

PRA, Electronic Records & Record Keeping, and Legal Update

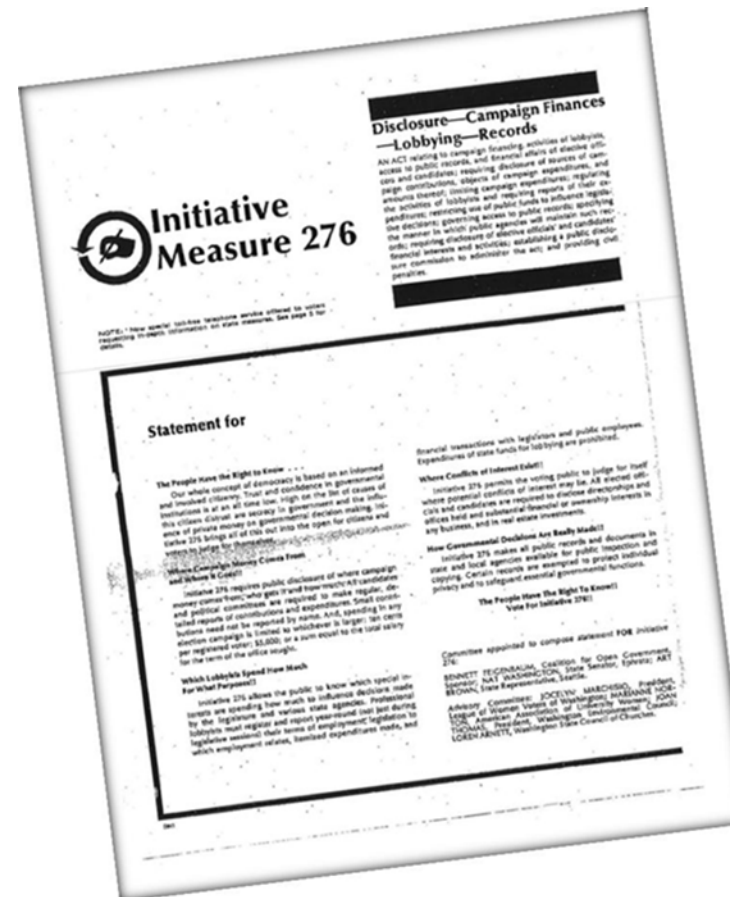
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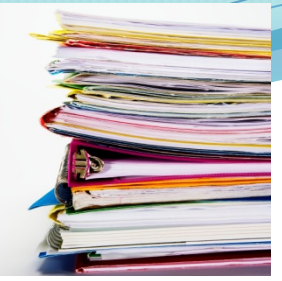
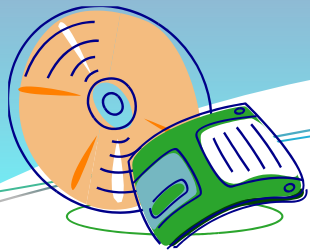
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Public Records Act 101

- Passed in 1972 – Initiative 276
- 72 percent of the popular vote
- RCW 42.56 (formerly RCW 42.17)





What is a Public Record?

Simply stated, a “public record” is any record which contains information related to the conduct of County business or the performance of any County function. RCW 40.14.010

- 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 42.56.030



Requests for Public Records

- “**identifiable**” public records
 - Requester can use agency public records request form.
 - If agency request form not used, requester must provide “fair notice” that he/she is seeking public records.
 - A request for “information” is not a request for “records” under the PRA.
 - At minimum, requester must **identify documents with sufficient clarity to allow the agency to locate them**. “Agencies are not required to be mind readers.”
- Requesters can ask to *inspect* records, or request *copies* of records.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.

~ 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*.

1. SEARCH & GATHER

The agency must look in all locations where records are reasonably likely to be located and follow leads. The agency must collect all records that are potentially responsive.

2. REVIEW

The agency must review records for exemptions. When an exemption is claimed, the agency must provide the requestor with enough information to understand what is being exempted, the legal basis for the exemption, and how that legal basis applies to the record (usually done in an “exemption log”).

3. RESPOND & DISCLOSE

The agency must initially respond to the request within 5 business days.
The agency must disclose all records (with appropriate exemptions) to the requestor.

4. RETAIN

The agency must keep a complete copy of all responsive records in a separate file, in both their redacted and unredacted forms.

What are your responsibilities regarding public records?

You, as an agency employee,

- are responsible for understanding and engaging in records management for your paper and electronic records;
- are responsible for providing public records to your agency's public records person when requested.

Enforcement & Penalties

- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
 - Up to \$100/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. Called “the Yousoufian factors”.
- 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; Wade’s Eastside Gun Shop v. Department of Labor and Industries*

Why Should You Care?

- Maintenance of public records is every agency employee's responsibility and almost everything you do at work creates a public record.
- Your agency's insurance fund does not pay for public records violations.
- You may have only one public records person and he/she can't do it all...you are responsible for keeping your records organized and searchable because **your** failure to do so can be a factor used to increase the penalty your agency has to pay if the law is violated.

Electronic Record Keeping

- Management of paper records – can they be scanned in and saved electronically (and the originals destroyed)?
 - Yes, if they are not records with a permanent retention.
 - Scanning has to meet specific requirements (quality control procedures, specific file format, specific resolution, etc)
 - Protocols in place for retention
 - Protection of documents
 - Strategies for migration & technology changes

https://www.sos.wa.gov/assets/archives/recordsmanagement/requirements_for_the_destruction_of_non-archival_paper_records_after_imaging_v1.1_may_2012.pdf

Litigation About Home Computers & Personal Devices

- Searches of agency + home/personal computers/devices can be **costly**, depending upon the scope of the request. *Forbes v. City Of Gold Bar* (2013)(city contracted with computer consultant, hired an additional employee, and transferred an employee from another department).
- Court **might be asked to order the entire hard drive searched** if it finds agency conducted insufficient search. *O'Neill v. City of Shoreline* (2008).

Text Messages

- **They are bad. Period.**
- Limitations on storage/collection
- What is the native format of a text message?
- How do we get them off of the phone?

What do we need to search for on personal mobile devices?

- Text messages
- Call/text logs (bills)
 - Did the county use it? Example: reimbursement request
- Affidavit of search
 - Must be “reasonable detailed, nonconclusory”
 - Detail the nature and extent of search
 - Must include “facts sufficient to show the information is not a ‘public record’”

Social Media

- Agency social media sites must be archived.
- Personal social media sites should not be used for government business.
- Do not comment on social media in an official capacity.
- Elected officials must be extra cautious.
- Consider a social media policy.

PRA Cases 2016-2017

- *Doe* cases
 - Requests submitted by Donna Zink to various state & local agencies for records regarding sex offenders.
 - All 3rd party actions filed by sex offenders themselves.
 - All class actions.
 - All sex offenders proceeded using pseudonyms (some approved on appeal, some not).

Doe v. WSP

(April 7, 2016)

- Request to WSP & WASPC for sex offender registration information
- Agencies agreed to release for all Level I sex offenders and provided 3rd party notification
- Does filed suit citing to Community Protection Act
- Trial court agreed and entered an injunction
- Washington State Supreme Court ruled CPA is not an “other statute” under the PRA – records go out.

Doe v. Zink & DOC

(June 12, 2017)

- Request to DOC for registration and notification letters for individuals with names starting with A, B, C, or D
- DOC agreed to release for all Level I sex offenders with A, B, C, or D
- 3rd party notification
- Does filed suit citing to Community Protection Act
- Preliminary injunction entered, but later lifted as a result of *Doe v. WSP*
- Case dismissed as moot – records go out.

Doe v. Thurston County & Zink

(June 20, 2017)

- Request to Thurston County for registration records, SSOSA evaluations, SSODA evaluations, victim impact statements, and database of RSOs
- Thurston County provided 3rd party notification to 723 individuals
- Does filed suit citing to CPA
- Injunction granted
- Court of Appeals rules SSOSA/SSODA evals are exempt under Uniform Health Care Information Act, registration records go out
- See *Doe G. v. DOC & Zink* – SSOSA/SSODA evals go out

Doe v. Benton County & Zink

(October 10, 2017)

- Request to Benton County for records related to RSOs
- DOC agreed to release and provided 3rd party notification
- Does sued and Zink filed a cross-claim against the County alleging that the County violated the PRA by delaying production to allow time for 3rd party notification
- Court denied cross claim.

Doe G v. DOC & Zink

(February 22, 2018)

- Request for SSOSA evaluations
- DOC agreed to release and provided
- 3rd party notification
- Does filed suit for Level I RSOs
- Trial Court ruled covered by UHCIA
- Washington State Supreme Court reversed concluding that they are not health care information
- Records go out

What we've learned:

- SSOSA & SSODA evaluations are not health care records, so they are not exempt in their entirety
 - They can go out – with appropriate redactions
- Level 1 sex offender records are not protected from release under the PRA because of the CPA
 - They can go out – with appropriate redactions

Other Case Law Developments

- Jail Records Act (RCW 70.48.100) is an “other statute”
 - “records prepared as a result of the inmate being in jail”
 - Exemption follows the records
 - Stay tuned – motion for reconsideration has been filed (*Zabala v. Okanogan County*)
- Collective Bargaining Act (chapter 41.56 RCW) is not an “other statute” (*SEIU 775 v. State of WA, et al*)
- Dates of birth of public employees
 - COA case says they can be redacted under Article I, section 7 of the Washington Constitution when released with full name
 - Stay tuned – will be heard by the WSSC (*Wa. Public Employees Assoc. v. State Center for Childhood Deafness & Hearing Loss et al.*)

Legislative Developments

- **HB 2097** – exempts individual’s religious information in public records
- **HB 2611** – privilege for certain communications made by a limited authority law enforcement officer to a peer support group counselor while receiving counseling
- **HB 2700** – exempts child forensic interviews that describe allegations of child abuse, neglect, or exposure to violence w/o a court order
- **SB 6408** – removes expiration of body worn camera legislation. Defines “intimate image” (an individual or individuals engaged in sexual activity, including sexual intercourse as defined in RCW 9A.44.010 and masturbation, or an individual's intimate body parts, whether nude or visible through less than opaque clothing, including the genitals, pubic area, anus, postpubescent female nipple).