

Public Records Act Training - Searching & Producing Records



Washington Association of County Officials

February 2019

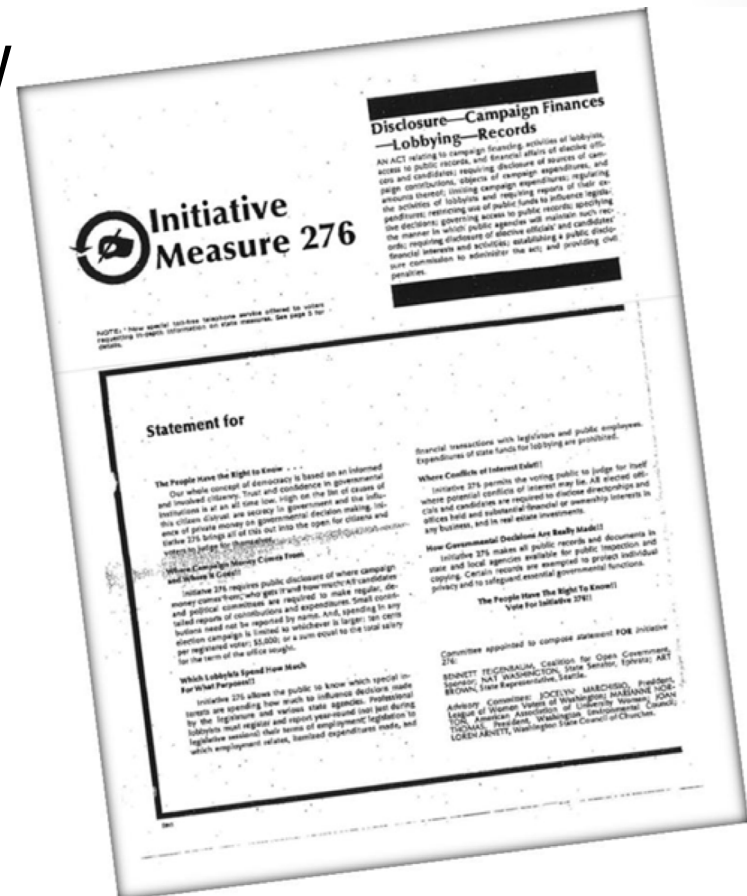
Prepared by Washington State Attorney General's Office



Washington's Open Public Records Act (PRA)

- 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)*



Touchstone:



- Public records of government agencies are presumed open. Requesters can ask for identifiable public records.
- 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



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

- So, “**public record**” is broadly defined.



Receiving a PRA Request



Agency Responses to Requests

- The agency has **five business days** to respond to a public records request.

5

- Agency response can:
 - Acknowledge receipt of the request and provide a reasonable estimate to respond**; or
 - Fulfill the request**; or
 - Provide an internet address and link** to the records on the agency's website (which fulfills part or all of the request); or
 - Seek clarification** (still need to give estimate of time)*; or,
 - Deny** the request with an accompanying written statement of the specific **reasons**.

~ RCW 42.56.520

New!

*ESHB 1594 (eff. July 23, 2017) – if request unclear, give estimate to greatest extent possible

respond

RCW 42.56.520(2)

- “Additional time required to respond to a request may be based upon the need:
 - **to clarify the intent of the request,**
 - **to locate and assemble the information requested,**
 - **to notify third persons** or agencies affected by the request,
 - or 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.”

Estimate of Time for Further Response

- An agency can provide an **estimate of time for further response**. Further response includes estimate to produce first installment.
- Estimate is to be **reasonable**.
- **More time may be needed if request is large or complex.**
- An agency can **extend** the time if needed.

~ RCW 42.56.520, RCW 42.56.080, RCW 42.56.550; *Andrews v. Washington State Patrol*; *Hobbs v. State*



Seeking Clarification

- An agency can seek clarification of a request if it is **not reasonably clear**, or does not request “**identifiable records**.”
- Remember: agency’s rules are to give “fullest assistance.”
- 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.*

~ RCW 42.56.520

*ESHB 1594 (eff. July 23, 2017)
Agency must respond
to parts of request that are clear.



Design Search



First, a Few Words from Our State Supreme Court on PRA Searches

And Now a
Word From
Our Sponsor



- “The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents.”
- “What will be considered reasonable will depend on the facts of each case.”
- “When examining the circumstances of a case, then, the issue of whether the search was reasonably calculated and therefore adequate is separate from whether additional responsive documents exist but are not found.”
- “[A] search need not be perfect, only adequate”.

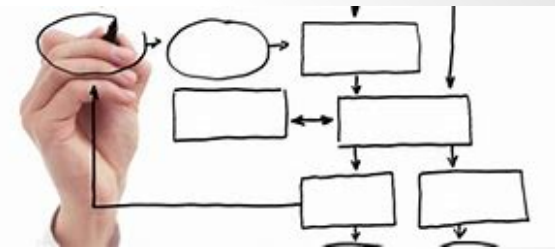


(Cont.)

- “Agencies are required to make more than a perfunctory search and to follow obvious leads as they are uncovered.”
- “The search should not be limited to one or more places if there are additional sources for the information requested.”
- “Indeed, ‘the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.’”
- “This is not to say, of course, that an agency must search *every* possible place a record may conceivably be stored, but only those places where it is *reasonably likely* to be found.”
- “[A]n agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. They should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.”

- *Neighborhood Alliance of Spokane County v. Spokane County* (2011) (internal citations omitted)

Decide Search Methodology



- Have a **standard methodology** of how the agency conducts searches, which can be adjusted if needed with respect to a particular request.
- Examples:
 - **Notification procedures.** *[Upcoming slides]*
 - **Checklists**/other means to document search locations. *[See samples]*
 - **Decisions/policies/training** on when searches will be conducted centrally; when individual employees/officials need to search.
 - **A tracking system.**
 - Assign a **tracking #**, use that number in communications to/from employees/officials regarding search and production of records, etc.
 - Keep a **log** of requests. RCW 40.14.026.
 - **Document** search efforts & results, so an affidavit can be written later if needed for litigation.
 - Track **search/production time/costs** if your agency is required to report to JLARC. RCW 40.14.026.
- If **no responsive records** are found, the agency should describe generally where it searched. *Neighborhood Alliance of Spokane County v. Spokane County.*

Decide Who to Notify



- **Inform staff/officials** who may possess or know of records responsive to a request, so they can **hold** those records. RCW 42.56.100.
 - May need to include **agency contractors**. *[Upcoming slide]*
 - May want or need to notify **others** who are named in the record or to whom the record specifically pertains if you think they may want to seek an injunction. RCW 42.56.540.
- Ask staff/officials **questions**, depending upon the PRA request or circumstances. Possible examples:
 - Does this request need clarifying? If so, how?
 - Do you have or potentially have responsive records?
 - Are there search terms you might suggest?
 - Are there other staff/officials (or former staff/officials) who might have responsive records?
 - If you have responsive records, what is your timeframe for providing them?
 - If you have responsive records, do some need review for possible exemptions?
- Consider using Outlook voting buttons or other means for staff/officials to **respond** to public records officer or designee.

Decide Search Terms



- Particularly useful for searches of **electronic records**.
- Use the **language** in the request, as clarified if needed.
 - Be clear on what requester is asking so you can design a valid search. Document such communications with requester.
 - Date ranges from requester are helpful.
- Consider requester's **suggested** search terms.
- Consider search terms suggested by **staff/officials**.
- Consider **other reasonable** search terms.
 - (For example, “memo” would include “memorandum”, and might include “brief” if referring to litigation records.)

Decide Search Locations



- Reminder: An agency must conduct an **adequate search** for responsive records.
 - The search should be **reasonably** calculated to uncover responsive records.
 - The search should follow **obvious leads to possible locations where records are likely to be found.**
 - Review employees'/officials' responses as to whether they or others may have records, and if so, where.
- Will need to search records in **multiple systems** if responsive records are likely to be located there.
 - Agency **records/files/accounts.**
 - If responsive public records are on/in
 - employees'/officials' **personal devices, personal accounts, or personal files**, those must be searched, too. *[Upcoming slide]*
 - The same may apply to **agency contractors' records.** *[Upcoming slides]*



~ RCW 42.56.520; *Neighborhood Alliance of Spokane v. Spokane County*; *Hobbs v. State*; *Block v. City of Gold Bar*; *Nissen v. Pierce County*.

Locations: *Reminder* - Public Records Include...

...records of agency business not only when they are created or retained by agency employees or officials on/in agency accounts and devices, but also on **home computers or devices, or in non-agency email accounts or social media accounts, or files.**



- *Mechling v. Monroe*
- *O'Neill v. City of Shoreline*
- *Forbes v. City of Gold Bar*
- *Nissen v. Pierce County*
- *West v. Vermillion*
- *West v. Puyallup*



Locations: *Reminder* - Public Records May Include Contractors' Records

- **Agency contractors' records** are another possible location depending upon the request and the circumstances.
- Public records may be agency records even if agency never possessed them (public records “**Prepared, Owned, Used or Retained**” by agency.)
- **Agency contract terms** – Put contractor on notice about PRA and contractor's responsibilities to preserve and provide public records.
- **Notify contractor** of PRA request if contractor's records are a reasonable possible location for responsive records.
 - See also RCW 42.56.540 (third party notice).

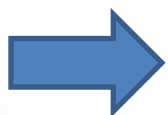
- *Concerned Ratepayers Ass'n v. Clark County PUD No. 1*
- *Telford v. Thurston County Board of Comm'rs* (four-part test for when contractor is “functional equivalent” of public agency for PRA purposes; see also *Cedar Grove Composting v. City of Marysville*)



Contractor's Records (cont.)

- Court of Appeals in *Cedar Grove Composting v. City of Marysville*:

We wish to be clear about what we are not doing in this opinion. We are not articulating a new standard that makes every record a government contractor creates during its engagement with an agency a public record subject to the PRA. Nor do we create a new duty on the part of a public agency to search the records of all its third-party contractors each time it receives a PRA request. Instead, we have applied established precedent about a private entity acting as the functional equivalent of a public agency to the analogous situation of a private entity acting as the functional equivalent of a public employee.



Work with your legal counsel if you have questions.
Can be fact-based analysis.

Conduct Search



Search Agency–Controlled Locations, Files, Devices, Accounts

- **Think about:**

- Paper files
- Filing cabinets
- Emails
- Electronic records (Excel, Word, etc.)
- Central directories
- Individual directories
- Agency social media accounts
- Websites
- Texts
- Voicemails
- Databases
- Metadata (if requested)
- Etc.



- Some searches may be conducted **centrally**, some may need to be performed by **individual persons** searching records in their office, computer, accounts, etc.

Search Other Reasonable Locations

- **Public Records Controlled by Agency Employee/Official – The “Search Mechanics”**

- The public **employee** must **obtain, segregate and produce** to the employer those public records that are responsive to a PRA request from the employee’s **personal accounts, files, and devices**.
- Employee may be required to submit affidavit regarding his/her search.
- *Nissen v. Pierce County*



- **Have Contractor Search Its Records (if relevant)**



Searches – A Few Recent Court Decisions



Church of the Divine Earth v. City of Tacoma. *[Missed records.]* Public records officer orchestrated a city-wide search through a network of records employees in all city departments & sub-departments, using search terms. Each department documented its search efforts.

- City produced over 3,500 pages of unredacted records and 200 redacted emails.
- During litigation discovery, the City identified a short video and 2 pages of notes that had not been produced during the PRA request – it promptly produced the records once they were discovered. Video was missed because it was created by a former intern and saved by date and therefore not located through search terms. Notes not produced because of a quirk on computer program.
- PRA claims dismissed.

Zellmer v. King County. *[Search method.]* Public agency used unreliable method for determining date of requested photographs by relying on the “date modified” field; therefore, its search for responsive records was inadequate.

Searches – A Few Recent Court Decisions (*cont.*)



Clapham v. WSP (2018). [*Search scope.*] No records existed related to the requester's PRA request for Washington State Patrol surveillance and harassment records, therefore, request was not for "identifiable" records. Court of Appeals:

- Agency properly sought clarification from requester.
- Agency provided the fullest assistance to the requester by responding within two days and searching four databases that would reasonably contain the records requested. This search was adequate.
- The PRA does not require an agency to spend a specified amount of time on a search.

Belenski v. Jefferson County (2015). [*Search locations, scope.*] Case involved multiple PRA requests. Court of Appeals:

- A public agency's internet access logs are public records – so when requested in one of the requests, they needed to be searched.
- County's search of three county departments for one other request was sufficient, given that it was for emails to/from a former employee. "Considering the nature of Belenski's request, it was reasonable to contact the auditor/payroll, central services, and BoCC/HR."

Searches – A Few Recent Court Decisions (cont.)



Zabala v. Okanogan County (2018). *[Search process – key words.]*

Request for monitored jail phone call records. Court of Appeals upheld dismissal of search claims.

- The inability to perform a key word search does not excuse an agency's response to a public records request.
- Nevertheless, the inability to perform a key word search for electronic records can be considered in determining whether the records sought are “identifiable.”

Kittitas County v. Sky Allphin (2018). *[Search process – declarations – training.]* Multiple PRA requests for records; multiple claims. Regarding searches, Plaintiff alleged agency conducted inadequate search & failed to train staff on how to search “sent” emails. Court of Appeals dismissed those claims:

- State agency submitted 25-page,
- 76-paragraph declaration (affidavit)
- attesting to the search and production of records,
- plus 11 other declarations regarding the searches.

AFFIDAVIT

Date _____ County _____

Purpose _____

PERSONALLY came and appeared before me, the undersigned Notary, the said person named _____ who is a resident of _____ County, State of _____ and makes the facts stated and General Affidavit upon oath and affirmation of belief and personal knowledge that the foregoing matters, facts and things are true and correct to the best of their knowledge.

(Swear Statement)
GIVEN this ____ day of _____, 20____

Signature of Affiant _____

SHOWN TO SUBSCRIBER BEFORE ME this ____ day of _____, 20____

NOTARY PUBLIC _____

My Commission Expires _____

To Recap....

[Handout]

When is a "Writing" a "Public Record" under the Public Records Act?

A Guide for Illustrative Purposes Only. Not Legal Advice/Opinion. Consult RCW 42.56 (PRA) and PRA Case Law for Further Analysis. Some Citations on Reverse.

1. Does the writing contain information relating to the **conduct of government or the performance of any governmental or proprietary function of a state or local agency?**

If NO, STOP. Not a public record.

If YES, proceed to Question # 2

2. Is the writing a **certain record** held by a **qualified volunteer**?
(See volunteer exception criteria on reverse.)

If YES, STOP. Not a public record.

If NO, proceed to Question # 3

3. Was the writing **prepared, owned, used or retained** by the state or local agency? → **If YES, is a public record.**

If uncertain (about record's preparation, use, ownership or retention), or to determine if the answer is "no," ask (a), (b) & (c).
The (a) – (c) analysis may be fact-specific. Additional analysis might be appropriate in a particular situation.

(a) Is the writing located in/on the state or local **AGENCY'S** files, servers, accounts, devices?

If YES, is a public record.

If NO, consider other places where records are reasonably likely to be located. Go to (b) & (c).

(b) Is the writing located in/on **AGENCY EMPLOYEES' OR OFFICIALS' PERSONAL** (non-agency) files, servers, accounts, devices?

If YES, did the employee or official prepare the writing in his/her **public employment or official capacity**? (Was the writing "related to" the employee's/official's **public responsibilities**?) Ask ALL THREE questions below - (i) through (iii). (Fact-specific)

If NO, consider other reasonable locations. Go to (c).

(i) Did the job **require** the writing? OR

(ii) Did the **employer direct** the writing? OR

(iii) Did the writing **further the employer's interests**?
(Must be more than a mere reference, mention or comment about the employee's or official's public duties.)

If (i), (ii) OR (iii) are YES, is a public record.

If ALL are NO, STOP. Not a public record.

(c) Is the writing located in/on **THIRD PARTY'S** files, servers, accounts, devices? (Third party = non-agency entities performing functions for the agency --- ex.: contractors/consultants)

If YES, (i) Did the agency **prepare, own, or use** the writing? Or
(ii) Does only the third party **retain** the writing but the writing involves the contract work &/or has a nexus to agency's decision process? (Fact-specific – more analysis may be needed)

If YES, is the third party the **"functional equivalent"** of a public agency/public employee?
(Fact-specific – see "Telford Test")

If NO, STOP. Not a public record.

If any YES, is a public record.

If NO, STOP. Not a public record.

1/25/19
A.G.O.



Another Search Guide

[Handout]



PRA – HOW TO PERFORM AN ADEQUATE SEARCH FOR RECORDS

PRACTICE TIPS

For Local Government Success



The Public Records Act (PRA), [chapter 42.56 RCW](#), requires that agencies perform an adequate search to locate records responsive to a public records request. The PRA itself doesn't provide detailed provisions on how to conduct an adequate search. Rather, such requirements can be found in court decisions interpreting the PRA, including *Neighborhood Alliance v. Spokane County* (2011); *Block v. Gold Bar* (2015), and *Nissen v. Pierce County* (2015). These practice tips are based on such case law. Use these tips to guide your agency's search for responsive records.* For more information and resources visit www.mrsc.org/opmapra.

Adopt a Standard Methodology to Search for Records

(This methodology will apply to each search.)

- | | |
|---|--|
| 1 | Records organization. Understand how each department within your agency organizes and retains its records. |
| 2 | Implement an effective system for locating and collecting responsive records. With an effective system in place, an agency can more efficiently find records responsive to a PRA request and more easily defend itself against a challenge that its search for records was inadequate, especially in situations in which the agency finds no records responsive to a PRA request.
a. How does the agency inform applicable staff and officials about a PRA request?
TIP: Consider having the Public Records Officer (PRO) email the records request to applicable staff and officials and require them to actively respond regarding whether they have responsive records via the "voting" function in Microsoft Outlook (or equivalent).
b. Who searches for the records?
TIP: If the PRO searches for records, consider developing a "tip sheet" identifying locations to search for commonly-requested records, listing commonly-used search terms, and providing other key information (see below). |

Specific Search Tips for Processing PRA Requests

(These tips are generally applicable to all requests and some are particularly useful for non-routine requests.)

- | | |
|---|--|
| 1 | Be clear on what the requester is seeking. <ul style="list-style-type: none">• In determining the scope of the search, take care not to interpret the request too narrowly.• If the request is unclear, seek clarification from the requester.• Document any communication the agency has with the requester. |
|---|--|

Producing Records



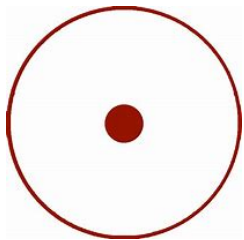
Review Before Producing






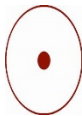


- **Review** records prior to producing to determine if they are responsive, and if there is any exempt content (*Exemptions - subject of future webinar*).
- **Nonexempt** records and portions of records will then be made available to the requester.
 - Copy fees may apply if copies are requested. (*Prior webinar – PRA Nuts & Bolts*).
 - Requester can ask for written estimate of copy fees up front.
- **Exempt records:** Requester will also be provided **citation to law/laws permitting withholding of information**, and a **brief explanation**.

Producing Records - Methods

- Different agencies may use **different methods** to produce **copies** of records, or may use a variety of or combination of methods.
- PRA does not dictate only one way.



Producing Records - Examples

- Post frequently-requested records on the agency **website**, and respond to a PRA request by providing a link to those records. RCW 42.56.520. (*Example: Commission meeting minutes*)
 - Agencies are encouraged to post commonly-requested records on their websites.
 - Makes records more accessible.
 - Enables quicker agency responses.
 - Enables requesters to choose to view or copy only those records they want.
- Deliver through **portals** (cloud-based server or FTP sites). 
- **Email**. 
- Copy records onto **disks** or **thumb drive/flash drive** and send them via U.S. mail or arrange for pick-up.  
- **Scan** paper records into electronic format, then deliver them (via email, disk that is mailed or picked up, etc.) 
- Make **paper copies** of paper records, and mail them or arrange for pick-up. 
- See also WAC 44-14-05001 (Model Rule comment – format for producing electronic records).

Producing Records - Metadata

- Metadata is electronically stored information associated with electronic files such as e-mail, Microsoft Word or Excel documents, or other electronic records.
- Can include information regarding the time or date a record is created, recipients of an e-mail, the author of an e-mail or other electronic document, and revisions made to a document.
- [M]etadata, “ ‘data about data, or hidden statistical information about a document that is generated by a software program,’ ” can be a public record. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*
- **Metadata must be disclosed and produced, if specifically requested in the PRA request.** *O'Neill v. City of Shoreline.*
- May need to work with your IT staff if metadata is requested, including to determine how metadata is to be searched & produced.



Producing Records – Installments

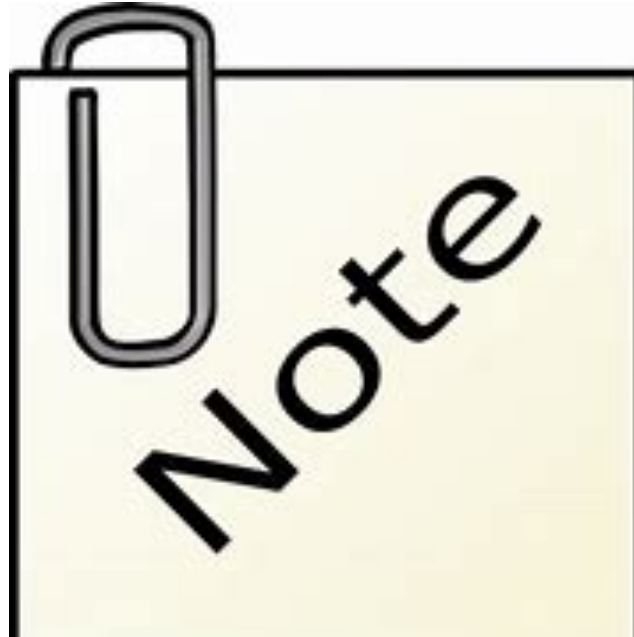


- Agencies can provide records in **installments**, particularly for larger requests.
- Agencies can require an installment to be paid for before the next installment is processed. If payment is not made, the request can be closed.
- Agencies can provide an installment by providing links to records on its website.

~ RCW 42.56.080, RCW 42.56.120



Final Note



PRA Litigation



- We discussed a few PRA search court decisions.
- PRA litigation will be covered in more detail in an upcoming webinar.
- But just a few final reminders.
 - PRA is enforced through the **courts**.
 - **Agency bears the burden of proof.**
 - The focal point of the judicial inquiry on searches and production is the agency's **search process**, not the outcome of the search.
 - Agency will need to file **affidavit(s)** under oath in court, testifying to:
 - The nature of the **search** (terms, locations, who searched, when, other details).
 - Search of personal devices/accounts (affidavits by the employees/officials searching their devices/accounts).
 - What records were produced; what records were withheld and/or redacted, and why.
 - Other information needed for the court to decide the PRA claims.

Penalties and Fees



- A court can impose **civil penalties**. No proof of “damages” required.
- A court is to consider **factors** in requiring an agency to pay a penalty. *[See upcoming slides.]*
- Plus, a court will award the prevailing requester’s **attorneys fees and costs**.
- Special penalty provisions and court procedures apply to lawsuits involving inmate requests.

~ RCW 42.56.550, RCW 42.56.565; *Yousoufian v. Sims*

Examples of some penalties:

- **\$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*)

Penalty Factors

A court must consider these nonexclusive **factors** in deciding whether an agency should pay a penalty. Range - \$0 - \$100/record or page/day:

❑ **Mitigating factors (factors that can reduce a penalty):**

- A lack of **clarity** in the PRA request.
- The agency's prompt response or legitimate follow-up inquiry for **clarification**.
- The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.
- Proper **training** & supervision of the agency's personnel.
- The reasonableness of any explanation for noncompliance by the agency.
- The helpfulness of the agency to the requester.
- **The existence of agency systems to track and retrieve public records.**

~ *Yousoufian v. Sims*



❑ **Aggravating factors (factors that can increase a penalty):**

- A delayed response by the agency, especially in circumstances making time of the essence.
- Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions.
- Lack of proper **training** & supervision of the agency's personnel.
- Unreasonableness of any explanation for noncompliance by the agency.
- Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.
- Agency dishonesty.
- The public importance of the issue to which the request is related, where the importance was foreseeable to the agency.
- Any actual personal economic loss to the requestor resulting from the agency's misconduct, where the loss was foreseeable to the agency.
- A penalty amount necessary to deter future misconduct by the agency considering the size of the agency and the facts of the case.
- **The inadequacy of an agency's search for records.**

~ *Yousoufian v. Sims; Neighborhood Alliance v. Spokane County*



Risk Management Tips

- Establish a culture of compliance with the PRA, beginning with agency leadership and support.
- Train appropriate staff and officials about the PRA's requirements.
- Review agency's PRA procedures.
- Review available resources; institute best practices.
- Review penalty factors.
- Keep updated on current developments in PRA through legislative action or court decisions; correctly apply law.
- Consult with agency's legal counsel.



THANK
YOU!

