

Public Records Act Training



August 2017

Prepared by Washington State Attorney General's Office



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!*

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.”

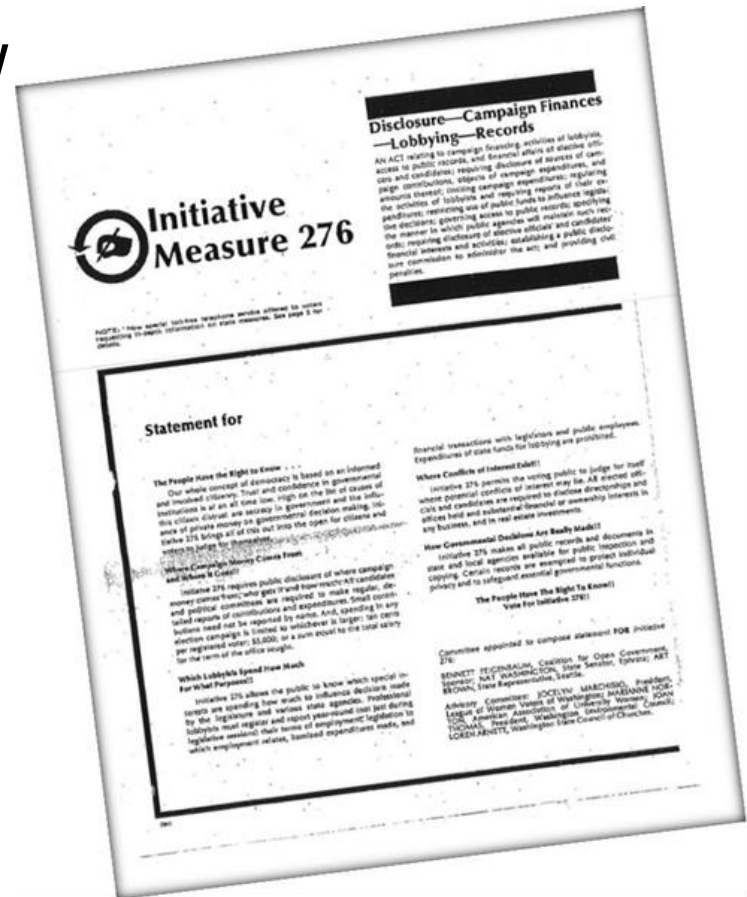
~ *RCW 42.56.030 (PRA)*



Washington's Open Public Records Act (PRA)

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

Most recent amendments –
ESHB 1594
(Chap. 303, 2017 Laws);
EHB 1595 (Chap. 304,
2017 Laws)



Touchstone:



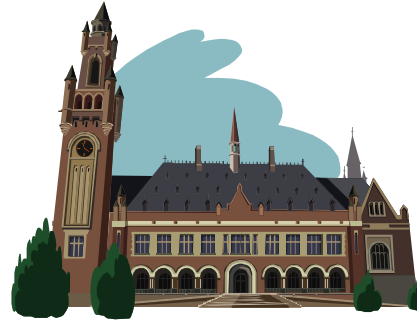
- Public records of government agencies are presumed open.
- Records or information in records can be withheld only by law (e.g. exemption in law). Exemptions must be “narrowly construed.”

~ 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.

PRA Does Not Apply to:

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



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

Volunteers



- ESHB 1594 (2017): records of **certain volunteers** are exempt from the definition of “public record.” They are:
 - Records not otherwise required to be retained
 - and are held by volunteers who
 - (a) do not serve in an administrative capacity,
 - (b) have not been appointed by the agency to an agency board, commission or internship, and
 - (c) do not have a supervisory role or delegated agency authority.
- Change effective July 23, 2017.



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.”

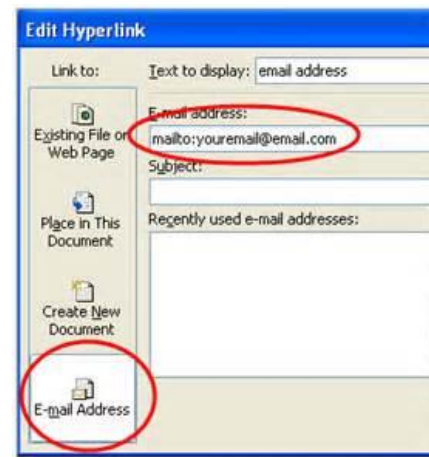
~ RCW 42.56.030

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



Note: Public Records Include...

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



Text Messages (“Scope of Employment”)

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

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



Call and Text Logs (“Use”)

- *Nissen v. Pierce County*

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

Call Log (104)

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

Incoming (23)

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

Other Locations of Public Records

- In/On Personal Computers, Personal Email Accounts, etc.
& 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.**
- *Court of Appeals*: Public records must be disclosed. The constitutions do not provide an individual a privacy interest in those public records. State Supreme Court denied review.
- See upcoming slide on “privacy.”



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**. See upcoming slide.
- Maintain a **list of laws** the agency believes exempts or prohibits disclosure.
- Provide certain **indexes** of records.
- Make non-exempt records **available for inspection and copying during customary business hours** for a minimum of 30 hours per week, excluding holidays.
 - ❖ Post customary business hours on the agency's website and make hours known by other public means.



~ 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 – Eff. July 23, 2017)



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



New PRA Procedures (cont.)

(ESHB 1594 and EHB 1595 – Eff. July 23, 2017)



- **Additional training.** Records officers must also receive training on electronic records.
- **Data collection & reporting.** Agencies having PRA staff and legal costs of more than \$100,000/year must report 17 data points about their agencies' PRA requests to the Joint Legislative Audit and Review Committee (JLARC). RCW 40.14.
- **Copy fees.** New procedures for fees/authorized copy fees for electronic records.



Fees

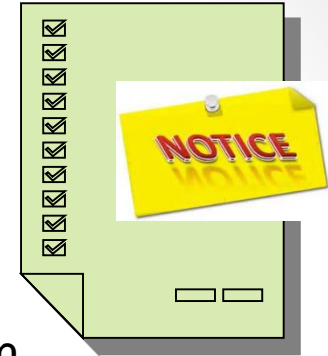


EHB 1595 (effective July 23, 2017):

- **Copy fee schedule:**
 - ❖ Agencies can charge **actual costs** (following certain procedures & **notice/public hearing**) or
 - ❖ **Default statutory costs** (following a declaration of undue burden in **rule**; list of costs in statute).
 - ❖ **Alternative flat fee up to \$2** for entire request (see details in statute)
- EHB 1595's **default schedule** includes paper copies, scanned copies, electronic records costs.
- No fee for records routinely posted on **agency website**.
- Must provide an **estimate of costs to requester** upon request.
- Act provides for **other fee arrangements** in defined circumstances.
- “Customized access charge” under defined circumstances.
- No fees for inspection.
- Court action can be brought to challenge agency’s estimate of fees.

~ RCW 42.56.120, RCW 42.56.130; RCW 42.56.550

Requests for Public Records



- Persons can request **identifiable public records** from public agencies.
 - Requester can use agency public records request form.
(Form not required effective July 23, 2017)
 - 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.**
 - 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.

Requests (Cont.)



- “**Identifiable**” records (cont.)
- EHB 1595 (effective July 23, 2017):
- “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 (eff. July 23, 2017): 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** 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.

~ 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 (eff. July 23, 2017) – 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 (eff. July 23, 2017)
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.
- Estimate is to be **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.
 - Prepare an exemption log if necessary.
 - Perform other essential agency functions.
- An agency can **extend** the time if needed.

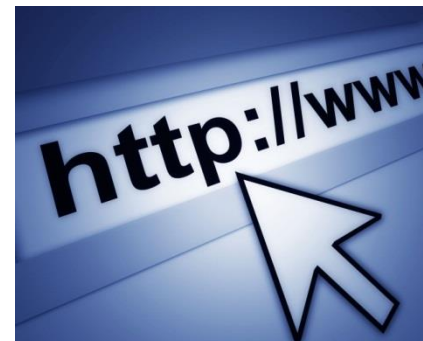
~ RCW 42.56.520, RCW 42.56.520, RCW 42.56.080, RCW 42.56.550; *Andrews v. Washington State Patrol*; *Hobbs v. State*

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 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.
- If responsive public records are on or in employees' personal devices, personal accounts, or personal files, those must be searched, too.
- The focal point of the judicial inquiry is the agency's search process, not the outcome of the search.
- The agency bears the burden of proof to show the adequacy of the search.

~ *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**.
- Employee may be required to submit affidavit regarding his/her search.

~ *Nissen v. Pierce County*



Exemptions

professionally redact [REDACTED] in Word Documents
you've ever had to [REDACTED] to purge corporate confidential or personal
information, you know it's not fun. You either need to [REDACTED]
[REDACTED] or getting far
matting tools.
I got a better solution: A [REDACTED]
for documents a sort-of CIA-like professional appearance.

- 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.
- 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.



Electronic Records Production & Disclosure – The Basics for Agencies





- **Remember definition** of “public record” – includes **electronic records**: emails, texts, databases, social media records, electronic versions of printed documents, Excel spreadsheets, PowerPoint presentations, website records, videos, audio recordings, etc. Includes public records on/in personal devices/accounts.
- Note other **legislative statements**:
 - **RCW 43.105.351**: ... *It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.*
 - **Chap. 69, Laws of 2010**: *The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.*

Electronic Records Production & Disclosure – The Basics (Cont.)

Remember there can be **changes/developments in law** (statutes, case law) including as they impact electronic public records. Examples:



- **ESHB 1594** (Chap. 303, Laws of 2017): Public records officers' required training on electronic records (retention, production & disclosure, updating & improving technology information services). 
- **EHB 1595** (Chap. 304, Laws of 2017):
 - Fees for copies of electronic records. 
 - Bot requests.
 - Translating a records into an electronic format (including scanning a paper record) is not creating a new record.
 - Local governments: consultation programs, competitive grant program.
- ***O'Neill v. City of Shoreline; Nissen v. Pierce County; West v. Vermillion***
 - Producing public records on home computers, personal devices, personal accounts. See *Nissen* for reference to agency policies.

Electronic Records Production & Disclosure

– Resources

- **Attorney General's Office.** www.atg.wa.gov. Examples:
 - Open Government Training Web Page (*upcoming slides*)
 - PRA Model Rules, WAC 44-14 (*to be updated*)
 - Consultation program (*local governments only*) (*To be developed*)
 - Other materials.



- **Municipal Research & Services Center:** www.mrsc.org.



Examples:

- “New PRA Legislation: To Boldly Go Where the PRA Hasn’t Gone Before”
- “Use of Electronic Devices During Council/Commission Meetings”
- “Establishing Effective Social Media Policies for Your Agency”
- “Text Messaging Policies”
- “Public Records: Tackling The Tough Questions (Including Use of Smart Phones and Other Thorny Issues)”
- Other materials.

- **Washington Secretary of State – State Archives.**

www.sos.wa.gov/archives. Examples:

- In-person trainings on electronic records management – retention.
- Advice sheets & other publications:
 - “Blogs, Wikis, Facebook, Twitter & Managing Public Records”
 - “Capture and Retention of Text Messages”
 - “Digital Audio/Visual – Recommendations and Best Practices”
 - Other materials.



Office of the Secretary of State

Washington State Archives

Electronic Records Production & Disclosure – Redaction Mechanics



- Electronic records **redaction**:
 - Various **software programs** permit standard redactions on many electronic records (Adobe Acrobat X Pro, Informative Graphics Redact-it, RapidRedact, and similar technologies).
 - Not all agencies have such software, or software than can electronically redact all electronic records.
 - For example, there may be “non-standard” redactions in some types of electronic records (videos, audios, photos, etc.) that require particular software.
 - In some circumstances, due to lack of software or other technical issues, it may be necessary to print out a copy of the electronic record and apply the redactions to the paper record.
 - An agency may need to work with its IT staff and legal counsel on such issues.

Electronic Records Production & Disclosure – Production Mechanics

- Electronic records can be **produced/delivered electronically** in many ways. Delivery practices may vary among agencies, depending upon agency resources, software, or other issues (e.g. limits on size of files that can be sent/received by email).
- Some examples:
 - Posting them on agency's web site and provide requester links to specific records.
 - Delivering copies on a CD, DVD, thumb drive/flash drive.
 - Delivering by email.
 - Delivering through an agency portal or cloud-based delivery (File Transfer Protocol - FTP).
 - Arranging for inspection at an agency's office, on an agency computer.



Electronic Records Production & Disclosure

– Updating & Improving Technology Information Services

- Agencies can consider making their websites - **current technology** - more **robust**. Examples:



- Posting more *commonly requested records*.
 - Posting information about how to *search for* online records.
 - Posting more information about how to *request* records (agency's PRA procedures, fee schedule, request form, contact information for Public Records Officer, etc.).
- Agencies can consider **new technology** purchases to assist them in retaining/producing records.



- **Examples:** Portals; electronic redaction tools; texting/website capture and retention software; other software.
- **Master state contracts:** Several vendors awarded statewide master contracts for retention - "Enterprise Content Management Systems." State, & local agencies can use. More information on State Archives website and Department of Enterprise Services website.
- **ESHB 1594:** Local government grants (State Archives) (*to be developed*).



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 **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*

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*

PRA Training


- “Open Government Trainings Act”: RCW 42.56.150, RCW 42.56.152, RCW 42.30.205.*
- Public records officers; statewide and local government officials. 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>

AGO PRA Assistance

- The **Washington State Attorney General's Office** has provided an explanatory pamphlet and other materials about the PRA on its website at www.atg.wa.gov.
- The AGO 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. ESHB 1594 (eff. July 23, 2017): The AGO may provide records **consultation** services for local governments. *(Program to be developed)*. 
- The AGO Government Training Web Page with training resources, videos, and other materials is at:
<http://www.atg.wa.gov/open-government-training>
- The AGO may also review a state agency denial of a record when the agency concludes the record is exempt.

~ 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*



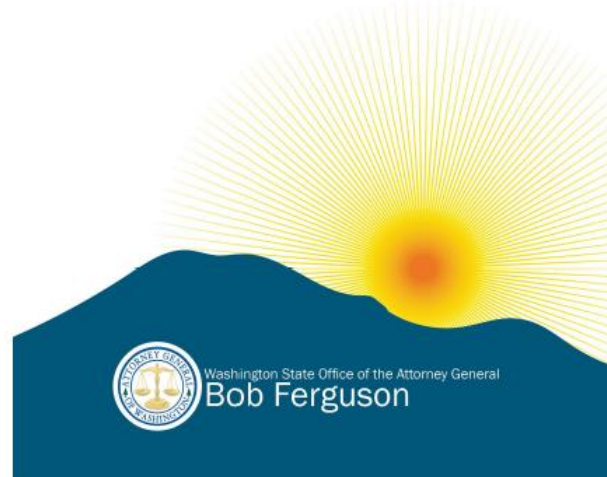
Updated
October 31,
2016**

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.



Thank you!

