing control of the instruments they created.

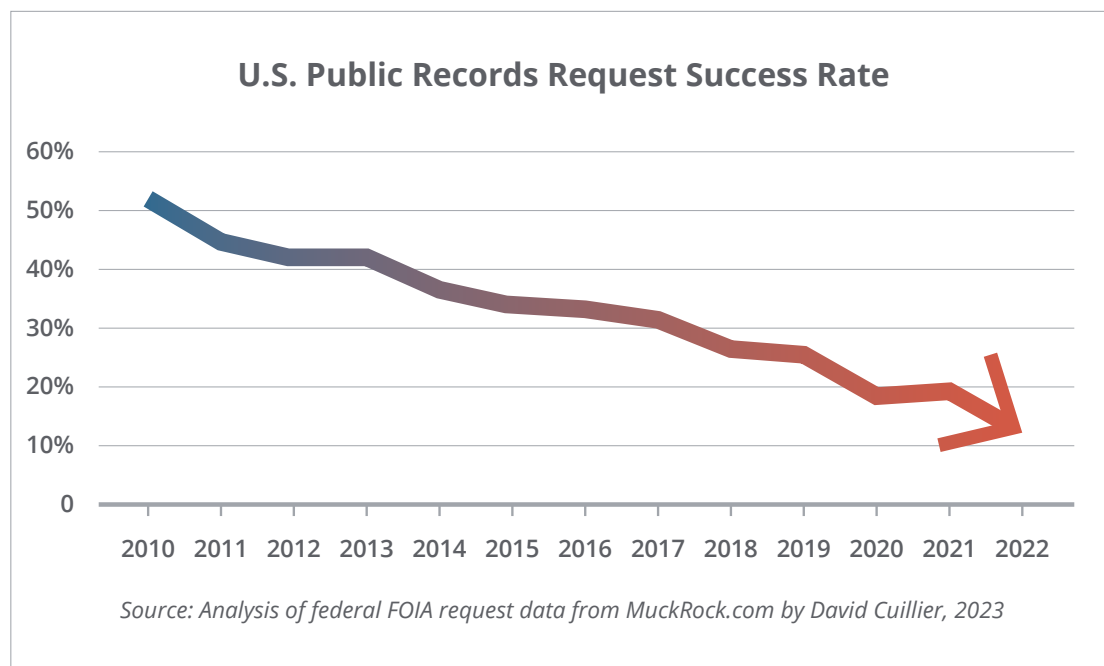
In 1972, nearly a million Washington state residents voted to approve Initiative 276, with only 372,693 voting no. The initiative led with this statement:

THE PEOPLE HAVE THE RIGHT TO KNOW

Our whole concept of democracy is based on an informed and involved citizenry. Trust and confidence in governmental 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.

A half century later, the public’s right to know is threatened, not just in Washington state but throughout the nation, as a result of decades of systematic dismantling and evisceration of open record laws – what some call “secrecy creep.”

Ten years ago, if you asked the federal government for a public record, you would get it about half the time. Now it’s 13% of the time. What will it be five years from now? Like climate change, we don’t notice until it’s too late, when we reach the tipping point in government transparency change.



The research says it all. Increasingly, public record backlogs **stymie timely response**. Citizens face arbitrary **copy fees** and **excessive delays**. Corporations have systematically **carved out secrecy** exemptions. The courts are **clogged with litigation**, costing taxpayers more than \$43 million per year. Government public information officers are becoming increasingly adept at **controlling their agencies' messages**, so you receive less information that is independently vetted and questioned by journalists. Enforcement of public record laws is **inconsistent and weak**. The U.S. Freedom of Information Act's legal provisions, on paper, are ranked in the bottom half of the world – **77th out of 139 nations**. Canada's law is ranked 53rd; Mexico's is 2nd.

These and other alarming threats to democracy are highlighted by experts in this important and timely white paper, a wake-up call for anyone who cares about democracy and the Republic. So, why should we care?

Because government transparency matters.



Freedom of information laws and practices lead to **cleaner drinking water**, lower **sex-offender recidivism**, fewer **food service complaints**, increased trust in **government institutions**, **reduced corruption**, and they help parents make **better school choices** for their children. For every dollar spent on public records-based journalism, society benefits \$287, according to Stanford University professor James Hamilton.

Some experts say the system is broken, and that we need to **start from scratch**. Others call for more **proactive release of records**, streamlining **first-person requests**, or using **machine learning** to retrieve and redact records.

We can look to successes – to practices that improve transparency. We can look to Washington state.

In my research, I have found Washington to be one of the **most transparent states** in the nation – about two-thirds of public records requests are successful. Compared to Alabama’s 10%, that is good. But 66% is still a D in my gradebook, and we know it’s not improving.

What does Washington do well, compared to other states? For one, it has stronger penalties for non-compliance than most states, **including fines** and mandatory payment of attorney fees for people who successfully sue for records. Those **sticks seem to matter**, as in the **case of Mesa, Wash.** An appellate court in 2018 ordered the town of fewer than 400 residents to pay its former mayor \$175,000 to resolve a lengthy public records dispute. Legislators should strengthen, not weaken, those provisions.

More can be done, as well. Citizens should not have to hire a lawyer to apply the law via court intervention. Instead, **independent oversight agencies** should allow free help, with the ability to require government to cough up the records, just as in Connecticut, Pennsylvania, and more than 50 nations throughout the world. Leaders should double-down on funding toward efficient records management tools. They should embrace the core principles of transparency and accountability.

There was a day when journalists served as the accountability watchdogs, suing for public records frequently, **pushing for transparency laws**, and exposing secrecy through tenacious reporting. Many still produce excellent work, and national and local media still **sue frequently**, but that light is fading as legacy media **struggle to survive**. As a result, smaller local news organizations **sue less** and have fewer reporters to expose corruption.

That means the responsibility falls to all of us. Just like in 1972, the citizens must make their voices heard and take control of the instruments they have created. That means supporting open government groups like Washington Coalition for Open Government (WashCOG). It means demanding that our leaders demonstrate backbone in serving with transparency and accountability, even when uncomfortable or difficult. And if they don’t, kick them out.

Ultimately, it means taking responsibility and ownership of our institutions, of our communities, because we, the people, have the right to know.

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BY MIKE FANCHER

Finding 1: The Washington Legislature Undermines the PRA Legislators Do Not Own Public Records, the People Do

In Washington, legislative transparency is expected. Public records belong to the people. However, the state Legislature has repeatedly adopted restrictions on access to public records, while not supporting proposals to increase people's access. Legislators repeatedly have sought to exempt themselves from the PRA and even now some assert there is a personal legislative privilege to exempt them from disclosing records. That assertion is wrong.

Open government is fundamental to the liberties we enjoy as a democratic society. Without the ability to inform ourselves, we can't hold officials accountable and public trust in government suffers.

The people of Washington intended for legislative records to be public when they voted overwhelmingly in favor of a 1972 citizen initiative on open government. That intention was reinforced in the preamble to the state's Public Records Act:

“The people of this state do not yield their sovereignty to the agencies which 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 Washington Coalition for Open Government (WashCOG) believes the people of Washington have a right to know who is seeking to influence our laws and the reasoning behind legislative actions. We have tried to work with legislators to expand access to legislative records, and have fought hard to protect the access people expect. But the list of exemptions created by lawmakers continues to grow dramatically.

The pressures against transparent government are relentless—never more so than early in 2018 when the Washington State Legislature passed a bill declaring the Public Records Act does not apply to the Legislature, its members, employees, and agencies. The House and Senate overwhelmingly approved the bill just 48 hours after it was made public, without any open hearings or floor debate.

The Legislature had voted to exempt itself from the open records law governing every other legislative body in the state. How long would it have been before city councils and school boards would have demanded that the Legislature grant them the same secrecy it had given itself?

Fortunately, after public outcry including more than 20,000 calls and emails, Gov. Jay Inslee vetoed the bill. Then in 2019, the state Supreme Court definitively ruled that individual lawmakers had to comply with the Public Records Act.

One might have thought the legislators would relent. Not so.

Early in 2023, WashCOG learned that the Legislature was asserting “legislative privilege” to withhold or redact records. There had been no general public discussion or legislative declaration regarding the assertion. That is to say, a decision was made in private to assert that legislators have a personal privilege to exempt their records from disclosure. That, itself, was an act of bad faith by those involved.

Legislative leaders were all over the map when questioned about the so-called privilege. Ultimately, some leaders in the state House settled on an explanation that the “privilege” is granted individually to legislators and perhaps staff under Article II Section 17 of the state Constitution.

That assertion seemed an astounding reach. That clause protects “freedom of debate.” Under the House’s new expansive interpretation, legislators could withhold records of internal legislative discussion of proposed policies, positions, or legislation, including deliberations, recommendations, opinions and advice.

That seemed an untenable argument which was rejected even by many legislators. WashCOG said the House position was wrong legally and politically. It violated the spirit of Washington’s open government laws: The people have a right to know.

WashCOG, an independent, nonpartisan organization, and Jamie Nixon, an open government advocate who worked on Washington’s 2021 redistricting commission, jointly filed a lawsuit in Thurston County, accusing the Legislature of violating the Public Records Act. The lawsuit sought a court order declaring that there is no legislative privilege allowing public records to be withheld or redacted.

At the time of the filing, Nixon said, “Transparency at all levels of government is critically important so that people can understand exactly how their money’s being spent, who is spending it, in what ways. It’s our money. It’s our government.”

In October, subsequent to WashCOG’s filing, a Thurston County Superior Court judge ruled in favor of state lawmakers’ use of “legislative privilege” to withhold certain public records. The ruling was in a related case brought by Arthur West, an open government advocate.

Judge Mary Sue Wilson ruled that “legislative privilege” exists in Article 2, Section 17. The extent of the privilege will be decided at a later date.

Likewise in November, Judge Anne Egeler issued an order saying lawmakers may withhold “records revealing internal legislative deliberations concerning bills contemplated or introduced in either house of the Legislature.”

In response to the rulings, WashCOG Secretary George Erb told *The Seattle Times* the exemption has in the past been applied “haphazardly” and the definition has been

vague. Erb worried the state was about to enter “a new era of lack of transparency,” especially in the Legislature.

“It is elected officials, who gather together to craft public policy in the people’s house,” Erb said. “Where’s the secrecy in that? The state Legislature is not a private country club.”

The WashCOG lawsuit and West’s will most likely be combined and brought before the Washington state Supreme Court.

Meanwhile, WashCOG has called on legislators to sign a pledge not to invoke “legislative privilege” in responding to Public Records Act requests. It says:

“In the interest of public transparency and open government, I instruct the records officer not to invoke a legislative privilege on my behalf when responding to public records requests.”

Signing the pledge will assure legislators’ constituents that Washington state government is operating openly, with the consent of the governed. WashCOG will post on its website at washcog.org which legislators have taken this pledge.

WashCOG believes Washington legislators need to accept that they do not own public records; the people do.

Conclusion and recommendation:

Nothing would do more to advance the spirit of the Public Records Act than for every member of the state Legislature to embrace it in words and deeds. Every legislative candidate should pledge to voters that open government starts with them. They should pledge to defend and strengthen the PRA. And, most of all, they should promise never to try to exempt the Legislature itself from the PRA.

This won’t happen unless voters demand it. Tell legislative candidates to promise:

- to support open, transparent and accountable government.
- to vote for narrow exemptions to the PRA only when they are necessary, such as for physical or digital security.
- to not withhold nor redact records based on a so-called “legislative privilege.”

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BY KATHY GEORGE

Legislators Thwart the State Sunshine Committee

The number of exemptions to the state Public Records Act has ballooned, despite the committee's mission to pare those back. From 2012 to 2022, the list of exemptions created by lawmakers increased more than 30%.

Washington's Sunshine Committee started out with good intentions. In 2007, Rep. Lynn Kessler, then majority leader of the state House, wanted to rein in the burgeoning number of public disclosure exemptions. So she sponsored **House Bill 1444** to create a committee of public records stakeholders, including representatives of the news media and state and local agencies, to review all exemptions and recommend whether to eliminate or modify them.

According to testimony at the time, there were at least 300 exemptions on the books, although nobody had done an official count.

The legislation passed overwhelmingly with strong support from open government advocates, and the Sunshine Committee surged into action.

In its first year the Sunshine Committee met 10 times (although only four meetings were required) and reviewed 41 exemptions, sending to the Legislature a dozen unanimous recommendations to scale back government secrecy. In 2009, the first bill to carry out Sunshine Committee recommendations breezed through the Legislature.

Unfortunately, that initial burst of enthusiasm for "sunshine" was never matched. The Sunshine Committee slowed its pace of review, usually meeting only once a quarter and abandoning any pretense of reviewing "each" exemption as the law envisioned. The Legislature did not pass a second Sunshine Committee bill until 2015, six years after the first one. In fact, in the entire history of the Sunshine Committee, only four of its bills passed – while more than a dozen went nowhere.

Today, the Sunshine Committee law (codified as **RCW 42.56.140: Public records exemptions accountability committee. (wa.gov)**) remains an inauspicious part of the Public Records Act, promising more than could possibly be delivered by 14 appointed volunteers with no staff and sharply differing views about how much secrecy is too much. In 2023, the Sunshine Committee discussed disbanding itself amid mounting evidence that the Legislature was no longer interested in reducing disclosure exemptions.

In fact, the Legislature's hunger for hiding public records has been the biggest barrier to accomplishing the heady goals of the Sunshine Committee law.

While showing little enthusiasm for removing exemptions from disclosure, the Legislature has continued to create new ones.

From 2012 to 2022, the annual list of exemptions grew from 449 to 585. See the latest list here: [Public Disclosure Exemptions 2022.pdf](#) (agportal-s3 bucket. s3.amazonaws.com).

The scoresheet is grim.

The Legislature has removed only five disclosure exemptions at the Sunshine Committee's urging since its inception. During the same period, the Legislature added more than 135 new exemptions. Here are just a few examples of information that has fallen out of public reach:

- Records relating to criminal terrorist acts
- Notices of crude oil transfers
- Cardiac stroke system performance data
- Hop grower lot numbers and lab results
- Identities of transit pass users

As The Seattle Times reported, Sunshine Committee members "haven't been really encouraged by the Legislature," according to Kessler, the former lawmaker who served on the Sunshine Committee from the outset. Kessler supported repealing the Sunshine Committee law, stating, "They seem to be even going more toward being exempted themselves. So I'm not sure they really believe in open government, at least not for themselves."

The past 16 years have shown that, despite good intentions of those involved, efforts to bring sunshine to Washington state will be clouded by ever-burgeoning exemptions.



Kathy George is a Seattle attorney practicing public records law and a WashCOG board member. She was one of Gov. Inslee's appointees to the Sunshine Committee from 2015 until she resigned in 2023.

BY PEGGY WATT

Public Officials and Agencies Obstruct Requesters

Some Officials Use Technology to Avoid Disclosure Laws

More than a decade ago, the Washington state Supreme Court ruled that public documents saved on personal cell phones and other private devices were still public records. But it's sometimes difficult to enforce the rule without lengthy and expensive investigations.

Those ubiquitous smartphones are handy communications tools, but they are also a temptation to abuse the transparency required under Washington's Public Records Act. Although Washington courts have affirmed that a public official can't sidestep the PRA by using personal devices or personal accounts for public communications, some officials have tried to elude the rule.

What's more, when an errant public official is caught and reprimanded, the taxpayers are often the ones who pay the price in court costs and penalties.

More than a decade ago, the Washington state Supreme Court affirmed that public records on personal devices or accounts are still subject to the PRA. (*O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010).) Organizations that train and advise public agencies about compliance—the Washington Association of Public Records Officers, Municipal Research and Services Center, Association of Washington Cities—all advise public employees and officials to use their professional email and devices for professional communications. Some agencies even provide officials with separate cell phones to use for official business.

But advice and action differ. How often do public employees and officials try to make an end run around disclosure laws by using their personal cell phones or email accounts? It's impossible to say because the issue only surfaces when communications are sought and denied—and that launches a lengthy and expensive process.

A dramatic example was the eight-year battle involving former Pierce County Prosecutor Mark Lindquist, who refused to produce text messages that were on his private cell phone. The state Supreme Court ruled unanimously in 2015 that when public employees use personal devices for public business, the records created are indeed public records subject to disclosure under the PRA. Glenda Nissen, a Pierce County Sheriff's detective, sought access to information on Lindquist's personal cell phone. (*Nissen v. Pierce County*, 183 Wn. 2d 863, 869, 357 P. 3d 45, (2015).)

But the public interest didn't end there. The Pierce County Council paid \$950,000 to Nissen for her legal costs and compensation for her original complaint that Lindquist retaliated against Nissen for her public criticism. The county's real costs, however, topped \$2.35 million in legal fees defending Lindquist as a public official.

A similar case involved Puyallup City Councilman Steve Vermillion, who continued using

a personal website and email he set up for his campaign even after he was elected. After a four-year fight, the Pierce County Superior Court ruled that the city and Vermillion were wrong to not disclose emails related to public business, even though they were on Vermillion's private website, and ordered the city to pay a \$131,064 penalty.

Puyallup spent more than \$285,000 on attorneys as the case went through the court system, with Vermillion appealing to the Washington state Supreme Court and then to the U.S. Supreme Court. (**West v. Vermillion and City of Puyallup, 384 P.3d 634, 196 Wash.App. 627, (2016)**), which declined to reconsider the lower court's ruling. The city defended Vermillion although it had no access to the correspondence that was sought, noted Puyallup City Attorney Kevin Yamamoto.

"What ability do I have to get [a council member] to fess up or supply their smartphone or personal computer so I can search that?" Yamamoto said in an interview. "A 1972-73 act never anticipated the way we communicate today."

That's dramatically illustrated with another type of technology that can subvert the PRA: Use of messaging apps that routinely delete messages after a short time. For example, messages sent on Signal, Confide, Snapchat and others can automatically self-destruct after a specified period, even if the conversation is a group chat among multiple users. Public officials' use of this software may also violate record retention laws, and could enable an end run around open meetings laws.

The challenge, of course, is that the evidence vanishes. Exposure relies on public servants (or their correspondents) with a conscience. Recent research by the Colorado Freedom of Information Coalition found that only Michigan has expressly prohibited state departments and agencies from using any technology that prevents them from maintaining or preserving electronic public records as required by law. The Colorado FOI Coalition is advocating for similar legislation in their state, and Washington should consider the same.

In addition to these cases, the PRA clarifies identifying a public record as "a record that an agency employee prepares, owns, uses, or retains in the scope of employment is necessarily a record 'prepared, owned, used, or retained by [a] state or local agency.'" (**RCW 42.56.010(3)**). But not all public officials have learned this costly lesson, perhaps in part because it doesn't cost them. Allegations have been made of similar end runs in other agencies, where public employees have even been encouraged to keep certain correspondence on private devices.

The few cases that have gone to court have produced rulings firmly on the side of transparency. These attempts at end runs are hard to track—often only exposed by whistleblowers—but they are contrary to the intent and the rules of the PRA. When exposed, agencies take a hit financially (which they share with taxpayers) and also in the community's trust of their public officials. Neither Lindquist nor Vermillion are still in office. But their choices were costly to their public agencies—and the residents—they were elected to serve.

Peggy Watt is a longtime journalist and a professor at Western Washington University who has been on the WashCOG board since 2011.

BY JUDY ENDEJAN

Government Keeps Erecting Hurdles for Records Requesters

State and local governments keep trying to put more bureaucratic obstacles in front of requesters. The stumbling blocks include lengthy administrative appeals and ambiguous dates for final installments. Such maneuvers make it harder for requesters to prevail in records disputes and discourage them from challenging agencies.

Just when Charlie Brown thinks he's going to kick the football, Lucy yanks it away. Once again, Lucy foiled Charlie Brown's attempt for a goal.

So, too, public agencies can arbitrarily move the ball when responding to Public Records Act (PRA) requests by creating bureaucratic obstacles for requesters. These come in different forms.

For instance, San Juan County enacted an ordinance that required a requester to exhaust administrative remedies created by the county to be able to sue the county for PRA disclosure violations. The Washington state Supreme Court struck down this ordinance in *Kilduff v. San Juan County*.¹

The Supreme Court rejected the county's claim that this ordinance was a proper rule, enacted to fulfill the duty to publish substantive and procedural rules governing records requests in **RCW 42.56.040**. The court reasoned that creation of a new administrative rule that hampered, rather than promoted, public access to records was not authorized by the PRA. Such a rule is an unauthorized roadblock to judicial review of an agency's denial of a PRA request under **RCW 42.56.550**.

Yet, the Washington Legislature in its 2023 session tried to adopt a new, administrative review process as a prerequisite to a lawsuit in House Bill 1597 by adding to **RCW 42.56.550**, "A party seeking judicial review must have exhausted all administrative remedies provided under **RCW 15 42.56.520** and shall sign a certification attesting that the request for records is not being made for any improper purpose." This bill did not pass, but its support is indicative of many government agencies and local officials' desire to limit accountability for PRA violations by creating new hurdles.

"Last installment" mysteries

Currently, the right to review is triggered by final agency action on a request, which does not depend on administrative exhaustion. Agencies can mess with this right by not clearly telling the requester that the agency has closed the request, either through ambiguous language or by simple inaction on a request for a long period of time. Because an agency can produce records in installments, it can be hard to tell that the agency has finished, or closed a request.

Under the problematic case of *Hobbs v. Washington State* produced in Auditor's Office², a PRA lawsuit is not ripe until "some agency action, or inaction, indicating

that the agency will not be providing the responsive records.”

Requesters face a conundrum in ambiguous situations, where it is hard to tell when an agency has provided the final installment of records. If a requester sues, to stay within the one-year statute of limitations for PRA actions in **RCW 42.56.550(6)**, an agency could argue that it wasn’t finished with its response, so the appeal should be dismissed under Hobbs. If the requester does not sue within that time, an agency can argue the suit is time-barred because it was not brought within one year of the “last installment.”

Agencies can, and will, erect other bureaucratic impediments to full and prompt access to public records in many other ways.

They can provide lengthy estimates of time for when they will respond under **RCW 42.56.520**. The agencies entirely control the reasonableness of this estimated response time, which requesters cannot challenge. The PRA only requires an agency to provide a “reasonable estimate, not a precise or exact estimate.”³ Moreover, the PRA does not bind an agency to its original estimate; an agency is permitted additional time to locate and provide public records.⁴

Many agencies have recently required requesters to ask for records via a web form that includes disclosing the identity of the requester and the purpose for requesting. The PRA, however, does not require use of a form; an email, letter or even verbal request in person may suffice. Also, requesters may be anonymous, and the PRA bars consideration of the requester’s purpose so long as it is not commercial use of a list.

Agencies, by policy, can require requesters to figure out which department within a large agency is the responsible responder for a PRA request (i.e., the fire department versus the police department), and delay or deny a request submitted to the wrong department, a common practice with King County.

Agencies can provide records in the format of their choosing. They are not required to provide records in electronic form, even if requested in the PRA request.⁵ This can delay response times and impose additional costs on the requester for paper copies of public records under RCW 42.56.070;.120.

Unfortunately, many public agencies erect unnecessary barriers for requesters that can only be abolished through litigation and appeals. These benefit agencies delay responses and undermine the purpose of the PRA.

Judy Endejan is a Seattle attorney who has represented media and communications clients in private practice and as corporate counsel. She is a founding WashCOG board member.

1. Kilduff v. San Juan County, 194 Wn. 2d 859, 453 P. 3d 719 (2019).
2. Auditor’s Office, 183 Wn. App. 925,936, 335 P. 3d 1004 (2014).
3. Andrews v. Wash. State Patrol, 183 Wn. App. 644, 652, 334 P.3d 94 (2014).
4. Hikel v. City of Lynnwood, 197 Wn. App. 366, 373, 389 P.3d 677 (2016).
5. Wash. Coalition v. Pierce County, 2019 Wash. App. LEXIS 392 (Div. II Feb. 2, 2019).

BY ROBERT MCCLURE

Public Officials Delete Key Text Messages

In several recent high-profile cases where officials and politicians could expect close public scrutiny, text messages were deleted from their cellphones or other devices. Though those actions stand in defiance of the public records law, few officials have been punished for their actions.

Several recent well-documented instances of government officials improperly deleting text messages raise significant doubts that government employees and elected officeholders are adequately trained on how to follow the state Public Records Act (PRA).

That's the most charitable interpretation. More distressing are indications that some officials no longer take seriously whether their actions criminally violate the state records law.

Here are several examples:

- Then-Seattle Mayor Jenny Durkan, Police Chief Carmen Best, Fire Chief Harold Scoggins and four other city officials deleted tens of thousands of text messages sent amid the furor of 2020's racial-justice protests. Durkan explained that she had dropped her phone while strolling along a beach, but a federal judge said Durkan's explanation "strains credibility." It turned out the phone had been manually set to delete text messages after 30 days. Best at first told journalists she did not know how the texts were deleted. But later, in sworn testimony, she said she had manually deleted texts in batches after determining unilaterally that they were not subject to the PRA. Seattle taxpayers ended up forking out nearly \$3 million in court settlements with two city whistleblowers and the *Seattle Times* over PRA violations, and to engage consultants to try to track down the missing texts. None of the officials involved has been prosecuted or fined.
- The Washington Redistricting Commission admitted in a court filing in December 2022 that Commissioner April Sims deleted text messages subject to the PRA. In addition, the commission improperly withheld many text messages requested by members of the public after the commission approved redistricting plans that had not been made public, without any public discussion. The Washington Coalition for Open Government (WashCOG) successfully sued the commission under the Open Public Meetings Act. WashCOG won, among other stipulations, a requirement that all future commissioners and staff receive open-government training within 30 days of commencing employment.
- Then-Richland School Board member Audra Byrd acknowledged she deleted text messages she sent amid a contentious move to drop a COVID-inspired mask mandate, saying her personal phone did not have the capacity to retain them. But in one of those text messages to a colleague, she said, "I am deleting all of this now," followed by a smiley-face emoji. She has never been prosecuted or fined.

These relatively well-known violations became public because they touched on areas of major controversy: race-equity protests, coronavirus mask mandates, and the critical once-a-decade divvying up of Washington's political power. These were high-profile affairs. Officials had every expectation of close scrutiny.

But what about the day-in, day-out conduct of tens of thousands of public servants across the state? The high-profile examples cited above raise serious questions about how often public documents in text messages are being deleted in violation of records retention requirements that supposedly carry the weight of the law.

Washington voters in 1972 established the principle that the public has the right to inspect the documents generated by their government servants, passing the Washington Public Disclosure Act by a wide margin.

It took some time after the advent of text messages for Washington courts to address the new technology in the context of the PRA. Fair enough. But it has now been eight years since the Washington state Supreme Court in 2015 declared in **Nissen v. Pierce County** that text messages related to government business are governed by the PRA, even if they are received or sent on a public official or employee's personal cell phone. How long will it be before this is adequately explained to state and local officials and officeholders?

These incidents share a key failing of the current state of affairs: enforcement of prescribed criminal penalties.

If Mayor Durkan, who previously served as U.S. Attorney for the Western District of Washington (the top federal law enforcement official in western Washington), could not be bothered to comply with the PRA, what assurance does the public have that other public servants are acting any differently? She should be held responsible for apparently willfully ignoring the requirements of the law.

April Sims deleted text messages just a few hours after she and other Redistricting Commission members voted to approve new redistricting plans that had not been written down or made public, yet she has never been held to account. Audra Byrd is no longer in a position to ignore the PRA because she was recalled by voters. But where is her punishment for apparently willfully violating the law?



In practice, elected and appointed officials are using private phones and other devices to conduct public business, a practice that imposes a burden on agencies and ultimately taxpayers by making it more difficult and costly to retrieve records in response to a PRA response.

WashCOG recommends four steps to improve the situation:

- 1** Require better and more training. Awareness that the PRA reaches private devices and accounts must permeate government agencies at all levels from the top person or/and board to front-line public servants. As we did in our settlement with the Redistricting Commission, WashCOG recommends that all staff and elected officials receive open-government training within 30 days of taking office.
- 2** Make public officials at least partly liable financially when citizens try to enforce the Public Records Act in civil court. If officials flout the law that Washington citizens overwhelmingly supported at the ballot box, they should personally suffer consequences.
- 3** Reform the state's record-destruction statute to provide realistic penalties and enforcement procedures for destruction of public records.
- 4** Agency officials and employees should be actively discouraged from using private modes of communication (and should be prohibited from using disappearing-message apps such as Signal to do public business). The proliferation of public business on private devices makes it more difficult, as a practical matter, for agencies to comply with the PRA because it removes the agency from direct control over the records. The practice imposes a burden on agencies and ultimately taxpayers, by making it more difficult and costly to retrieve records in response to a PRA response.

If these recommendations are followed, the residents of Washington state will be able to have a better understanding of the intricacies of how their lawmakers communicate and do the people's work.

Veteran journalist Robert McClure is a co-founder of InvestigateWest, a Seattle-based journalism studio covering the environment, public health and government accountability. He joined the WashCOG board in 2021.

BY GEORGE ERB

Officials Have Interfered With Public Records Officers

In at least two cases around the state, public agency officials have obstructed legitimate records requests by ordering records officers to deny disclosure or hide troubling and embarrassing information.

Public agency officials in Washington state have interfered at times with public records officers who were responding to records requests, although the frequency of these incidents is unknown.

Two cases have come to light in recent years. An attorney for former Seattle Mayor Jenny Durkan in 2020 meddled with the work of two records officers. The following year, former Monroe School District Superintendent Justin Blasko delayed the release of one public records request and misled the district's records manager about the presence of job-related texts on his personal cell phone.

How often agency officials interfere with public records officers is difficult to determine. Few such incidents become part of the public record. Officers with the Washington Association of Public Records Officers (WAPRO) in emails said the nonprofit does not monitor agency interference and declined further comment, saying their organization focuses only on its educational mission.¹

The events in Seattle arose from the Black Lives Matter protests in the spring of 2020, when protesters clashed repeatedly with police and occupied six blocks of the Capitol Hill neighborhood. In a controversial move, the city abandoned its nearby police precinct.

To understand the city's actions, the public and the media filed numerous public records requests, including 48 that sought communications from the mayor's office.²

At the time, Kimberly Ferreiro and Stacy Irwin were senior public disclosure advisers with the city of Seattle Mayor's Office. Their immediate supervisor was Michelle Chen, Durkan's legal counsel.

While working on the records requests, Ferreiro and Irwin discovered that about 10 months of the mayor's text messages were missing – messages that were relevant to the requests.

In a subsequent lawsuit for wrongful discharge, Ferreiro and Irwin contended that Chen directed them to keep requesters in the dark about Durkan's missing texts and to instead provide "recreated" texts from messages sent or received by others.³



The two records officers also alleged that Chen instructed them to interpret the records requests in such a way that more than half of the requests would exclude the mayor's texts. One requester, *The Seattle Times*, was singled out. Ferreiro and Irwin said Chen told them to withhold the documents sought by the Times' request "because she did not like the content of the responsive records."⁴

Both records officers objected repeatedly because they believed Chen's directions violated Washington state's Public Records Act. They refused to follow Chen's instructions, and in March 2021 Irwin filed a whistleblower complaint with the city's Ethics and Elections Commission.⁵

The commission's investigation concluded that Chen's decision to narrowly interpret most of the records requests to exclude the missing text messages violated the Public Records Act. The investigation report also said Chen's decision to not tell requesters about the missing and recreated texts violated best practices, but not necessarily the letter of the law.⁶

Both records officers said the workplace consequences for their actions were severe. According to their lawsuit, Ferreiro and Irwin "were routinely subjected to scorn, ridicule, abuse, and hostility from Ms. Chen and managers at the City of Seattle."⁷ Irwin went on medical leave in February 2021, and Ferreiro did so a month later. Both soon resigned from the city.

In August of that year, Chen left her job at City Hall. Her attorney later told *The Seattle Times* that the investigation was unfair, and that Chen had followed the advice of the office of the Seattle City Attorney.⁸

The city in May 2023 settled Ferreiro and Irwin's wrongful discharge lawsuit by agreeing to pay \$2.3 million, a figure that included all expenses and attorneys fees.⁹

Thirty-three miles north of Seattle, in Monroe, Wash., Justin Blasko by December 2021 was coming to the end of a tumultuous tenure as superintendent of the public school district.

Teachers, parents and students complained publicly that the Monroe School District was not addressing long-standing issues of racism and discrimination. More than 1,000 people signed a petition demanding change at the top. On Dec. 13, Monroe students walked out in protest.

Days later, the school board placed Blasko on administrative leave¹⁰, and the district hired an outside firm to investigate misconduct allegations against the superintendent.

Among the investigation's numerous findings¹¹ were instances of Blasko interfering with public records requests.

In May 2021, a requester asked the district to disclose its staff climate and culture surveys. Blasko intervened and instructed the public records officer to delay releasing the survey until later that summer. One witness told the investigator that Blasko said he wanted the survey results withheld until his contract extension was negotiated in June.¹²

The district released the survey results in August, three months after the records were requested.

School officials in December 2021 received another records request, this time for Blasko's cell phone records, including text messages on his personal device. Blasko told the public records officer that he did not do government business on his personal cell phone.

His colleagues said otherwise. Two district staff members said they had exchanged job-related text messages with Blasko from his personal device. They even provided screenshots of texts from Blasko's personal phone. The superintendent denied using his personal cell phone for district business, but the investigator found the witnesses more credible.¹³

Blasko resigned in July 2022 and walked away with a severance payment of \$396,374.55.¹⁴

Although the frequency of agency interference with public records officers is unknown, the cases that have come to light are troubling and almost certainly not solitary incidents. Officials in the Seattle Mayor's Office and the Monroe School District meddled with public records requests to advance their own self interests. They delayed disclosure of or hid information they considered inconvenient, embarrassing or even damaging.

This is contrary to a central principle of the Public Records Act, which is that the public needs to know what its officials are doing. Only then can voters weigh their governments' performance, hold their officials accountable and make informed decisions.

WashCOG Secretary George Erb is a retired news reporter, editor and university journalism instructor. He joined the coalition board in 2002.

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2. Investigative report, case No. 21-WBI-0304-1, May 6, 2021, the city of Seattle Ethics and Elections Commission.
3. Irwin and Ferreiro v. city of Seattle, King County Superior Court, Case No. 21-2-11739-9 SEA, Sept. 3, 2021.
4. Ibid.
5. Investigative report, case No. 21-WBI-0304-1.
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7. Irwin and Ferreiro v. city of Seattle.
8. "Employees who blew whistle on Seattle mayor's missing texts file lawsuit against the city," *The Seattle Times*, Sept. 3, 2021.
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BY WILLIAM JOHN CRITTENDEN

Finding 3: Agencies Often Fail to Properly Maintain, Organize and Disclose Records

Many Agencies Fail to Adequately Organize Their Records

State law says agencies must adopt rules to protect and organize records. But many agencies failed to keep pace with the digital revolution, leaving them weighed down with poorly organized electronic records that require costly and time-consuming searches. As a result, many requesters face unnecessary delays, and officials often blame the Public Records Act—rather than their own records management—for devouring staff time.

For more than 50 years, the Public Records Act (PRA) has required agencies to organize their records, making it easier for officials to find documents and fulfill records requests. But most agencies have failed to efficiently organize their growing volumes of digital records, resulting in records searches that are more time-consuming and costly.

The drafters of the 1972 Washington Public Disclosure Act (now PRA) understood that public records must be properly organized, and that disorganized public records are a significant impediment to transparency, making prompt and complete responses difficult. The PRA has always required agencies to keep their records organized. RCW 42.56.100, part of the original 1972 initiative, provides:

Agencies shall adopt and enforce reasonable rules and regulations... consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information.

This section of the PRA recognizes that the goals of fullest assistance and the timeliest possible action on PRA requests cannot be achieved unless public records are kept organized. Consequently, an agency's responsibilities under the PRA start with keeping public records organized. An agency that fails to keep its records properly organized is in violation of the PRA.

When the PRA was enacted most public records were on paper, kept in notebooks or filing cabinets. But even then, the PRA explicitly applied to all forms of electronic records.

The computer revolution should have improved transparency and reduced the cost of complying with the PRA. Unfortunately, agencies started creating huge amounts of electronic records without adopting meaningful procedures for organizing them. Government employees routinely create Microsoft Word or Excel documents without proper file names and without saving these documents in file structures where they can be easily identified. Many government agencies still have no rules restricting the use of private devices or accounts for government business and have only reluctantly accepted that government records on private devices are public records at all.



Agency attorneys have contributed to this problem by acting in the interests of public officials who want to keep using their private devices for government communications instead of acting in the interests of their agencies by stopping these practices. The inexcusable failure of the city of Seattle to retain the electronic communications of city officials, including the mayor, during controversial Black Lives Matter protests on Capitol Hill in 2020 was the direct result of more than a decade of statewide agency resistance to the idea that emails and text messages on privately owned devices are public records subject to the PRA.

Most PRA officers mistakenly believe that it is not their job to keep agency records organized, and most agencies have no meaningful rules for the organization of public records. Instead, PRA officers are merely investigative clerks who attempt to locate disorganized records in response to PRA requests. And when an agency's chronic lack of organization makes it difficult and time-consuming to respond to a PRA request, PRA officers and their attorneys frequently complain about the burden of searching large amounts of disorganized records.

Messy records = messy searches

The lack of proper organization makes it necessary for requesters to make broad requests and sift through unwanted records to ensure that the desired records are located and produced. Keyword searches frequently produce large amounts of unwanted records, which may be produced in batches, thereby extending the time required for a complete response. Agencies will often require a requester to purchase an installment of useless, nonresponsive records identified by keywords, and refuse to continue searching until payment is made. Records identified using keyword searches are produced in the order in which they are located or reviewed, which is often unrelated to the logical order such records would have if properly organized.

The state Office of the Attorney General (OAG) has not only failed to take the lead to bring agencies into compliance with **RCW 42.56.100**, but has actively resisted the idea that agencies have any legal obligation to actually organize their records. The OAG is charged with promulgating model rules for agencies, but it has consistently failed to promulgate meaningful rules for the organization of electronic records. The OAG even refused to adopt proposed rules that would have addressed these organization issues.

In 2017, the Attorney General undertook a formal rulemaking process to update the PRA model rules. In response, WashCOG explained that the existing model rules failed to implement the agencies' duty to keep public records properly organized. WashCOG proposed specific rules to restrict the use of personal computers, devices, email or text accounts and social media, and to require that all public records be retained on computers controlled by the agency.

WashCOG also proposed specific rules for the organization of several types of public records, rules intended to improve PRA compliance while reducing the need to search for, review and redact records in response to PRA requests, including:

- rules for file names and filing systems that contain public records so that responsive records can be located by subject matter as opposed to ineffective and time-consuming key word searches
- rules restricting the use of social media, and requiring agencies to organize and store their social media data
- rules for email communications including consistent, meaningful subject lines, the storage of attachments, and the logical organization of email records as opposed to allowing emails to accumulate in email Inbox and Sent Items folders
- rules for retaining word processing files so that earlier versions of government records are not destroyed or overwritten
- rules requiring frequently used government forms to limit the inclusion of exempt information and to clearly identify exempt information to reduce timely record reviews and ad hoc redactions
- rules for creation and retention of records of how agencies search for records in response to PRA requests
- rules requiring agency attorneys to identify and segregate records containing privileged information or work product to reduce the need for attorneys to review or redact records
- rules requiring all records involving outside legal counsel to be retained by the agency itself
- rules requiring multi-agency organizations to either directly comply with the PRA as agencies or ensure that records of an agency's participation in the organization are organized and retained by the agency itself.

Unfortunately, the OAG erroneously interprets the agencies' obligation to keep records organized as merely an obligation to protect public records from the public. The OAG rejected all of WashCOG's proposed rules for organizing specific types of records and adopted a toothless rule that focuses on the nonexistent problem of preventing requesters from damaging public records. As a result, agencies still have not adopted proper rules for organizing records, and PRA compliance still suffers.

The chronic failure of agencies to comply with this part of the PRA has resulted in slower PRA responses, increased cost for agencies, and political pressure to weaken the PRA. Agencies in Washington state need to start complying with their legal obligation to keep all public records organized. WashCOG intends to push agencies to improve their records organization, to compel the OAG to adopt proper model rules, to take legal action against recalcitrant agencies, and to hold anti-transparency public officials, employees and attorneys accountable. The public can assist with these efforts when requesting records by reminding agencies that they have an obligation to keep records organized, by demanding that agencies perform logical searches of agency records before relying on keyword searches, and by requesting a copy of an agency's rules for organizing its records.

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BY JOAN K. MELL

Disclosure Delays Plague Records Requesters

Although state law says agencies must make records “promptly” available to requesters, the government has various ways to delay disclosure—even to the point of unilaterally canceling requests. The public and the media are then forced to wait, and wait some more, often for significant information that would shed light on rapidly unfolding public issues.

Sadly, Public Records Act (PRA) requesters frequently experience “disclosure delays.” Conceptually, PRA “disclosure delays” are an oxymoron. Washington’s citizens wanted nothing less than “prompt” access to public records.

The people expressly said so twice. **RCW 42.56.080(2)** states that “agencies shall, upon request for identifiable public records, make them promptly available to any person.” In addition, **RCW 42.56.520(1)** states that “Responses to requests for public records shall be made promptly by agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives.”

The courts interpreting the PRA have recognized that agencies should act with a sense of urgency. Whether an agency responds “promptly” may mitigate any penalty assessment if an agency otherwise violates the PRA.¹ When an agency unreasonably delays disclosure, a requester may sue over that delay as a stand-alone violation without waiting for the agency to close the request.² The requester need not prove the agency withheld any records. It may be sufficient that the agency simply took too long to respond.³

There is no finite point in time when a response is per se untimely because not all delays are unreasonable. The people said five business days is presumptively prompt.⁴ Yet agencies do not routinely make public records available that “promptly.” Of those agencies that **reported their 2021 public records data to the Joint Legislative Audit Review Committee (JLARC)**, the average number of days to respond is 20.

The PRA statute, **RCW 42.56.520**, identifies four specific grounds for an agency to extend response deadlines without any limits on the frequency or duration of such extensions:

1. the need to clarify the intent of the request
2. to locate and assemble the information requested
3. to notify third persons or agencies affected by the request
4. to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.

Agencies rarely attempt to justify extensions, but rather unilaterally set expected deadlines and then extend them without pointing to any acceptable rationale.

An agency is not required to explain its delays to the requester or estimate when it will fully respond, although the unreasonableness of any explanation of noncompliance may be an aggravating factor in a penalty assessment.⁵

After acknowledging receipt of the request within the first five business days, the agency has no other required deadlines. The five-day acknowledgment is the only mandatory notification. After that, an agency communicates when it chooses. Agencies may or may not communicate monthly, or with any predictable frequency. Agencies miss their own deadlines. Agencies extend their own deadlines multiple times. Agencies may choose not to communicate for months. All of this unreliability makes it difficult for a requester to anticipate when an agency will make the records available. Requesters must remain vigilant to avoid missing notifications that a record installment is ready.

Courts have no set time frames that constitute an unreasonable amount of time for agencies to respond to records requests. Ten months has been ruled an unreasonable delay.⁶ Five months to respond is reasonable.⁷ Twenty-five days is reasonable.⁸ Thirty days is reasonable.⁹ Fifty-nine days is reasonable.¹⁰ Seventy-four days is reasonable.¹¹ Anecdotally, a Thurston County judge has commented that an agency taking a year and a half to respond is too long, while a different Thurston County trial court ruled that the Office of the Attorney General can take two and a half years to dole out installments.

Agencies deploy various strategies to legitimize their delays.



Clarification requests

The triggering event for an agency to respond under the Public Records Act is its receipt of a request stated with sufficient clarity to give the agency fair notice that it has received a request for public records.¹²

Fair notice may be evaluated on various factors in two categories: the characteristics of the records and the characteristics of the request.¹³ The factors relating to the characteristics of the request are:

- its language
- its format
- the recipient of the request.¹⁴

The factors relating to the characteristics of the records are:

- whether the request was for specific records, as opposed to information about or contained in the records
- whether the requested records were actual public records
- whether it was reasonable for the agency to believe that the requester was requesting the documents under an independent, non-PRA authority.¹⁵



The clarity of a public records request affects the agency's obligation to respond and may be a mitigating factor in any penalty assessment.¹⁶ Agencies understand these legal implications and can create ambiguity where there is none solely to justify a prolonged response.

A common clarification issue involves conjunctive and disjunctive terms in a request such as "and" / "or." For instance, when requesting communications like e-mail, texts, and instant messaging among individuals, the agency may interpret the request to require disclosure of all senders and recipients in one communication rather than communications between any and all persons identified. Agencies could and should assume "and" and "or" to require production of everything, rather than some responsive information, but agencies are not uniformly that helpful.

Agencies have been trained to send an acknowledgment letter repeating the request and seeking clarification. In that communication, the public records officer sometimes explains how the agency will approach its search. A requester should carefully read and respond to such communications (and include a request to the public records officer to acknowledge the request has been clarified as of a specific date).

Requesters working with public records officers on clarification of a request should be cautious when the officer asks the requester to reframe the request. Agencies at times use the clarification process as a rationale for assigning a new tracking number to the request, which allows the agency to reset the start date for a response.

Agencies value later start dates because the start date may be the date from which a penalty calculation is measured.¹⁷ The further back an agency can push its duty to respond, the more time an agency has to respond without penalty. Agencies should not have the discretion to unilaterally assign new tracking numbers when a requester clarifies an existing request solely to reduce the penalty calculation.

Consolidating requests

Agencies sometimes group requests by subject matter or requester to prolong response deadlines. For example, the state Employment Security Department grouped its processing of multiple requests for fraud investigative materials after the agency realized it lost hundreds of millions of dollars to thievery and mistakenly paid benefits during the pandemic. The agency held the requests indefinitely, responding to no one until leadership within the agency changed. Then it disclosed the materials.

In other instances, agencies consolidate requests from one requester, then phase responsive materials into multiple installments over time with page limits per installment. By doling out smaller installments over time, public interest dissipates, and the information becomes stale and useless, all while the agency creates the appearance of responsiveness. By the time the agency finishes responding years

later, and the case is finally ripe for filing an enforcement action, the requester no longer needs the information and cannot justify investing the necessary resources to hold the agency accountable for its deliberate delaying tactics.

In a recent success for rolling back grouping policies, *The Seattle Times* negotiated a pre-litigation settlement with the Seattle Police Department (SPD) in which the SPD agreed to no longer group requests filed more than two months apart. The SPD also agreed to hire four temporary employees to help work through the agency's large backlog of requests. In the past, that backlog had become part of the SPD's justification for its grouping practices.

Multiple requests

In the past, a requester could submit a public records request to a government entity and the entity would identify the appropriate department to respond to the request. A request to one agency department could have been answered by another department.¹⁸ However, Pierce County in *Koenig v. Pierce County*¹⁹ argued successfully that the prosecutor's office and sheriff's department were discrete units of local government such that a public records officer had no duty to locate responsive records from another department. Since *Koenig*, other agencies have limited searches by department, which shifts the burden back to requesters to submit a request for records from discrete divisions within an agency to obtain a complete response.

Requesters unfamiliar with an agency and its operations may not know where records are maintained or who prepares, owns, or uses the records. This confusion stifles their ability to request the information from the right place. There have been no binding court decisions obligating agencies to inform requesters where the information is likely to be located. Agencies may opt to remain silent, which is what the state Redistricting Commission director did over the objections of the public records officer who wanted to inform requesters that the records they were seeking were likely in the possession of the legislative caucuses. The absence of any affirmative duty on agencies to assist a requester in locating responsive records does not adhere to PRA policy of providing requesters with the "fullest assistance."²⁰

The division of duties within an agency also complicates the process for requesters who then must manage multiple requests to a single agency. A requester ends up purchasing duplicated records. Variations in the practices of public records officers within distinct divisions frustrate both seasoned and novice requesters. Agencies should be required to assign requests among departments and assist requesters in processing a request from the agency without having to duplicate the same request to multiple departments.



Non-Responsive records

Invariably, agencies prepare records for disclosure based upon content, releasing non-controversial content first. The more interesting content usually comes in later installments, if at all. Agencies are less able to delay production of meaningful content when the request is simple. Agencies can and should ask a requester to prioritize the categories of a request for multiple records. However, agencies do not commonly ask, leaving the requester with no idea how the agency is grouping or prioritizing installments. For this reason, it is better to submit multiple one-item requests than one request for multiple items. Agencies should inform requesters of the content retrieved from a search to affirm the information is responsive prior to sending an installment. However, agencies do not take time to verify that the information located in a search is actually responsive. A requester who receives non-responsive records in any installment should document how the information is non-responsive in writing to put the agency on notice that the information is not what the requester wants.

Internal interested party notifications

In the midst of a fraud scandal, the state's Employment Security Department (ESD) chose to send documents to the official who created or received the record before disclosing the records to a requester. This prolonged response times for months. The thought was that the official should know when records implicating the official's conduct were about to be released. The PRA expressly prohibits withholding records that embarrass or inconvenience officials.²¹ When sued, ESD agreed to stop sending documents to officials to review prior to disclosure.

Third party notifications

Agencies have been trained to provide notice to individuals who are the subject of documents requested if the agency has privacy concerns about disclosing the records.²² The agency will give an individual time to file for injunctive relief to stop the disclosure. When an agency uses this option, a requester should ensure that the agency has limited the content of what it is withholding and has not delayed production of records that are not exempt.



In sum, requesters should expect agencies will not respond within five days to their public records requests. Even so, requesters should not be deterred from challenging unreasonable delays. When agencies take too long to respond, the requester should make follow-up requests for the agency's tracking sheet and all communications regarding its search for responsive records. The requester then has an accurate timeline to present to the court when arguing an agency's response was not prompt as required under the PRA.

Joan K Mell is a veteran attorney who works out of her own Tacoma law firm, III Branches Law. She represented WashCOG in its separate open-government lawsuits against the Washington State Redistricting Commission and the state Legislature.

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BY WILLIAM JOHN CRITTENDEN

Attorneys Often Steer Agencies Into Needless Litigation

Lawyers who represent the government are a force to be reckoned with—and not in a good way. They are unelected and beholden not to the public, but to the agencies that hire them. Too often they lead agencies in records disputes down legal paths that are needlessly time-consuming, costly and acrimonious. Repeatedly, the losers are requesters, taxpayers and frequently the agencies themselves.

Attorneys who represent government agencies generally have significant negative impacts on transparency. Attorneys trained and accustomed to representing private clients are often excessively secretive and litigious when advising or representing government agencies in transparency disputes. Without adequate supervision and public oversight, agency attorneys cause their agencies to unnecessarily withhold public records and take legal positions that are not in the public interest.

Transparency requires the public to have the information necessary to hold public officials accountable. Elected public officials are entrusted by local voters to govern in the public interest, and if they fail, they can be removed from office by voters. Public officials are held accountable under both the Open Public Meetings Act (OPMA), Chap. 42.30 RCW, which requires most agency decision-making to be conducted in open public meetings, and the Public Records Act (PRA), which makes agency records and communications available for public scrutiny.

But when government agencies become involved in a legal dispute, transparency goes out the window, largely because of agency attorneys. Unelected agency attorneys are not chosen by voters and cannot be removed by voters.

An exception to the OPMA allows agencies to use “executive sessions” to discuss legal matters without public oversight. Agency attorneys not only fail to disclose the subject matter of executive sessions involving legal counsel but routinely fail to keep any records of such sessions and do not inform the public of what decisions, if any, the agency may have made in executive session.

The PRA includes exceptions for attorney-client privileged communications and attorney “work product.” Unfortunately, most agency attorneys apply these exceptions so broadly that the public is kept completely in the dark about legal matters and the work done by agency attorneys at taxpayer expense.

Aggressive advocates

Agency attorneys are both legal technicians and zealous advocates for their agencies in litigation. They are not impartial, are often unqualified to make policy decisions, and lack the interest in public service that motivates, or at least should motivate,

their agencies. By the standards of behavior that are expected in science, journalism or public service, many if not most attorneys are partisan, secretive, amoral. It is an unfortunate reality that there is very little quality control in public service.

With few exceptions, there is no public process for hiring or retaining an agency attorney. Attorneys get agency jobs by schmoozing, often with other unelected public officials such as city managers.

In general, agency attorneys are unelected city employees or contractors. As a result, agency attorneys are not accountable to the public. Instead, they are beholden to the public official who hired them. Full-time agency attorneys are not independent from the policy makers who hire them, and they are incentivized to act in the interests of their employer. Private outside counsel are even more problematic, having the additional improper incentive not to solve transparency problems, but to bill as many hours as possible. Many outside attorneys do not even provide their agencies with written legal advice or complete copies of their files to avoid scrutiny of bad (or missing) legal advice or poor strategic decision-making, and to conceal the attorney's involvement in a public controversy. Some agencies have had to be sued to force them to produce their attorneys' invoices, which are supposed to be public records.

In contrast, the Washington state Attorney General, the Seattle City Attorney and the various county prosecuting attorneys are elected offices. These public officials are incentivized to ensure their own reelection by controlling the flow of information about how they do their jobs and manage their agencies.

Agencies are not required to be secretive in most legal matters. In many instances an agency's legal matter is also a matter of public controversy that should be addressed openly to ensure that the agency is acting in the public interest. The PRA exemptions for attorney-client communications and work product are not mandatory and can be waived by the agency in the interest of transparency. Unfortunately, agency attorneys don't give their own clients the option of being transparent, instructing their clients to broadly apply PRA exemptions and to always discuss legal matters in executive session.

Agency attorneys work for the taxpayers, and they are supposed to help their agencies comply with the law and act in the public interest. Unfortunately, agency attorneys are by far the least transparent of all government officials. Agency attorneys cause and then use the lack of oversight to ignore the public interest and pursue their own agendas and/or the anti-transparent agendas of their elected officials and agencies.



Spreading secrecy

Agency attorneys create transparency problems when they become involved (or inject themselves into) agency decision-making without carefully segregating their legal advice from other records. The casual intermingling of privileged legal advice with other information results in too much non-privileged information being withheld. The mere inclusion of a lawyer in an email thread can cause an agency to treat the entire conversation as a privileged legal matter exempt from public disclosure. Agency attorneys fail to identify privileged legal advice as such, requiring time-consuming reviews of large amounts of records to ensure that privileged legal advice is properly redacted. Far too often agency attorneys simply do not bother to keep their unsophisticated clients informed, and they don't even put in writing their legal advice, or the legal decisions allegedly made by their clients after being properly briefed.

Agency attorneys assert a PRA exemption for attorney "work product" far too often and too broadly. The "work product" doctrine is intended to prevent private litigants from obtaining an unfair advantage over their opponents by disallowing discovery into an opposing party's research or investigation. This doctrine should have only limited application to government agencies where the cost of such research or investigation is paid by the taxpayers. Unfortunately, Washington's appellate courts, which all consist of either attorneys with no prior experience with the PRA and/or former government attorneys, have uniformly failed to reign in excessive and unnecessary claims of "work product" by agencies.

Consequently, agency misuse of the "work product" exemption results in time-consuming reviews and excessive redaction of records that should simply be disclosed or remain unredacted. In 2019, the state Court of Appeals erroneously allowed Pierce County to withhold as "work product" numerous emails from prosecuting attorneys in other counties regarding whether to support former Pierce County Prosecutor Mark Lindquist's efforts to withhold public records (text messages) behind a claim of "privacy."

Currently, WashCOG is suing San Juan County for excessively redacting attorney invoices under a claim of work product.

This anti-transparency attitude bleeds over into PRA compliance generally. Far too often, an agency's level of compliance with the PRA is determined by the legal advice provided by the agency's attorney with no public input. Agencies allow their attorneys to determine which PRA exemptions to assert and in what format records will be provided.

Digital disorganization

When the PRA was enacted by the voters in 1972, most government records were on paper. Public officials had no choice but to employ clerks to keep such records logically organized in physical files. Used properly, the digital revolution should have improved government transparency and reduced the time and cost for obtaining public records. But as electronic records became more common over the past decades, the agency attorneys failed to advise their clients that they have a legal obligation to keep digital records just as organized as paper records. (See *"Many Agencies Fail To Adequately Organize Their Records"* on page 42.) The result is an ever increasingly disorganized mountain of digital public records. Thirty years ago, all

records relating to a single agency decision or action might have been obtained by copying a handful of documents located in a file cabinet. Today, obtaining the same public information may require a broad PRA request requiring an agency to search large amounts of disorganized email, text messages, electronic files and even the private digital accounts and devices that public officials and employees should not be using for government business.

In August 2019, WashCOG asked the Washington Association of Prosecuting Attorneys (WAPA) to produce all records addressing any legal issues relating to either the PRA or OMPA. In response, WAPA admitted that its records were not organized and then took more than six months to review nearly 5,000 emails that were identified by keyword searches for phrases such as “public records act.”

Agency attorneys have failed to recognize and deal with the transparency problems and conflict of interests created by the use of private cell phones, computers and email accounts for government business. In the era of paper records, if a public official had a work-related telephone conversation at home and made a record of that conversation on a privately owned notepad, everyone understood that the resulting record was a public record. The fact that the public official’s phone and notepad were used was irrelevant, and the public official had no “expectation of privacy” in the resulting record.

But as private cell phones and private computers became ubiquitous, agency attorneys failed to advise their clients that any record relating to government is a public record, and that the use of private devices and accounts should be avoided. And when the public started requesting public records from the private devices and accounts of public officials, agency attorneys uniformly failed to recognize the conflict of interest between (1) the agency’s objective in complying with the PRA and avoiding unnecessary expenses and (2) the public official’s goal of withholding public records. Agency attorneys effectively abandoned their role as enforcers of the PRA and misused their offices and public resources to defend the “privacy” of the public officials.

Agency attorneys are active in multi-agency organizations like the Washington Association of Prosecuting Attorneys (WAPA) and the Washington State Association of Municipal Attorneys (WSAMA). These organizations exist to improve the legal services that public attorneys provide to their agencies, and these organizations openly use public resources and government attorney time because, in theory, they are acting in the public interest. But these pseudo-governmental organizations operate with very little oversight, and tend to promote the personal and professional interests of the member attorneys. Through these organizations, agency attorneys spread misinformation about the causes of transparency problems and share ideas about how to resist complying with the PRA. Both organizations have filed amicus (friend of the court) briefs in PRA appeals to support the anti-transparency actions of their members against the public interest.

Reinforcing bad habits

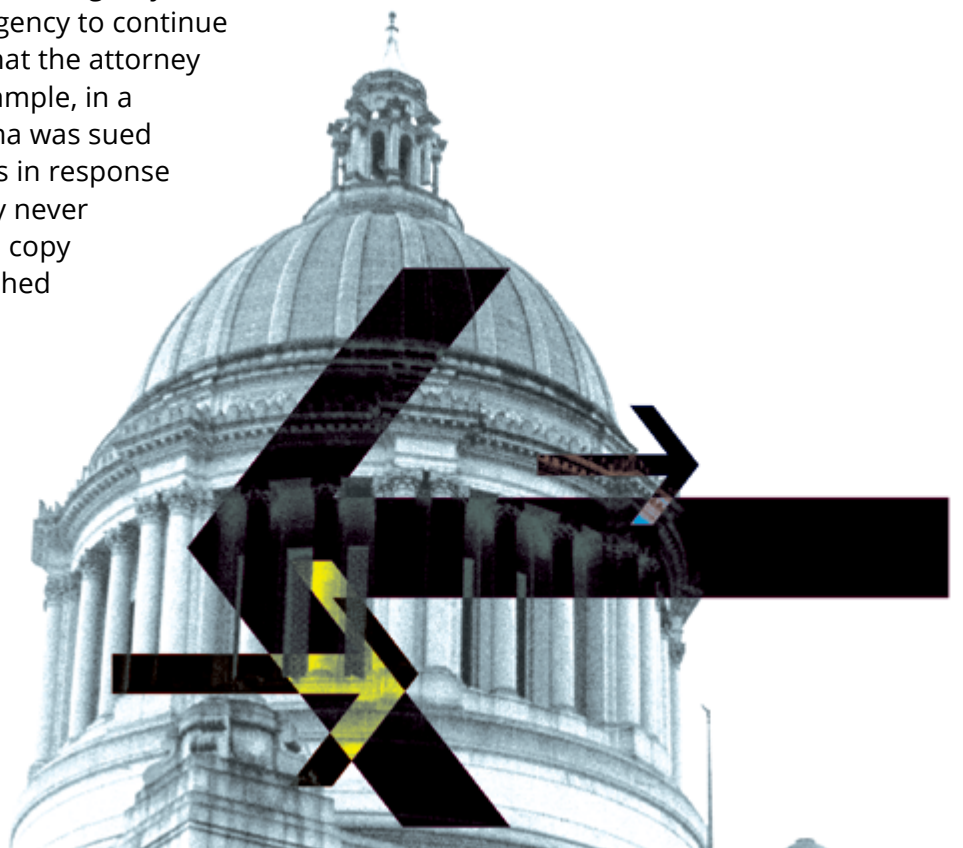
Agencies are required to train public officials and employees in PRA compliance. Unfortunately, such training is often provided in house by an agency’s own attorneys or by private attorneys who provide such training as a way to promote themselves as “experts” in the PRA. This feedback loop reinforces bad habits and

misunderstandings of an agency's obligations under the PRA. Agency PRA training materials routinely fail to address records organization or the improvement of agency processes. Instead, agency training focuses on protecting the agency from PRA liability in the event of a lawsuit. As a result, agencies have become experts at providing disclaimers to requesters, asking requesters for unnecessary clarification, and dribbling out responsive records as slowly as possible while maintaining the illusion of PRA compliance.

The PRA requires agencies to act in good faith and to be helpful to PRA requesters, and most agencies at least purport to pursue these public policy goals when responding to PRA requests. But when a PRA request becomes a PRA lawsuit, those public policy goals vanish. Good faith and helpfulness are instantly replaced by the excessive litigiousness of agency attorneys who do not understand how to properly represent a public agency in the public interest.

Not all PRA lawsuits have merit. But when an agency is sued for violating the PRA, there is a good chance that the agency is either out of compliance with the PRA or at least engaging in some sort of anti-transparent conduct that should be changed. Because the PRA provides for daily penalties and awards of attorney's fees, when an agency is sued for violating the PRA the first step in properly defending the agency is to investigate the complaint and bring the agency into full PRA compliance as quickly as possible. Agencies accused of misinterpreting PRA requests or withholding records should immediately double check the agency's response to the PRA request and produce any arguably responsive records. Then, and only then, should an agency answer the complaint. And the answer should admit any violations of the PRA rather than incurring the litigation costs of defending obvious violations.

But agency attorneys mistakenly believe that it is always their job to "defend" the agency's conduct regardless of the public interest in enforcing the PRA. In cases where agencies should respond to PRA lawsuits by immediately producing the requested records, agency attorneys have caused the agency to continue to withhold the records so that the attorney can litigate the issue. For example, in a recent case the city of Tacoma was sued for failing to produce records in response to a PRA request that the city never actually received. Although a copy of the PRA request was attached to the complaint, which the city answered, the city did not start responding to the request until nine months later. The Pierce County Superior Court imposed a large penalty on the city.



On appeal, the attorney for the city argued that, where the city had not actually received the original PRA request before being sued, it was her job to “defend” the city by continuing to withhold the requested records. Almost 50 years after the PRA was enacted, the state Court of Appeals had to explain what should have been obvious:

[The City Attorney] could simultaneously argue the City did not receive the letters until it received the complaint and instruct the City to respond to the letters as PRA requests as soon as it received them. In fact, starting the PRA response, rather than waiting nine months for confirmation of something the City already knew—that O’Dea was seeking these records under the PRA—was the only reasonable course.

O’Dea v. Tacoma, 19 Wn. App. 67, 82, 493 P.3d 1245 (2021). Since this opinion was issued in 2021, several other agencies have been found liable for PRA violations because their attorney caused the agency to continue to violate the PRA during the litigation rather than simply bringing the agency into compliance.

Litigation rabbit holes

Even the smallest agency can be drawn into expensive PRA litigation without understanding what it did wrong or why the agency’s conduct is unacceptable. Agency attorneys control the flow of information to elected officials such that agencies don’t have any understanding of what their options might be or what the attorney is doing on the agency’s behalf. Too often the egos and profit motives of attorneys cause them to maneuver their clients into vigorously defending absurdly anti-transparent legal positions at taxpayer expense. As a result, large amounts of tax dollars are wasted on the pointless legal maneuvers and arguments of attorneys. The lack of adequate oversight on agency attorneys produces an almost continuous taxpayer funded attack on the PRA in Washington courts. Decades of PRA litigation between overzealous agency attorneys and underrepresented requesters has made a mess of the case law interpreting the PRA.

The PRA explicitly forbids any consideration of the identity of a requester and/ or the purpose of a PRA request. The PRA also imposes the “burden of proof” on agencies, requiring agencies to prove that they have complied with the PRA instead of requiring the requester to prove that a violation has occurred. Nonetheless, agency attorneys routinely ignore these rules, withholding evidence from courts while attacking the requester personally. Far too often these tactics work because Washington state judges have been slow to understand that a PRA requester is not just another plaintiff in litigation, and that agency attorneys in PRA cases are government officials with duties that most defense attorneys do not have. The conduct of agency attorneys increases litigation costs for both the agency and the requester, and often increases the acrimony and the determination of the requester to hold the agency accountable. For-profit attorneys are intentionally litigious because it produces more billable work.

Civil litigation is expensive, and the cost of litigation can quickly exceed the dollar value of the underlying dispute. As a result, the modern trend is for courts to encourage settlements of lawsuits. Court rules encourage settlement through so-called “offers of judgment,” by which the defendant formally offers the plaintiff a sum of money to dismiss a case, and if the offer is declined, the plaintiff cannot recover their attorney’s fees unless they obtain a bigger judgment in court than the declined offer. This process works as intended in most civil cases.

But Washington state courts have erroneously applied this procedure to PRA cases, which are supposed to be about government transparency, not money, with severe negative consequences for the PRA. In PRA litigation, the offer of judgment procedure has enabled agency attorneys to efficiently bail out of PRA cases that they have mishandled or over-litigated. By offering the requester a few thousand dollars to go away, the attorney can blame the PRA while avoiding any scrutiny of the attorney’s own excessive invoices. At least one well-known PRA defense attorney has done this in dozens of PRA cases involving the same requester, making obscene amounts of money while blaming the waste of tax dollars on the PRA.

Finally, agency attorneys are constantly misrepresenting the root causes of excessive PRA litigation, and they deliberately spread the false idea that it’s easy to make money by suing agencies for violating the PRA. Agency attorneys grossly overstate the agencies’ potential liability for penalties to justify over-litigating PRA cases and then blame the PRA for the wasted tax dollars. Neither the agencies nor their attorneys have ever actually studied the root causes of excessive PRA litigation because they know what such studies would show: that the agency attorneys are most of the problem. But the misinformation from agency attorneys is amplified by WAPA and WSAMA, and treated as fact by misinformed legislators who constantly sponsor misguided attempts to wreck the PRA.

William John Crittenden is a Seattle attorney and a member of WashCOG’s board. He often represents requesters, and he has represented the coalition in separate open-government lawsuits against San Juan County, the Washington State Association of Municipal Attorneys, the state Department of Corrections and Pierce County.

BY JOAN K. MELL

When It Comes to Transparency, the State AG Lags, Fails to Lead

The Washington state Office of the Attorney General (OAG) could be at the forefront of open government. Instead, the agency relies on outdated technology to process records requests, and it adopted a model rule that lets agencies unilaterally close records requests under certain circumstances.

The Washington state Office of the Attorney General is presumably a laboratory and role model for the best practices that all other agencies should follow statewide. But when it comes to public records, the state's in-house law firm falls short.

In our digital age the Attorney General's office continues to rely on payment and delivery procedures for records requests that would sound familiar to Washington residents from the 1800s. We are well into the 21st century, yet requesters must pay the Attorney General's office for the records either in person or by mail. After getting paid, the agency mails the records to the requester. The process alone takes weeks.

In another troubling case of poor leadership, the Attorney General's office adopted a model rule that closes a records request if the requester fails to pick up or pay for the records within 30 days. On the 30th day, the agency closes the request, and the requester has no recourse other than to resubmit the request and begin the process again.

Both practices are a disservice to requesters who are, after all, members of the public and the media who are trying to figure out whether their government is acting wisely on their behalf.

Regular mail deliveries

Certain agencies turn around requests promptly using internet portals to upload commonly requested records such as law enforcement investigative reports. The advantages of portal access include the ability to obtain the records at the time the agency uploads them. The portal contains the history of all communications and stores the installments in the form produced, which helps track agency action and allows a requester to verify the date, time, and content of disclosure.



Surprisingly, not all agencies use digital technologies intended to streamline disclosures—even agencies that have the resources and capabilities. For instance, the state Attorney General's office uses digital technologies for civil litigation where disclosures are voluminous and time sensitive, but it refuses to use the same technologies to facilitate disclosure of public records.¹

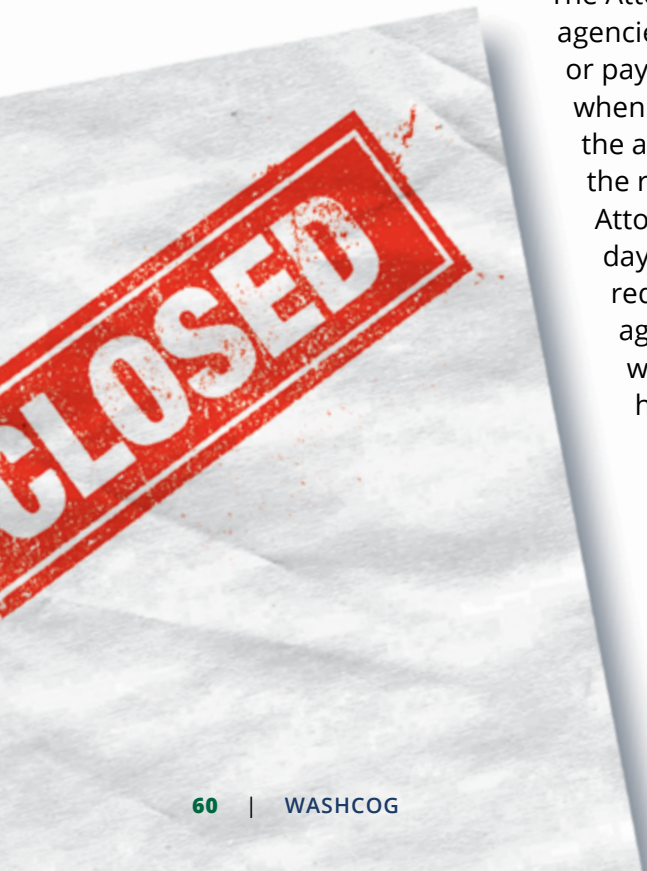
The agency has said digital technologies are not reliable or user friendly for unsophisticated requesters.² The Attorney General's office considers sending by regular mail CD and USB storage devices “more efficient for business needs.” Because of this, the Attorney General's office follows a protocol that consumes at least a month for each installment made available.

The protocol involves the agency sending an e-mail notification that an installment will be made available upon receipt of payment. The agency directs the requester to submit payment by check or money order made payable to the public records officer. A requester must hand deliver or regular mail the exact payment to the Attorney General's office, commonly in Olympia. The Attorney General's office then processes the payment. After processing the payment, two-weeks from the date of receipt, the public records officer downloads the installment onto a storage device, CD or USB, depending upon which hardware the requester purchases (CD for \$4.09 and USB for \$6.38), then sends the CD or USB back to the requester by regular mail. At times, the CD or USB is corrupted, containing no downloadable data. The agency then starts the process over again.

Unfortunately, the Attorney General's office, by refusing to make digital payment and delivery systems available to requesters, sets substandard protocols for other agencies to follow that discourage prompt responses. Requesters should have the option to pay for and receive records digitally.

Unilateral closures

The Attorney General promulgated model rules urging agencies to close requests if a requester fails to retrieve or pay for records within 30 days.³ Within the PRA, when requesters fail to claim or review a request, the agency is not obligated to fulfill the balance of the request,⁴ but there is no 30-day limitation. The Attorney General's office has propagated the 30 days as presumptively reasonable despite harm to requesters who need access to the information. The agency defiantly adheres to its presumption even when the agency knows for certain a requester has not abandoned their request.



The Attorney General's office has no procedure to cure a default for a late payment or a missed notification that an installment is ready. A requester's sole option for obtaining records once an agency closes a request under the Attorney General's protocol is to restate the same request wherein the agency assigns a new tracking number and starts the whole process over again, which has significantly prolonged responsiveness for requesters. Premature closures harm requesters who seek to enforce their rights under the PRA because once the agency begins responding anew to a request, a requester may be barred from bringing an enforcement action until the agency closes the new request.⁵

The Attorney General's model rule setting 30 days as a presumptive abandonment of a request should be repealed or amended to enable a requester to cure any default without the penalty of having to make a new request. Agencies should be required to do more than threaten a requester that an agency will close a request at some date in the future after 30 days using boilerplate language in its "installment ready" notices. Agencies should have to provide closure notifications informing requesters of the actual date of closure and that the closure was based upon non-payment. In addition, agencies should be required to inform requesters when the one-year statute of limitations begins to run -- and they should do this when the agency has closed a request or otherwise decided it is taking no further action to respond to the request.

Joan K. Mell is a veteran attorney who works out of her own Tacoma law firm, III Branches Law. She represented WashCOG in its separate open-government lawsuits against the Washington State Redistricting Commission and the state Legislature.

1. III Branches, PLLC v. State Office of the Attorney General, Speaking Agent Deposition Transcript, Christina Beusch, Feb. 15, 2023.
2. Id.
3. WAC 44-14-04005(1).
4. RCW 42.56.120(4).
5. Hobbs v. State, 183 Wn. App. 925, 335 P.3d 1004 (2014).

BY HANNAH SELLS MARCLEY

Finding 4: Open Government Training is Inadequate and Often Wrong

At the State AG, It's Advice for Me but Not for Thee

The state Office of the Attorney General plays a pivotal role in training and advising government officials on the Public Records Act. But institutional incentives give the agency little reason to advise requesters or provide training that interprets the PRA in ways that favor the public. The result is a baseline understanding of records laws among public employees that tilts not toward disclosure, but toward government self-preservation.

If you google the phrase “fox guarding the hen house,” you will find a definition that I really like: “a person likely to exploit the information or resources that they have been charged to protect.”

In Washington state, that is exactly the situation for our public records. The Office of the Attorney General (OAG) has been given a huge role in implementing the transparency goals of the Public Records Act (PRA), but, like the fox, the agency has many reasons to use that power in its own interests. The OAG, as an entity governed by its own PRA interpretations and charged with defending state agencies when accused of PRA violations, has no incentive to guard an agency’s obligation to the public from bureaucratic decay.

Transparency, like all big, organizational goals, is a constant commitment and requires active protection. To that end, in 2013 the Washington state Legislature passed the Open Government Trainings Act.¹ This law requires state and local elected officials, as well as all agency-designated public records officers (collectively “agency responders”), to undergo training on the legal requirements governing record retention² and record production.³

But not all training leads to success. Training for a marathon won’t help you win a chess match. Training with the right goal in mind is key.



When it comes to the state PRA, the right goal is government transparency. The legislation was a good idea, but it made the content of the training depend on the Attorney General's model rules for the PRA. This placed the state OAG at the center of PRA training and made other agencies think that relying on the OAG was sufficient for compliance. Agency responders receive training, not from requesters or transparency advocates, but from other government insiders. This means that most training is done with the wrong goal in mind: self-preservation. This flaw led to a predictable outcome: *The training isn't good enough.*

An out-of-date manual

The OAG houses mountains of information on the PRA. This includes some items that are out of date and some that are contrary to the PRA's goal.

For example, the OAG puts forward an Open Government Resource Manual that is now seven years out of date, therefore missing important updates like the legislative passage of **ESHB 1594** (PRA training, consultation, and grants), **ESHB 1692** (limiting disclosure of employee information where the employee has been the victim of harassment), or **HB 1595** (creating a method for assessing charges for PRA document access).

For an example of the training materials that contradict the PRA, see *"Many agencies fail to adequately organize their records"* on page 42.

The OAG has also consistently used its rule-making authority to advocate for the most agency-friendly possible reading of legislative requirements, rejecting the interpretations put forward by newspapers, WashCOG and other transparency advocates.

For example, in **WAC 44-14-03006**, the OAG said that "An agency may prescribe the means of requests in its rules." And it cites **RCW 42.56.040**, part of the PRA, for support. That law includes many agency duties, including the duty to publish its rules of procedure for submitting PRA requests. But the PRA does not call for agency rules to limit the way requests are made, only to facilitate a way requests can be made. The PRA's only requirement for requests to be valid is that an agency receive "fair notice" that a public records request was made, a much broader and more versatile standard than allowing agencies to make one, prescribed proper path for requests.

WashCOG commented on this rule when it was proposed, explaining the legal problems with the sentence. The OAG rejected WashCOG's comment, claiming that the need to designate one person responsible for requests was too great to allow the PRA to be interpreted so broadly.⁴ This is just one example of many. Check out the Concise Explanatory Statement for **WAC ch. 44-14** to see more examples of areas where the OAG rejected transparency in favor of ease for the government. Finally, the OAG offers a PRA assistance program to local governments.

Limited support for requesters

Unlike the copious, self-serving guidance the OAG provides to other government actors, the support for requesters is minimal and geared toward limiting the government's exposure to liability.

The Attorney General has an obligation to assist requesters via the Open Government Ombuds position, established in 2005. The role, which started with the best intentions, has been on a rocky road with some high points and low points, though the trend is not good.

There have been four ombuds in the OAG: Greg Overstreet, Tim Ford, and Nancy Krier, followed by a two-year vacancy, and now Morgan Damerow. For commentary on that progression by those who know it best, listen to this **podcast** featuring my interview with Overstreet. It traces the history and decay of the office from Overstreet's time, when the office would publicly push agencies to disclose records, to the current point, which finds the OAG itself one of the hardest agencies from which to get records.

Damerow does not come from the world of requester advocacy, but has led the Local Government help line for many years. In one training, he made his opinion of the PRA clear:

Unreasonable/angry parents are birds of a feather. They flock together. They research. They blog. More and more they are understanding the power they can wield and thus misery they can cause under the public records act by pushing just a few buttons on their keyboards.

Damerow's background and actions in office make plain that his bias is toward the government agencies, not the public, even now that his role is public records ombuds. In litigation, he has represented state agencies that sought to avoid disclosure and liability by encouraging third parties to sue several times. Requesters are entitled to a refund of their attorneys' fees when the state refuses to provide records. But when the state essentially invites a third party to oppose disclosure, no refund is available. This tactic is certainly in the best interest of the agencies that would otherwise risk liability, but it is not in the best interests of transparency or equity.

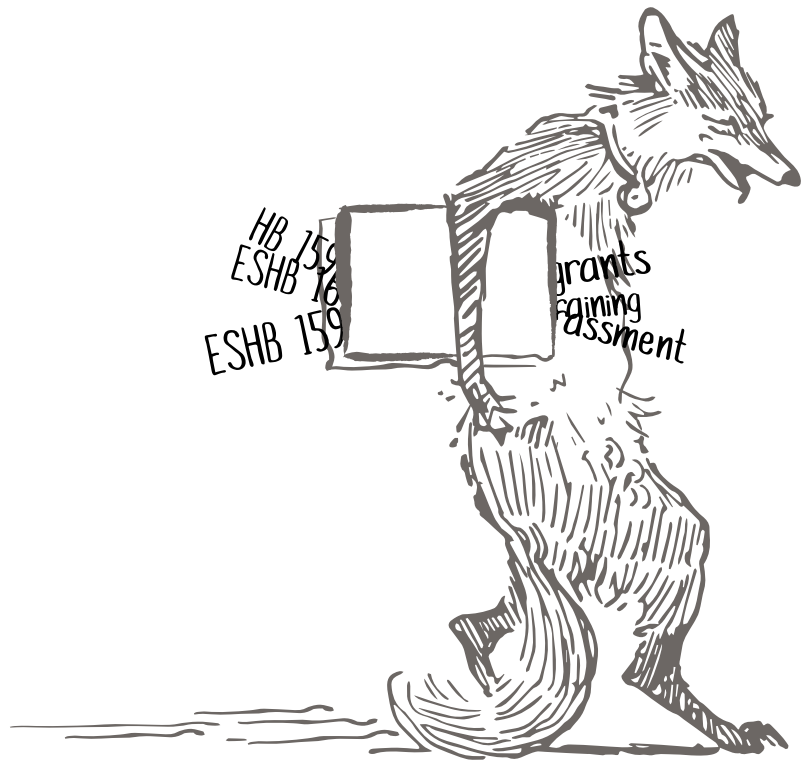
It is no surprise then that, under Damerow, the ombuds program seems to have atrophied to a point of uselessness. Occasionally it ignores help requests altogether, including a request by a Lewis County resident who sought advice on an unresponsive local official and several others. In contrast, I requested all records the OAG had on the Local Government Public Records Consultation Program, and though production is ongoing in the six batches I have received, I have not seen a single instance of a government actor asking for help and being ignored.

When the ombuds does answer, the answers are rarely satisfactory. In some cases, the ombuds claims that since litigation is ongoing, it would be "inappropriate" to assist the requester, citing no support for that proposition. He has claimed attorney-client privilege on communication with local agencies in his ombuds role, even though such a relationship would be a conflict of interest and even though local agencies cannot be represented by the Attorney General's office.

Although the OAG is itself governed by the PRA, it occupies a central role in defining what PRA compliance looks like and training others to respond properly. Regardless of any personal strength of character and inclination toward transparency that individuals in the OAG may bring, the incentives to let the PRA decay are strong for the office as an institution. It is foolish to trust an agency that has to live with the consequences of a strong PRA to decide what the PRA requires. Like letting a fox guard a hen house, or a toddler write the chore chart, the incentives are just too strong to foist the burden onto someone else. And that is exactly what the OAG is doing.

Hannah Sells Marcley is a government accountability attorney based in Northern Virginia. The former Washington state resident is a WashCOG board member and belongs to the Virginia Coalition for Open Government and the National Freedom of Information Coalition. She remains a lifelong fan of Washington state's unique, quirky and wonderful style.

1. 2013 Wa. SB 5964.
2. RCW 40.14.
3. RCW 42.56.
4. See Office of the Attorney General Concise Explanatory Statement, March 31, 2020.



BY MICHELE EARL-HUBBARD

Finding 5: The Public Records Act Needs to Hold Officials Accountable

Few Consequences for Those Who Ignore Transparency Laws

For the Public Records Act to have real strength, Washington needs a law, like some other states, where agency officials or office holders are held personally accountable for violating disclosure rules.

Washington's Public Records Act (PRA) is often heralded as one of the strongest, on paper, in the nation. But its strength is often paper thin, and largely fictional, due to flaws in its drafting and application.

First, only "agencies" can violate the PRA—or likely be sued by the public for violations of the act.

It is a felony for an individual to destroy or hide a public record pursuant to *RCW 40.16.010*, available at <https://app.leg.wa.gov/rcw/default.aspx?cite=40.16.010>:

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than one thousand dollars, or by both.

Yet at least one court has refused to allow a requester to hold an individual elected official accountable for such destruction in the context of the PRA lawsuit. In *O'Neill v. Shoreline*¹, a city councilwoman altered an email before forwarding it to the public records officer for production and then allowed the original to be destroyed. When the requester sued the councilwoman and the city for PRA violations, the appellate court noted the claim of such alteration and destruction would be a felony, but stated that a prosecutor would need to charge the matter and achieve a conviction for that fact to be considered in the context of the PRA case.

In another example, then-Seattle Mayor Jenny Durkan, Police Chief Carmen Best, Fire Chief Harold Scoggins and four other city officials deleted tens of thousands of text messages sent in 2020 during protesters' lengthy occupation of an area on Seattle's Capitol Hill. The officials gave various excuses for why the texts had been deleted when the city was sued civilly for damages for events during that

occupation. The reasons varied, from claims the former mayor dropped her phone in water while strolling on a beach to an allegation that settings were automatically changed to delete after 30 days.

But investigations proved thousands of messages were manually deleted, not by a setting, but by an official. The judge in the civil case found their excuses “strains credibility” and fined the city for destruction of evidence. The prosecutor investigated and then declined to file any criminal charges. Tens of thousands of important records that the public had a right to see were destroyed, many clearly intentionally, and no one will be charged. And since the public cannot prosecute destructions of records unless they had been requested before destruction, the public cannot step in where the prosecutor has failed and hold officials accountable.

This law is strong on paper, but largely worthless in application.

Another court has gone so far as to hold that requesters may not even have a private right of action to sue an agency at all over failures to comply with mandatory aspects of the PRA such as the duty to designate a PRA Officer² or to prepare an index. **Vance v. Office of Thurston County Commissioners**³ holds that only the attorney general or a local prosecutor has the right to enforce those portions of the PRA. In Vance, a record requester sued the Thurston County Commissioners for failing to designate a public records officer and to have an index as required by the PRA. He lost because the court found he had no right to sue to enforce those failings.

When the news media sued to obtain records from individual legislators, the Washington state Supreme Court wisely and correctly held that the offices of individual state senators and state representatives were “agencies” under the PRA⁴, preventing legislators from hiding records from the public. It ruled that only the “office” can be sued, not the individual.



Additionally, if an agency is sued and loses, we the public taxpayers are the ones punished as we entirely foot the bill. Agencies that lose a PRA case are required to pay the reasonable fees and costs incurred by the requester and a statutory fine of up to \$100 per record per day for each day of the violation.⁵ But because the money used to pay the judgment or any settlement comes from the general fund of the agency—usually not even at the departmental level—officials and employees at the agency level that were directly involved hiding or destructing the document, or who were in a position to correct the illegal behavior, may not even feel the budget impact or any incentive to change.

PRA litigation, from an agency standpoint, is like playing poker with other people's money—the person sitting across the table. Win or lose, there will be little impact on the agency. There may be no personal impact on the individuals involved. They likely won't lose their job. They might even get a promotion. There is no real personal accountability in the PRA—except perhaps for elected officials who may be made to pay at the ballot box by an angry and fed up electorate. But the risks of that may seem too far removed when officials weigh whether to release or hide records from the public against the likelihood that requesters will learn of the hiding, sue, and be able to prove it.

A case I won in the first decade of my career illustrates this point well. In *Prison Legal News v. Department of Corrections (DOC)*⁶, the Washington state Supreme Court held that DOC had illegally redacted records requested by my client, a prisoner-run newspaper, regarding medical misconduct in prisons, and ordered the records released and remanded to the trial court for an award of fees, costs and penalties.

When I spoke to the assistant attorney general to coordinate receipt of the records, she confessed to me that DOC had destroyed all the unredacted copies of several of the records during the appeal and that my client could not ever be given the records it had sued for years to obtain, and earned the right to receive. (My client was eventually able to see through the black on some of the documents by holding them up to a lightbulb.)⁷ When my jaw rose from the floor, and I began sputtering about the \$100 per day times multiple documents that my client should be awarded for the years it had not been provided, and would never be provided, the records the public was entitled to, and the hundreds of thousands of dollars in attorney fees and costs my client should receive, she said, to my eternal shock, that that “was a drop in the bucket in the grand scheme of things.”

There was no real remorse, no real consequences, because whatever amount of money the state would be made to pay, it was not really the state's or DOC's money, it was ours as taxpayers. And the government was not troubled in the least for being at risk for paying us our money for years of illegally hiding our records and their embarrassing facts from us.

For Washington's PRA to have real strength, and not just on paper, we need a law with real consequences to the people and officials involved. We need a law, like some other states have, where individuals actually go to jail for egregious violations, can be fired, are held personally accountable, and citizens can initiate litigation without waiting for a prosecutor to prosecute a fellow government employee or official for violations.

Under Vance and O’Neill discussed above, Washington courts have found that only prosecutors can punish individuals for their part in violating the PRA or for felony destruction of documents, and that only a government entity, such as the Attorney General’s office, can sue an agency for failing to comply with the law’s requirements such as naming a PRA officer or creating and publishing an index. The recent Seattle example shows that even the most egregious destructions will not be prosecuted by the government.

The Construction section of the PRA at RCW 42.56.030 reads as follows:

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.⁸

We the people need a public records law with real teeth and real accountability to enforce this mandate. The one we have now does not.

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1. O’Neill v. Shoreline, 145 Wash. App. 913, 932 (Div. One, 2008), reversed in part on other grounds by O’Neill v. City of Shoreline, 170 Wash.2d 138 (2010).
2. RCW 42.56.580, available at <https://app.leg.wa.gov/rcw/default.aspx?cite=42.56.580>
3. 117 Wash. App. 660, 668-669 (2003).
4. Associated Press, et al., v. Washington State Legislature, 194 Wash.2d 915 (2019), available at <https://cases.justia.com/washington/supreme-court/2019-95441-1.pdf?ts=1576772686>.
5. RCW 42.56.550, available at <https://app.leg.wa.gov/RCW/default.aspx?cite=42.56.550>.
6. 154 Wn.2d 628 (2005).
7. See <https://www.prisonlegalnews.org/news/2008/may/15/washington-doc-pays-pln-541000-for-illegally-withholding-records/>.
8. Available at <https://app.leg.wa.gov/RCW/default.aspx?cite=42.56.030>.

Washington state is lucky. It has legions of people who want to make state and local government more visible, more accountable, and ultimately more effective and responsive. Some of the very best of those people worked on this project.

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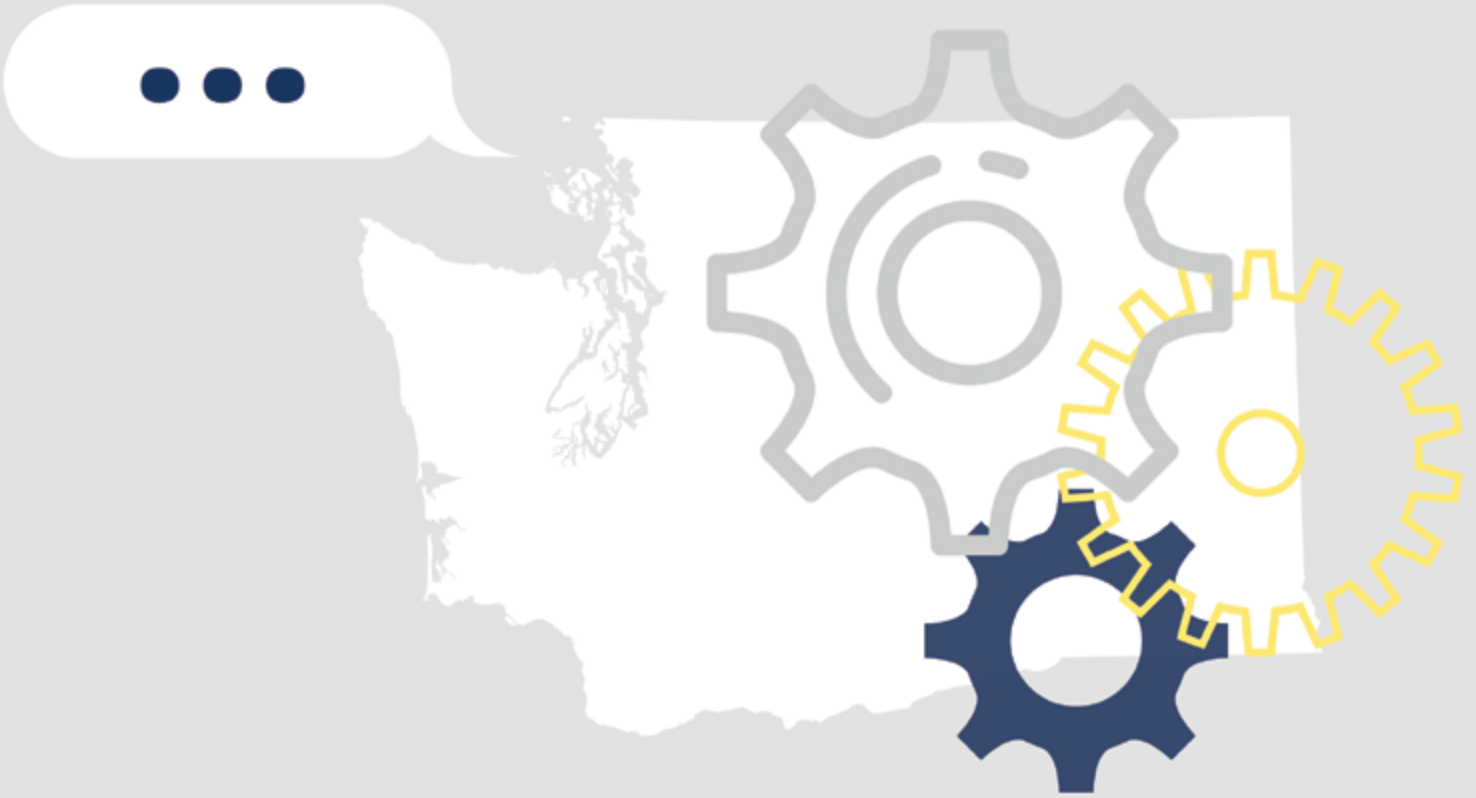
WashCOG's passionate executive director, **Juli Bunting**, kept the organization going while many of us were consumed by this project.

Report co-editors **George Erb** and **Jim Simon** began their collaboration at a uniquely Seattle location: the Starbucks at the Kraken Community Iceplex. They consumed large amounts of coffee and tea while working on this report.

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Open government really is good government.



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