

The Public Records Act

Litigation

Enforcement and Penalties

February 2019

Washington Association of County Officials

Prepared by Washington State Attorney General's Office



Review



- Public 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 for requester and give brief explanation**.
- Agencies must have and follow **PRA procedures**.
- PRA is enforced through the **courts**.

Webinars: PRA Nuts and Bolts
Redacting and Withholding Records - Exemptions

PRA Litigation



Location – Court System
Production Challenges
Injunctions
Enforcement and Penalties

PRA Litigation



Location – Court System

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Location – Court System



Most Public Records Act (PRA) (RCW 42.56) claims are litigated are litigated in **state courts**.

RCW 42.56.540 - Court protection of public records.

- (1) The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, **the superior court for the county in which the movant resides or in which the record is maintained**, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

RCW 42.56.550 - Judicial review of agency actions.

- (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, **the superior court in the county in which a record is maintained** may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records.



Location – Court System (*cont.*)

Sometimes, PRA claims or issues are litigated in **federal courts**.

US Constitution, Art. III, § 2

- **U.S. Supreme Court** (a federal court) has jurisdiction to include as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this **Constitution**, the **Laws of the United States** ... to Controversies to which the **United States shall be a Party...**"

28 U.S.C. § § 1331, 1367(a)

- The district courts shall have original jurisdiction of all civil actions arising under the **Constitution, laws, or treaties of the United States**. In any civil action for which the **federal district courts** have original jurisdiction, the district courts shall have **supplemental jurisdiction** over all other claims that are **so related** to claims in the action within such original jurisdiction that they form part of the **same case or controversy**.

Three Situations Where PRA Has Been Litigated or Briefed In Federal Court

1. Federal records or federal agencies are involved.
2. Federal constitution or federal statutes are involved.
 - A. Cases filed in federal court.
 - B. Cases filed in state court and State's highest court decides federal issue; further appeal is to U.S. Supreme Court.
3. Federal court analyzes PRA, but no PRA violations are claimed or injunctions are sought.



U.S. Supreme Court

PRA Litigation



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Production Challenges



Requesters may challenge:

- An agency's estimate **of the time** that the agency requires to respond to a PRA request.
- An agency's estimate **of the charges** to produce copies of public records.
 - May include challenges to cost for "customized search."
New 2017
 - > The burden of proof is on the agency to show that the estimate it provided is reasonable.
- An agency's application of an **exemption** when it redacted or withheld a record, during its production of records.
 - > The burden of proof is on the agency.

PRA Litigation



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Injunctions



The examination of any specific public record may be enjoined by the superior court if:

- examination would clearly not be in the public interest,
and
- would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

Action may be brought by an agency or a person who is named in the record or to whom the record specifically pertains.

Injunctions (*cont.*)

“3rd Party Notice”

An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested.

> Give deadline on which a court order must be presented to the agency.



Burden of Proof

The party attempting to prevent dissemination of the public record Has the burden of proving that the exemption applies.



Lyft v. City of Seattle

190 Wn. 2d 769 (May 31, 2018)

- Request to City of Seattle for records provided by ride share companies under agreement to share information with the city.
- The **injunction standard** in the PRA at **RCW 42.56.540** applies, requiring a court to determine that disclosure would clearly not be in the public interest and would substantially and irreparably damage a person or vital governmental interest.
- The superior court erred by applying the general civil injunction standard in *Civil Rule 65/Tyler Pipe Indus. v. Dep't of Revenue*, and by not adequately considering the PRA's more stringent standard under RCW 42.56.540.



Sheats v. City of East Wenatchee

___ Wn. App. 2d ___ (December 11, 2018)

- **Action to enjoin release of pre-employment test records.**
- RCW 42.56.250(2), which exempts certain employment information including “other related materials submitted with respect to an applicant,” applies to exempt polygraph reports taken by police officers as part of a pre-employment screening.
- However, in order to enjoin dissemination of an exempt record, the party attempting to prevent dissemination must show that “disclosure would clearly not be in the public interest, and would substantially and irreparably damage any person or would substantially and irreparably damage vital government functions.”
- Because the report discloses numerous instances of theft and dishonesty, and because the public has an interest in knowing whether a particular officer is law abiding, the public has an interest in viewing the redacted report.



PRA Litigation



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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*)



Legal Challenges

Requesters can challenge an agency's production of records alleging:

- Failure to Provide Initial Response in 5 Days
- Estimate of copying costs
- An Inadequate Records Search
- Improper Redaction
- Inadequate Exemption Log
- Silent Withholding
- Delay in Records Production



Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
 - “[I]t shall be within the discretion of the court to award such person an amount not to exceed **one hundred dollars for each day** that he or she was **denied the right to inspect or copy said public record**.”
 - Up to \$100/record/day. Within court **discretion** to award *per page* penalties. *Wade’s Eastside Gun Shop v. L & I*.
 - A court is to consider the **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.

Purpose of Penalties

The purpose of the penalty provision in the PRA is to discourage improper denial of access to public records.

The penalty for violation of the PRA is designed to discourage improper denial of access to public records and encourage adherence to the goals and procedures dictated by the statute; to promote access to public records and governmental transparency; it is not meant as compensation for damages.



Penalty Factors

A court must consider these nonexclusive **factors** in deciding whether an agency should pay a penalty:

□ **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 requester 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*



Special Penalty Provisions Inmate Litigation



Inspection or copying by persons serving criminal sentences—Injunction.

- A court shall not award penalties under RCW [42.56.550](#)(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, **unless the court finds that the agency acted in bad faith** in denying the person the opportunity to inspect or copy a public record.

Burden of Proof

- **42.56.550 - Judicial review of agency actions.**
- (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. **The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.**



Zink v. City of Mesa

4 Wn. App. 2d 112 (June 14, 2018)

(Amended June 14, 2018, published in part)



- Case involved 33 violations and over 22,000 penalty days. Trial court set daily penalty rate for each request, including a variable reduced rate for certain request. Trial court determined that total preliminary penalty award was excessive due to the City of Mesa’s small size and limited resources – preliminary award approximately 2x city’s annual general fund tax revenue Trial court reduced final penalty award by 50%.
- Published: Trial court has discretion to make global reduction of preliminary **penalty award**. Under “deterrence” *Yousoufian* factor, trial court properly considered the city’s small size and limited resources.
- Unpublished : Court dispensed with several arguments by requester concerning retroactivity, due process and separation of powers.

Asotin County v. Eggleston

___ Wn. App. 2d ___ (January 17, 2019)



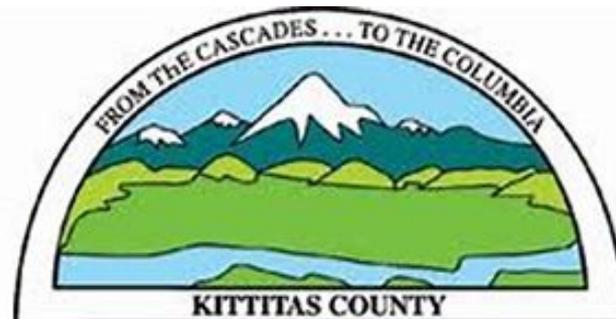
- Eggleston requested copies of the legal costs incurred by the county relative to any and all legal actions involving him. **The County filed for an Order to Show Cause why production of records should not be enjoined.**
- The County asserted records may be protected by RCW 42.56.290. (Records would not be available to another party under the rules of pretrial discovery.) Eggleston responded that records must be released if protected material can be redacted. **The County proposed narrowly tailored redactions which the court agreed with as part of in camera review and records were produced.**
- RCW 42.56.550(4) grants attorney fees and penalties to a person “who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record...” Action need not be initiated by the party, only that they were successful in obtaining records. Remanded for further proceedings consistent with the Court’s decision.

Hoffman v. Kittitas County

4 Wn. App. 2d 776 (July 24, 2018)

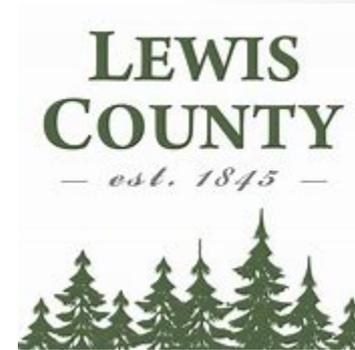
(Amended August 20, 2018)

- Public agency improperly redacted and withheld 126 records for 246 days. Trial court calculated the **penalty amount** under the *Yousoufian* analysis and assessed 50 cents per day for each document/page, for a total of \$15,498.
- Court of Appeals affirmed lower court findings under *Yousoufian*; there was no abuse of discretion. A PRA penalty “is guided by an overarching concern for deterrence” thus a court should consider an agency’s overall level of culpability, “not just the culpability of the worst actor.” Here, the penalty amount was reasonable, including if cost per resident is considered.
- Here, the penalty amount was reasonable, including if cost per resident is considered (citing city’s evidence in *Zink v. Mesa*).
- Petition for review granted.



Green v. Lewis County

Unpublished (July 16, 2018)



- Public agency admitted it **mistakenly omitted one document in response to a PRA request.**
- In lawsuit, requester (inmate) unsuccessfully sought to prove agency withheld record in bad faith, which accounted for the majority of his litigation costs. Trial court awarded requester 25 percent of his attorneys' fees/costs since the requester did not prevail on a majority of his claims, and a smaller penalty (\$5/day for 369 days) than the requester had sought.
- Court of Appeals: Trial court affirmed under *Yousoufian*; there was no abuse of discretion in assessing the penalty.
- Agency's production of record during litigation satisfied its obligation under the PRA and stopped the accrual of penalties (vs. records produced by third parties during litigation.)

Litigation – Too Much Disclosure?



- What if an agency **discloses information someone argues it could or should have withheld** under an exemption?
 - Some exemptions are permissive (meaning an agency can use them, or not). Some exemptions are mandatory.
 - **Do your research.**
 - Remember: third party notice.
- **RCW 42.56.060 - Disclaimer of public liability.**
 - “No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted **in good faith** in attempting to comply with the provisions of this chapter.”

Time to File

RCW 42.56.550(6) **Judicial review of agency actions**

Actions under the PRA must be filed within **one year** of the agency's claim of exemption or the last production of a record on a partial or installment basis.

Requester's lawsuit claiming that Pierce County improperly withheld records was dismissed where requester failed to comply with one-year statute of limitations in filing action. There was no evidence of deception or bad faith to support an equitable tolling of the statute of limitations.

Strickland v. Pierce County



Penalties Outside of PRA



Penalties in Other Laws:

There can be criminal liability for willful destruction or alteration of a public record.

~ *RCW 40.16.010*

For state employees, penalties can be assessed under the State Ethics Law if an employee intentionally conceals a record that must be disclosed under the PRA, unless decision to withhold was in good faith.

~ *RCW 42.52.050*

Many Other PRA Court Decisions



- There are many other PRA court decisions since the law was enacted in 1972 (effective 1973).
- About 25-30 PRA appellate decisions (published and unpublished) are issued each year.
 - Other cases are filed but settled, so no appellate decision.
- Sources of some case law summaries:
 - **AGO Open Government Resource Manual** (*next slide*) (*last updated 2016*)
 - **Washington State Bar Association Public Records Act Deskbook** (*last updated 2014*)
 - **AGO Training Materials** – Example: Recent PRA Cases (2018- 2019 to date) (*see handout*)

AGO Open Government Resource Manual – Available on AGO Website*



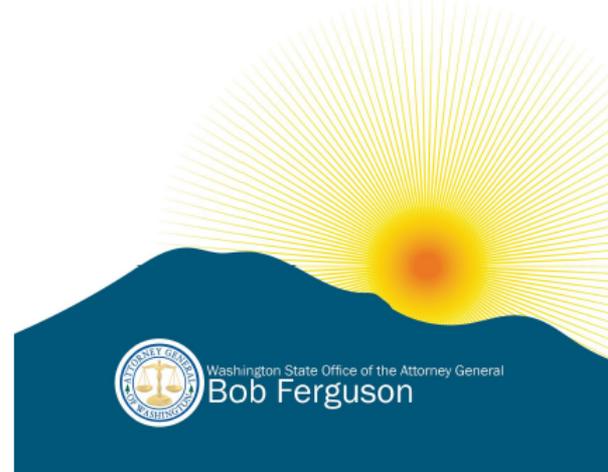
Updated
October 31,
2016**

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.

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 PRA; correctly apply law.

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

- Consult with agency's legal counsel.



QUESTIONS?

