

# Public Records Act Training



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*June 2, 2017*

*2017 Sex Offender Management Conference*

*Lacey, WA*

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*Nancy Krier*

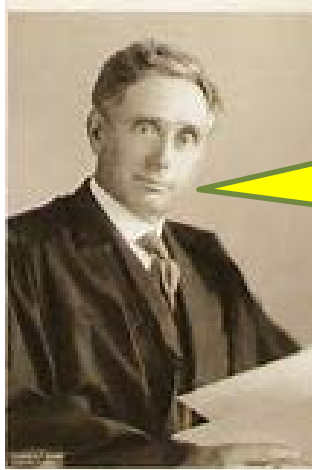
*Assistant Attorney General for Open Government*



# Open Government Laws Like the Public Records Act are Often Called “Transparency Laws” or “Sunshine Laws”



This is because they “shine light” on government. U.S. Supreme Court Justice Louis Brandeis once famously said, “*Sunlight is the best disinfectant.*”



*Let Us  
Begin!*

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***Transparency builds public confidence in government.***

# Purpose

- “The people do not yield their sovereignty to the agencies which serve them.”
- “The people, in delegating authority, do not give 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 they may retain control over the instruments they have created.”

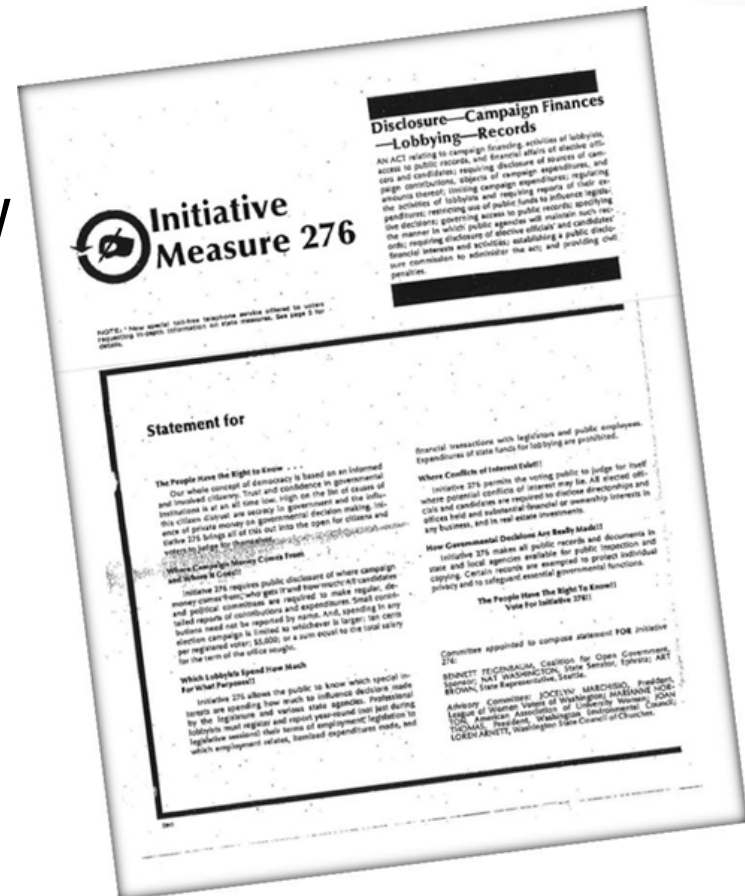
~ *RCW 42.56.030 (PRA)*



# Washington's Open Public Records Act (PRA)

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

*Most recent amendments –  
ESHB 1594; EHB 1595  
(2017)*



# Your attention please ....

Examples of PRA 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).

- **\$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** – LCB (*included other open government claims*)
- **\$187,000** – Port of Olympia
- **\$175,000** – Mesa (*reduced from \$353,000 - possible appeal*)
- **\$174,000** – Seattle
- **\$150,000** – Jefferson County
- **\$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

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- **\$723,290** – UW (*reversed on appeal*)
  - **\$649,896** – DSHS (*reversed on appeal*)



# Purpose

- The “free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.”
- Act is to be “liberally construed.”

~ *RCW 42.56.030; RCW 42.56.550*

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- “It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *sine qua non*\* in regard to a socially effective and desirable continuation of our democratic form of representative government.”

~ *Washington State Supreme Court*

*\*indispensable action*



# Touchstone:



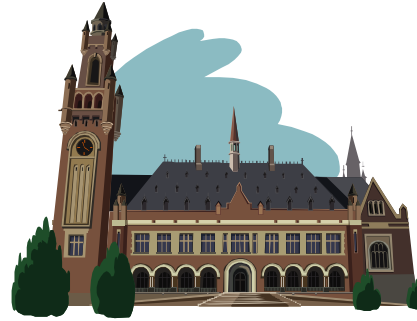
- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ RCW 42.56.030



# PRA Applies to Records of:

- State government agencies\*
- Local government agencies\*
- Limited extent to Legislature



~ RCW 42.56.010

\* And to agencies that are the functional equivalent of public agencies. See more information in court decisions regarding when private entities' records are subject to PRA. *Telford v. Thurston County*; *Fortgang v. Woodland Park Zoo*.

# PRA Does Not Apply to:

- Court records (court files)
- 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 42.56.030

# 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 42.56.030

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



# Volunteers



- *ESHB 1594: records of **certain volunteers** are exempt from the definition of “public record.”*
  - *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.*
- *Act becomes effective July 23, 2017.*

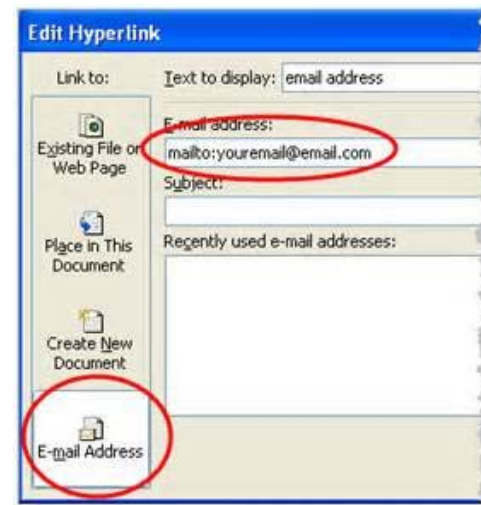


# Note: Public Records Can Include...

...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.



Let's Go Digital



If an agency employee conducts agency business on a personal computer, with a personal e-mail account, or with a personal device, then the records are subject to a public records request.

## “Public records” include:

- ***Does v. King County***: A private university’s security video of a shooting, provided to public agency investigating incident.
- ***Belenski v. Jefferson County***: Agency’s employee internet access logs. (Court of Appeals)
- ***Fisher Broadcasting v. Seattle***: Records in a database that are partially responsive to a PRA request.
- ***Cedar Grove Composting v. City of Marysville***: Records of contractor employees who are acting as functional equivalent of public employee, under the exceptional facts of that case.

# PRA Developments: Litigation Re 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). This was an issue *Paulson v. City of Bainbridge Island* (now settled). However, see more recent case - *Nissen v. Pierce County* (upcoming slides).



# *Nissen v. Pierce County* (Aug. 2015)

## - Text Messages

- **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.



# Nissen v. Pierce County

## - Call and Text Logs

- 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)

\* 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)



# Post- *Nissen*: *West v. Vermillion, Puyallup* (Nov. 8, 2016)

- PRA request for public records in a **local elected official's personal residence, on a personal computer, and in a personal email account.**
- *Official's position*: Refused to provide records. Official said he had an expectation of privacy under state and federal constitutions.
- *Court of Appeals*: Official's arguments rejected.
  - Public records must be disclosed. The constitutions do not provide an individual a privacy interest in those public records.
  - Case remanded to have superior court amend its order and conform the procedures to *Nissen*.
  - State Supreme Court denied review.
  - Petition for certiorari reportedly filed at U.S. Supreme Court.
- See upcoming slide on “privacy.”

## Examples of Pending Cases With Other Issues About What Records Are Subject to PRA

- ***West v. Clark County.*** Issue: Access to an elected local official's personal Facebook page records. Official's search affidavit is also being contested. Cowlitz County Superior Court.
- ***West v. Puyallup.*** Issue: Access to local official's Facebook page records. Pierce County Superior Court.



# Comments from the Supreme Court in *Nissen v. Pierce County*



- “Agencies should **develop ways to capture public records** related to employee cell phone use.”
- “E-mails can be routed **through agency servers, documents can be cached to agency-controlled cloud services, an instant messaging apps can store conversations.**”
- “Agencies could provide employees with an agency-issued device that the agency retains a right to access, or they could prohibit the use of personal devices altogether.”
- “That these may be more effective ways to address employee cell phone use, however, does not diminish the PRA’s directive that we liberally construe it to promote access to public records. RCW 42.56.010(3).”

# General PRA Procedures



Under PRA, agencies must:

- Appoint a **public records officer**.
- Publish **procedures** describing certain agency organization, operations, rules of procedure, and other items listed in PRA 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**.
- 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.



~ RCW 42.56.040, RCW 42.56.070 - .090, RCW 42.56.580, RCW 42.56.580.

# New PRA Procedures

*(ESHB 1594 and EHB 1595)*



- **Format for requests.** *No official format is required. Agencies can recommend requestors use their form or web page. Must accept in person requests made during normal office hours.*
- **Log.** *Agency must keep a log of PRA requests (ID of requester, date of receipt, text of request, description of records produced, description of records redacted/withheld and reasons, and date of final disposition.) RCW 40.14*
- **Ordinances.** *Local agencies should consult AGO Model Rules in developing PRA ordinances.*
- **Additional training.** *Records officers must also receive training. (Upcoming slide)*

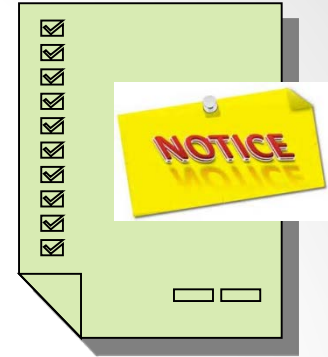
# New PRA Procedures (cont.)

(ESHB 1594 and EHB 1595)



- **Data collection & reporting.** Agencies having staff and legal costs of more than \$100,000/year must report 17 data points about their agencies' PRA requests. JLARC. RCW 40.14.
- **Fees.** New procedures/authorized costs. (Upcoming slide.)
- **Consultation programs.** Records consultation service for local governments - Attorney General's Office, State Archives.
- **Competitive grant program.** For local governments – technology information systems. State Archives.
- **Open records portal study.** State Archives.

# Requests for Public Records



- Persons can request **identifiable\*** public records from public agencies.
  - 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. Requests can be made via mail, e-mail, in person.
- 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*.

*\*See EHB 1595 which provides more guidance on “identifiable records.” (Next slide).*

# Requests (Cont.)



- “**Identifiable**” records (cont.)
- *EHB 1595:*
- “A public records request must be for **identifiable records.**”
  - “A request for all or substantially all records, prepared, owned, use or retained by an agency is not a valid request for identifiable records under this chapter,
  - “Provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency’s records.”





# Requests (Cont.)



- Requesters do not:
  - Generally need to identify **purpose** of request, unless required by law (e.g., restriction on providing lists of individuals for a commercial purpose).
  - Need to limit the **number** of requests they make.
  - Need to **exhaust** an agency's internal appeal procedures prior to seeking judicial review when a record is denied and two business days have passed. (Agencies are to have review mechanisms but review deemed completed after 2 business days following the denial of inspection.)

~ *RCW 42.56.070, RCW 42.56.520, Zink v. City of Mesa*

# Requests (Cont.)



- *EHB 1595: An agency may deny a “**bot**” request, under the criteria in the bill.*
  - *A “bot” request is one of multiple requests from a requestor to the agency within a 24 hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential function of the agency.*
  - *“Bot” request means a request for public records that an agency reasonably believes was automatically generated by a computer program or script.*



# Requests (cont.)

- **Requesters must:**

- **Clarify** a request when an agency asks for clarification.
- **Claim or review records** when the records or an installment of records is ready.
- Comply with **agency procedures** including those that protect records from damage/disorganization (such as when viewing records).
- Provide a **deposit** (not to exceed 10 percent of the estimated cost of copies) when an agency requires a deposit.
- **Pay** for copies per fee schedule, including copies for an installment.

- **Requesters should also:**

- Promptly **communicate** with agency,
- including to **voice any concerns** regarding agency action or inaction.



Communicate.

~ RCW 42.56.070(7) – (9), RCW 42.56.080, RCW 42.56.100, RCW 42.56.120, RCW 42.56.520, Model Rules, Zink v. City of Mesa, Hobbs v. State Auditor

# Agency Responses to Requests

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



- Agency response can:
  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)\*; or,
  5. **Deny** the request with an accompanying written statement of the specific **reasons**.

~ RCW 42.56.520

*\*ESHB 1594 – if request unclear,  
give estimate to greatest extent possible*



respond

# 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: Agency must respond to parts of request that are clear.*



# 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. [See next slide.]
- Estimate is to be **reasonable**.
- It may be a good practice to briefly **explain why** more time is needed to process a request. If challenged in court, it is an agency's burden to show why an estimate of time is reasonable.
- **Factors** may include, for example, time needed to:
  - Get clarification if necessary.
  - Search for records. More time may be needed if request is large or complex.
  - Assemble and review records.
  - Provide notice to affected third persons/agencies if necessary.
  - Prepare an exemption log if necessary.
  - Perform other essential agency functions, considering agency resources including staff availability.
- An agency can **extend** the time if needed. Again, it may be a good practice to explain why.
- Estimate is to be "reasonable", not precise or exact. If agency misses internal self-imposed deadline, not a PRA violation if agency was acting diligently to respond to request.

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

# Installments



- Agencies can provide records in **installments**, particularly for larger requests.
- Agencies can request a deposit up front for copies (not to exceed 10 percent).
- Agencies can provide an installment by providing links to records on its website.
  - ❑ Note: Agencies are encouraged to post commonly-requested records on their websites. This:
    - Makes records more accessible.
    - Enables quicker agency responses.
    - Enables requesters to choose to view or copy only those records they want.

~ RCW 42.56.080, RCW 42.56.120



# Searches



- An agency should **read the request carefully** to understand what records are requested.
  - Clarify the request if needed.
  - An agency can also ask the requester to suggest search terms.
- An agency must conduct an **adequate search** for responsive records.
  - Consider all formats (paper, electronic, etc.)
  - Consider records of current staff/officials, and former staff/officials, if potentially responsive.
  - Consider possible locations (e.g., file cabinets, agency website, audio files, etc.)
- 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.
- If responsive records are on or in **employees' personal devices, personal accounts, or personal files**, those must be searched, too. (*See upcoming slides*).
- The focal point of the judicial inquiry is the agency's **search process**, not the outcome of the search.
- It is a good idea to **document** search efforts (locations, search terms used, etc.)  
The agency bears the **burden of proof** to show the adequacy of the search.  
~ *RCW 42.56.520; Neighborhood Alliance of Spokane v. Spokane County; Hobbs v. State; Block v. City of Gold Bar; Nissen v. Pierce County.*





# “Mechanics” of Searching/Producing Public Records Controlled by Employee

- 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**.
- The employee must produce any public records (e-mails, texts, and any other type of data) **to the employer agency**.



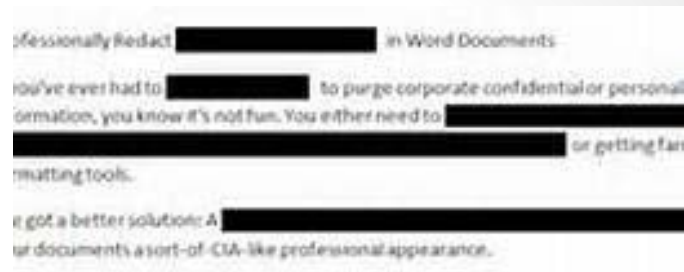
# Mechanics (cont.) - Affidavit



- The **employee's reasonably detailed, nonconclusory affidavit** submitted in good faith attesting to the nature and extent of the **search** can provide the requester, the agency, and the trial court with sufficient information.
  - The trial court can resolve the nature of the record based solely on affidavits without an in camera review and without searching for records itself.
  - So long as the affidavit gives the requester and trial court a sufficient factual basis to determine information withheld is nonresponsive, the agency has performed an adequate search under the PRA.
- Where an employee **withholds personal records** from an employer, he or she must submit an **affidavit** with facts sufficient to show the information is not a "public record" under the PRA.

~ *Nissen v. Pierce County*

# Exemptions



- 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**.
- The general rule is the agency withholds only the exempt information, and releases the rest.
- Exemptions must be authorized in law --- in PRA or other laws.

~ RCW 42.56.050, RCW 42.56.210 - .510, RCW 42.56.550

# Exemptions (Cont.)



- When withholding part (redacting) or all of a record, agency must **describe record** by date, type, authors/recipients, and total number of pages.
- Agency must **list exemption and give brief explanation**.
- This information can be provided to the requester in an “**exemption log**” or in other formats, so long as the required information is provided.
- Common exemptions are certain information in student or employment records, attorney-client privileged information, pending investigative records in certain investigations, and protected health care information.
- Agencies are not generally authorized in the PRA to provide lists of individuals for commercial purposes.
- The **agency bears the burden of proof** to justify the exemption.

~ RCW 42.56.050, RCW 42.56.210 - .510, RCW 42.56.550

# Privacy



- **There is no general “privacy” exemption in the PRA.**
- If privacy is an express element of another exemption, privacy is invaded only if disclosure about the person would be:
  1. **“Highly offensive to the reasonable person” and**
  2. **“Not of legitimate concern to the public.”**

~ RCW 42.56.050

This means that if information does not satisfy both these factors, it cannot be withheld as “private” information under other statutes.

***Predisik v. Spokane School Dist. No. 81:*** A person “has a right to privacy under the PRA only in ‘matter[s] concerning the private life.’” Those are “private facts” fairly comparable to these:

“Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.”

# Fees\*



- Agencies cannot charge fees to allow requesters to **inspect** records.
- Agencies cannot charge fees for **searching, reviewing or redacting records**.
- Agencies cannot charge a requester for **staff salaries, benefits, or general overhead or administrative costs**, unless they are directly related to the actual cost of copying records (the charges must be reasonable, and documented).
- Agencies can charge fees for the **copies** themselves (15 cents per page, or actual costs). Agencies can pass along to the requester the cost of sending records to an outside vendor or service so the records can be copied.
- Agencies can charge for costs of **mailing** records (postage, shipping container, etc.)
- Agencies are to make their **fee schedules** available to the public.
- There may be other laws, outside the PRA, that permit an agency to charge fees for records.



~ RCW 42.56.060, RCW 42.56.120, RCW 42.56.130

# Fees (cont.)



*EHB 1595:*

- Agencies can charge **actual costs** (following certain procedures) or a **default statutory cost** (following a declaration).
- EHB 1595's **default fee schedule** includes paper copies, scanned copies, electronic records costs; and ,an optional up to alternative \$2 flat fee.
- No fee for records routinely posted on **agency website**.
- Must provide an **estimate of costs to requester** upon request.
- “**Customized service charge.**”
- Provides for **other fee arrangements** in defined circumstances.
- Can **waive fees** if in agency rule.
- **New court action** to challenge estimate of fees.



# Enforcement & Penalties



- PRA enforced by **courts** for claims listed in PRA.
- A court can impose **civil penalties**. No proof of “damages” required.
- A court is to consider the **factors** in requiring an agency to pay a penalty.
- 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*

*EHB 1595: **New type of claim** – challenge to estimate of fees*



# 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 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*



# 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*



# Recent Headlines

- “Taxpayers on the hook for officials’ wrongful secrecy,” *The News Tribune* (11/4/14)
- Editorial: “Public work on private devices must remain public,” *Spokesman Review* (5/7/15)
- “County to settle public records lawsuit for \$575,000,” *Everett Herald* (9/6/14)
- “County paid thousands after not disclosing video,” *KIRO TV* (11/4/14)
- “Kennewick settles public records lawsuit,” *Tri-City Herald* (10/11/14)
- “City to pay \$174K to KOMO-TV to settle SPD dash-cam lawsuit,” *Seattle Times* (1/5/16)
- “Clallam County may pay \$550K after files for public records found in basement,” *Seattle Times* (7/4/16)
- “Tacoma to pay \$50,000 for violating public records act,” *News Tribune* (3/5/17)
- “County pays \$150K in records request settlement,” *ptleader.com* (4/26/17)

# Evolving Law: Legislation & Court Decisions



- **Legislation** (number of bills affecting public agency records).
  - 2014: At least 14 bills passed.
  - 2015: At least 21 bills passed.
  - 2016: At least 14 bills passed.
  - 2017: More than 100 bills introduced. Several have passed.
- **Appellate Court Decisions** (published and unpublished).
  - 2014: At least 22.
  - 2015: At least 24.
  - 2016: At least 27.
  - 2017: At least 6 as of May 2017. Many other decisions pending.

# Examples of Some Recent Court Decisions Regarding Release of Sex Offender Records

- **Benton County v. Zink** (2015): Requester (Zink) asked to review and/or copy “all SSOSA forms as well as all victim impact statements filed and maintained anywhere in Benton County.” While later narrowed, county estimated response would not be fulfilled until 2023. She wanted them in electronic format. Court of Appeals: **The PRA does not require creating a new record by scanning hard paper copies into an electronic format.** An agency may assess a requester the charge of an **outside vendor** for converting paper copies into electronic format.
- **Doe v. WSP, WASPC** (2016): Zink requested various records relating to sex offenders. State Supreme Court: The Community Protection **Act (RCW 4.24.550) regarding release of sex offender information to the public was not an “other statute” exempting level I sex offender information from disclosure.** When a statute is not explicit, courts will not find an “other statute” exemption. Courts will also identify a legislative intent to protect a particular interest or value. PRA exemptions are permissive rather than mandatory. In contrast, an agency cannot provide a record when a statute makes it “confidential” or otherwise prohibits disclosure.

# More Decisions

- **State v. Doe I** (2016): This is not a PRA case but it is a “spin off” of *Doe v. Washington State Patrol*. That case involved PRA requests from Ms. Zink. This case involved access to information about petitioner in **court files**. He filed a motion to **redact/seal** all identifying information in his petition seeking relief from further sex offender registration. Court of Appeals: Remanded case for trial court to determine whether Doe established a “serious and imminent threat to an important interest” if the records were not redacted or sealed, given “the broad scope of Ms. Zink’s requests.”
- **Doe v. Dep’t of Corrections, Zink** (2017): Zink requested all SSOSA evaluations, SSODA evaluations and impact statements at DOC from Jan. 1, 1990 through the 2015 request. PRA injunction brought by the ACLU on behalf of Level I sex offenders against DOC & Zink. Issue: whether SSOSA evaluations are exempt from disclosure under the **Uniform Health Care Act** or two statutory provisions that apply to DOC. The Court of Appeals found that they were exempt under health care act and upheld permanent injunction barring the release of Level I evaluations. DOC and Zink appealed to State Supreme Court - pending.



# Open Government Training

- Effective July 1, 2014, elected local and statewide officials, and records officers, are to receive open government training (“Open Government Trainings Act”). RCW 42.56.150, RCW 42.56.152, RCW 42.30.205.\*
- They can take training sooner than July 1. 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/open-government-training>

- \**Additional training required in ESHB 1594 for public records officers.*



# Open Government Training (cont.)

- Current law: records officers training:
  - Must be completed no later than 90 days after assuming responsibilities as a public records officer or records manager;
  - Include refresher training at intervals of no more than four year intervals as long as they maintain the designation;
  - Must be consistent with the Attorney General's Office Model Rules;
  - Can be completed remotely with technology including but not limited to internet-based training.

- **ESHB 1594:**

*Must address **particular issues** related to the retention, production, and disclosure of electronic documents, Including updating and improving technology Information services.*



# Open Government Assistance

- The **Washington State Attorney General's Office** has provided an explanatory pamphlet and other materials about the PRA. It also has materials about the OPMA. *Manual: see next slide.*
- The Attorney General's Office has also published PRA Model Rules. *(Will be updated).*
- The Attorney General has also appointed an Assistant Attorney General for Open Government. The AGO can provide technical assistance and training.
- The Attorney General's Office **materials about the PRA**, and other open government topics and resources, are on its website at [www.atg.wa.gov](http://www.atg.wa.gov).
- The Attorney General's Office Open Government Training Web Page with training resources, videos, and other materials is at:  
<http://www.atg.wa.gov/open-government-training>
- The Attorney General's Office may also review a state agency denial of a record when the agency concludes the record is exempt.
- The Attorney General's Office may issue formal opinions about the PRA for qualified requesters.
- *ESHB 1594: The Attorney General's Office may provide records **consultation** services for local governments.*

~ RCW 42.56.155, RCW 42.56.570,  
RCW 42.56.530, RCW 42.30.210



# AGO Open Government Resource Manual – Available on AGO Website\*



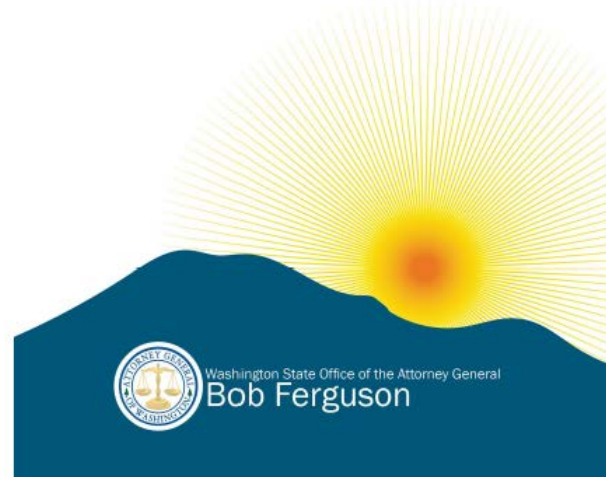
**Updated  
October 31,  
2016\*\***

## 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 ESHB 1594 or EHB 1595, which will be effective July 23, 2017.*

# 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.



# Note other records laws, too:

## Records Management & Retention – RCW 40.14

### Retention requirements/Schedules





# Contact: Washington State Archives

<http://www.sos.wa.gov/archives/recordsmanagement/default.aspx>

- Records retention/management laws
  - Retention Schedules
  - Training (& online tutorials)
    - Resources
    - Contacts
- Other information & assistance



# Thank you!

