



Thanks, everyone,
for helping me
search these
records!

The Public Records Act Nuts and Bolts

February 2019

Washington Association of County Officials

Prepared by Washington State Attorney General's Office



Public Records Act

- Passed in 1972 – Initiative 276
- RCW 42.56
(formerly RCW 42.17)

Most recent amendments

ESHB 1594

(Chap. 303, 2017 Laws)

EHB 1595

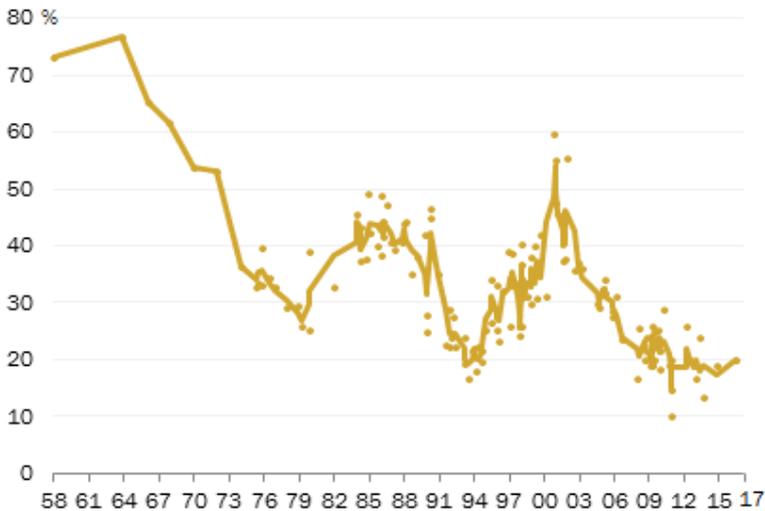
(Chap. 304, 2017 Laws)



Public Trust & Government

Public trust in government remains near historic lows

Trust the federal government to do what is right just about always/most of the time...



Notes: From 1976-2016 the trend line represents a three-survey moving average.

Source: Survey conducted April 5-11, 2017.

Trend sources: Pew Research Center, National Election Studies, Gallup, ABC/Washington Post, CBS/New York Times, and CNN polls.

PEW RESEARCH CENTER

FOIA - Presidential Statement

"I signed this measure with a deep sense of pride that the United States is an open society."

THE SUN FINAL
BALTIMORE, FRIDAY, AUGUST 9, 1974

NIXON RESIGNS

Ford will become president at noon

No deal made on prosecution, Jaworski says

Decision is laid to weakness of political base

Ford's task is to break with past

Decision is laid to weakness of political base

Your Attention Please

Examples of Public Records Act penalty orders, judgments and settlements following lawsuits by requesters alleging PRA violations by a public agency. *(Does NOT include attorneys fees and costs in all cases).*

- **\$1,770,000** – City of Tacoma
- **\$600,000** – Snohomish County
- **\$575,000** – Snohomish County
- **\$550,000** – Clallam County
- **\$502,827** – L & I (*upheld by State Supreme Court*)
- **\$500,000** – Board of Accountancy (*global settlement of 7 lawsuits and 15 PRA disputes*)
- **\$488,000** – Bainbridge Island (*\$350,000 penalty, remainder is attorneys fees/costs*)
- **\$371,340** – King County
- **\$192,000** – Liquor and Cannabis Board (*included other open government claims*)
- **\$187,000** – Port of Olympia
- **\$175,000** – Mesa (*reduced from \$353,000*)
- **\$174,000** – Seattle
- **\$150,000** – Jefferson County
- **\$130,000** – Wapato (*3 requesters*)
- **\$100,000** – Shoreline (*with attorneys fees, total amount was more than \$500,000*)
- **\$100,000** – Spokane County
- **\$85,000** – San Juan County
- **\$50,000** – City of Tacoma
- **\$45,000** – Kennewick
- **\$45,000** – Everett
- **\$45,000** – Port of Vancouver
- -----
- \$723,290 – UW (*reversed on appeal*) \$649,896 – DSHS (*reversed on appeal*)



Touchstone:



- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



PRA Applies to Records of:

- State government agencies*
- Local government agencies*
- Extent to Legislature – pending



~ RCW 42.56.010

* *And to agencies that are the functional equivalent of public agencies.*

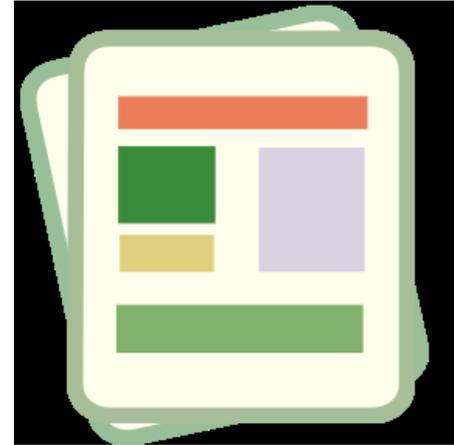
PRA Does Not Apply to:

- Court records (court files)
- Records of certain volunteers (see upcoming slide)
- Private organizations or persons*



* *Unless, for example, the records are used or retained by a government agency.*

Public Record



“Public record” means:

- any writing
- containing information
- relating to
- the conduct of government or
- the performance of any governmental or proprietary function
- prepared, owned, used, or retained
- by any state or local agency
- regardless of physical form or characteristics.”

~ RCW 42.56.010

Writing

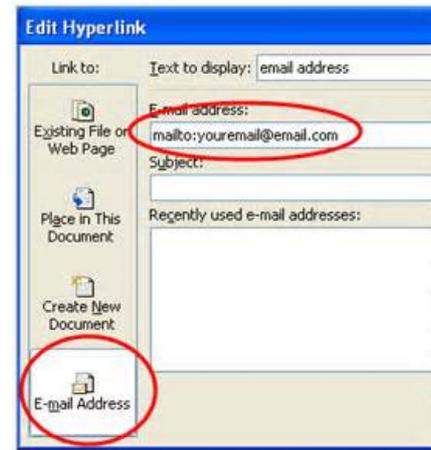
“**Writing**” includes “handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of communication** or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.”

~ RCW 42.56.010



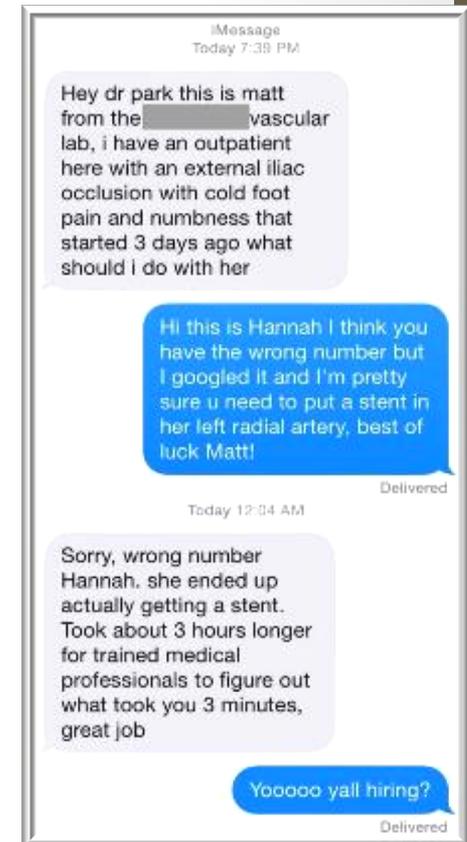
Note: Public Records Include...

...records of agency business when they are created or retained by agency employees or officials on **home computers or devices, or in non-agency email accounts or files.**



Text Messages

- ***Nissen v. Pierce County*** (2015)
 - Text messages sent and received by a public employee **in the employee's official capacity** are public records of the employer, regardless of the public or private nature of the device used to create them; thus, even if the employee uses a private cell phone.
 - A record that an agency employee prepares, owns, uses, or retains ***within the scope of employment*** is a record “prepared, owned, used or retained by a state or local agency” under the PRA.
 - An employee’s communication is “within the scope of employment” *when the job requires it, the employer directs it, or it furthers the employer’s interests.*
 - This inquiry is always case - and record - specific.
 - *The Nissen court equated “official capacity” with “scope of employment” when referring to an elected official.*
 - *See also West v. Puyallup.*



Call and Text Logs (“Use”)

- *Nissen v. Pierce County*

- For a record to be “used” by an agency it must bear a nexus with the agency’s decision-making process.
- A record held by a third party, without more, is not a “public record”, unless the agency “uses” it. In this case, that applied to **call and text logs** at the phone service provider which **were not used by the agency** (“the county did nothing with them”).

Call Log (104)

L * These details are cross-referenced from this device's contacts

Incoming (23)

#	Country code	Network code	Party	Time
1	310	410	[Redacted]	Pedro* 7/29/2012 7:30:13 AM(UTC+0)
2	310	410	[Redacted]	Pedro* 7/30/2012 1:36:51 AM(UTC+0)
3	310	410	[Redacted]	Dad* 7/30/2012 2:34:08 AM(UTC+0)
4	310	410	[Redacted]	Dad* 7/30/2012 5:38:54 PM(UTC+0)
5	310	410	[Redacted]	Cesar* 7/30/2012 5:44:59 PM(UTC+0)
6	310	410	[Redacted]	Beto* 7/30/2012 5:49:11 PM(UTC+0)

Social Media

- PRA requests for public records in a **local elected official's personal residence, on a personal computer, and in a personal email account (2016); and personal Facebook site (2018).**
- Court of Appeals:
 - West v. Vermillion, Puyallup (2016): Public records must be disclosed. The constitutions do not provide an individual a privacy interest in those public records. State Supreme Court denied review. (See upcoming slide on "privacy.")
 - West v. Puyallup (2018): Facebook posts on an elected official's personal site are **public records** if they relate to the conduct of government and are prepared within the scope of employment or official capacity.



Volunteers



- RCW 42.56.010(3): Records of **certain volunteers** are exempt from the definition of “public record.” They are:
 - Records not otherwise required to be retained
 - and are held by volunteers who
 - (a) do not serve in an administrative capacity,
 - (b) have not been appointed by the agency to an agency board, commission or internship, and
 - (c) do not have a supervisory role or delegated agency authority.
- Change effective July 23, 2017.



General PRA Procedures

Remember there can be changes in law (statutes, case law).



Under PRA, agencies must:

- Appoint a **public records officer**.
- Publish **procedures** describing certain agency organization, operations, rules of procedure, and adopt/enforce **rules/regulations** that:
 - Provide full public access to public records
 - Protect public records from damage/disorganization
 - Prevent excessive interference with other agency functions
 - Provide **fullest assistance** to requesters
 - Provide most timely possible action on requests.
- Publish **fee schedule**. (Revised 2017) *see upcoming slide*
- Maintain a **list of laws** the agency believes exempts or prohibits disclosure.
- Provide certain **indexes** of records.
- Make non-exempt records **available for inspection and copying during customary business hours** for a minimum of 30 hours per week, excluding holidays.
- Post customary **business hours** on the agency's website and make hours known by other public means.

General PRA Procedures (cont.)



Remember there can be changes in law (statutes, case law).

- **Format for requests (New 2017)**
 - No official format is required. Agencies can recommend requesters use their form or web page. Must accept in person requests made during normal office hours.
- **Log (New 2017)**
 - Agency must keep a log of PRA requests (identity of requester if provided, date of receipt, text of request, description of records produced, description of records redacted/withheld and reasons, and date of final disposition.)
- **Records Production (New 2017)**
 - Translating a records into an electronic format (including scanning a paper record is not creating a new record.

~ RCW 42.56.080; RCW 40.14.026; RCW 42.56.570

General PRA Procedures (cont.)



Remember there can be changes in law (statutes, case law).

- **Additional training (New 2017)**
 - Public records officers' required training on electronic records (retention, production & disclosure, updating & improving technology information services).
- **Data collection & reporting (New 2017)**
 - Agencies having PRA staff and legal costs of more than \$100,000/year must report 17 data points about their agencies' PRA requests to the Joint Legislative Audit and Review Committee (JLARC).
- **Bot requests. (New 2017)**
 - Agencies receiving multiple automatically generated requests from a requestor within a twenty-four hour period may deny the request if responding would cause excessive interference with essential functions.

~ RCW 42.56.152; RCW 40.14.026; RCW 42.56.120; RCW 42.56.070



Fees



- **Copy fee schedule:**
 - Agencies can charge **actual costs** (following certain procedures & **notice/public hearing**) or
 - A **default statutory cost** (following a declaration of undue burden in **rule**).
 - **Alternative up to \$2** for entire request (see details in statute)
- The **default schedule** includes paper copies, scanned copies, electronic records costs.
- No fee for records routinely posted on **agency website**.
- Must provide an **estimate of costs to requester** upon request.
- Act provides for **other fee arrangements** in defined circumstances.
- “Customized access charge” under defined circumstances.
- No fees for inspection.
- Court action can be brought to challenge agency’s estimate of fees.

~ RCW 42.56.120; RCW 42.56.070; RCW 42.56.130; RCW 42.56.550

Effective July 23, 2017

Training

- The “Open Government Trainings Act” requires OPMA & PRA training for specified persons. RCW 42.30.205; RCW 42.56.150; RCW 42.56.152.
- Refresher training occurs no later than every 4 years.
- Training can be taken online, in person, or by other means.



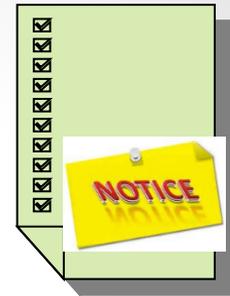
- Training resources, videos, and more information about the Act (a “Q & A”) are available on the Attorney General’s Office Open Government Training Web Page:

<http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

Records Request Stages



Requests for Public Records



- Persons can request **identifiable public records** from public agencies.
 - At minimum, requester must **identify documents with sufficient clarity to allow the agency to locate them.**
 - A request for “information” is not a request for “records” under the PRA.
- Requesters can ask to ***inspect*** records, or request ***copies*** of records. Requests can be made via mail, e-mail, in person.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.
- Generally no need to identify **purpose** of request, unless required by law (e.g., restriction on providing lists of individuals for a commercial purpose).
- Requesters may make PRA requests in addition to discovery in a law suit.

~ RCW 42.56.520; RCW 42.56.080; RCW 42.56.040; RCW 42.56.100;
Hangartner v. City of Seattle; Bonamy v. City of Seattle; Hobbs v. State.

Agency Response to Requests

- The agency has **five business days** to respond to a public records request. (Revised 2017)
- Agency response must:
 1. **Acknowledge receipt** of the request and provide a reasonable estimate for a further response; or
 2. **Fulfill the request**; or
 3. **Provide an internet address and link** to the records on the agency's website (which fulfills part or all of the request); or
 4. **Seek clarification** (still need to give estimate of time to the greatest extent possible); or,
 5. **Deny** the request with an accompanying written statement of the specific **reasons**.

~ RCW 42.56.520
Amendments effective July 23, 2017

Seeking Clarification

- An agency can seek clarification of a request if it is **not reasonably clear**, or does not request “**identifiable records**.”
- Agency must respond to parts of request that are clear*.
- Agency should explain why it needs clarification, in order to provide fullest assistance to requester and to search for potentially responsive records.*
- If requester does not respond to request for clarification, the agency may close the request (for the unclear portions).*
- Remember: agency’s rules are to give “fullest assistance.”

~ *RCW 42.56.520*

*Effective July 23, 2017

Searches and Producing Records



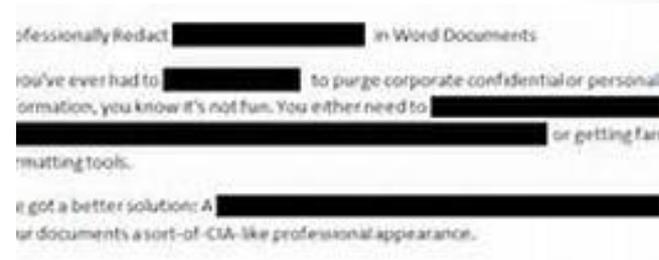
- An agency must conduct an **adequate search** for responsive records.
- The focal point of the judicial inquiry is the agency's search process, not the outcome of the search.
- The agency bears the burden of proof to show the adequacy of the search.
- Records production will depend on current agency policy and the requestor's preference.
- Requesters may ask to inspect or receive copies of records.

UPCOMING WEBINAR

February 21, 2019

Searching and Producing Records

Redacting and Withholding Records



- Records are presumed open.
- If a record, or part of a record, is withheld from the public, the agency must cite to an **“exemption”** in law and give a brief explanation.
- Exemptions are **narrowly construed**.
- Agency must **list exemption and give brief explanation**.

UPCOMING WEBINAR

February 27, 2019

Redacting & Withholding Records

Litigation Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
- A court considers ***Yousoufian* factors** in requiring an agency to pay a penalty.
- Plus, a court will award the prevailing requester’s **attorneys fees and costs**.

UPCOMING WEBINAR

February 27, 2019

Litigation – Enforcement and Penalties

Open Government Risk Management Tips

- Establish a culture of compliance with the PRA.
- Receive training on the PRA.
- Review available resources; institute best practices.
- Keep updated on current developments in OPMA & PRA; correctly apply law.

*The PRA changes through:
Legislative amendments,
or
Develops through case law.*

- Consult with agency's legal counsel.



Local Government Public Records Consultation Program

- The program assists local government agencies by providing information and assistance for developing PRA best practices, including:
 - Responding to records requests,
 - Seeking additional public and private resources for developing and updating technology information services.
 - Mitigating liability and costs of compliance.
- No cost to the agency.
- Contact: Morgan Damerow (360) 570-3418
PRAConsultation@atg.wa.gov
- Web page: <http://www.atg.wa.gov/pr-consulting-program>

AGO PRA Model Rules – ch. 44-14 WAC



Washington State
Office of the Attorney General

Attorney General
Bob Ferguson

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MODEL RULES ON PUBLIC DISCLOSURE



History

As part of the 2005 recodification of the Public Records Act to chapter 42.56 RCW, the Legislature asked the Attorney General to provide guidance to both records requestors and agencies on the public records process by drafting model rules on public disclosure. RCW 42.56.570.

After conducting a 13-city Open Government tour, gathering comments, and holding a public hearing, the Office adopted Model Rules in 2006. Chapter 44-14 WAC. In 2007, again at the Legislature's directive, and after gathering additional comments, the Office adopted Model Rules for electronic records. In 2018, after gathering additional comments, the Office updated the Model Rules to reflect changes in statutes, laws and technology since 2006-2007.

Effect

The Model Rules are non-binding and provide "best practices" for requestors and agencies. Agencies can use the Model Rules to develop their own practices and rules. Local agencies should consider the Model Rules. RCW 42.56.570.

Open Government

[Request AGO Public Records](#)
[Open Government Training](#)
[Public Records & Open Public Meetings](#)
[Open Government Resource Manual](#)
[Model Rules](#)
[Open Government Ombuds Function](#)
[Sunshine Committee](#)
[Local Government Public Records Consultation](#)

AGO Open Government Resource Manual – Available on AGO Website*



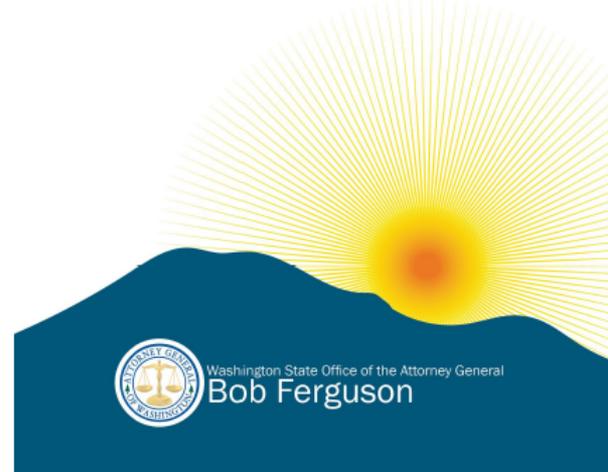
Updated
October 31,
2016**

WASHINGTON STATE



Sunshine
Laws 2016

An Open Government Resource Manual



* <http://www.atg.wa.gov/open-government-resource-manual>

**Does not yet include statutory changes resulting from 2017-18 sessions.

QUESTIONS?

