

**CONCISE EXPLANATORY STATEMENT**

**Attachment B**

WAC ch. 44-14

Office of the Attorney General  
Public Records Act Model Rules –  
2017 Proposed Updates;  
2018 Final Rules

Supplemental Memorandum

March 2018

**\* Concise Explanatory Statement – Attachment B**  
**Supplemental Memorandum**  
**Response to Suggestions Concerning**  
**Agency Public Records Creation, Management and Similar Topics**

This memorandum is provided as part of the Office of the Attorney General's (AGO's) Concise Explanatory Statement response to several suggestions made concerning the AGO's proposed rulemaking to update chapter 44-14 WAC [advisory Public Records Act (PRA) Model Rules]. CR-102 (WSR 17-17-157). RCW 42.56.570 provides:

(2) The attorney general, by February 1, 2006, shall adopt by rule advisory model rules for state and local agencies, as defined in RCW 42.56.010, addressing the following subjects:

- (a) Providing fullest assistance to requestors;
- (b) Fulfilling large requests in the most efficient manner;
- (c) Fulfilling requests for electronic records; and
- (d) Any other issues pertaining to public disclosure as determined by the attorney general.

(3) The attorney general, in his or her discretion, may from time to time revise the model rule[s].

**Summary**

The AGO adopted the Model Rules in chapter 44-14 WAC. Their focus is procedures for public records disclosure. This memorandum addresses suggestions that the AGO should engage in new and additional rule making in chapter 44-14 WAC on multiple topics, and with respect to RCW 42.56.100. RCW 42.56.100 provides in part: "Agencies shall adopt and enforce reasonable rules and regulations... consonant with the intent of this chapter to provide full public *access* to public records, *to protect public records from damage or disorganization*, and to prevent excessive interference with other essential functions of the agency...Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." (Emphasis added).

The AGO adopted the Model Rules in 2006-2007. The AGO proposed updates in 2017 for several limited purposes, and invited public comment. See CR-102. Some commenters suggested that the Model Rules should address multiple new areas beyond the Model Rules language adopted in 2006-2007, and beyond the proposed amendments in the CR-102 filed in 2017. Such new topics concern, for example, specific suggested rule language on records creation, organization, management, and recordkeeping, including but not limited to how state and local agency records should be organized on agency computer systems. See October 4, 2017, submissions of the Washington Coalition for Open Government; some comments in the October 4, 2017 submission

on behalf of Allied Daily Newspapers of Washington; August 31, 2017 comments by April Atwood; and, September 26, 2017 comments by Cal Taki. Those suggestions propose, for example, that the Model Rules should now address the following new topics:

- organization of agency records including agency emails and specifically Inbox and Sent mailboxes, and email subject lines;
- organization of other electronic records, including word processing files, file systems and records naming conventions;
- organization of agency records that are subject to commonly-asserted exemptions;
- organization of agency legal files;
- criteria for agency servers to be protected against virus, malware and unauthorized access;
- design of agency forms;
- an explanation of agency duties with respect to control of its records provided under other laws outside the PRA;
- requirements for record-keeping/retention with respect to drafts;
- creation of records including but not limited to creation of information to be included in attorney invoices and outside legal counsel agreements;
- creation of procedures for common interest and joint defense agreements;
- creation of procedures governing litigation correspondence;
- restrictions on agency participation in multi-agency organizations unless certain conditions are met, including but not limited to procedures governing location and preservation of records related to meetings and conferences;
- correspondence with legislators;
- creation and production of future records;
- removal of references to faxes as outdated;
- use of other agency equipment such as a requirement that paper records be scanned;
- prohibitions on agency creation of certain types of records (such as social media or texts) unless certain conditions are satisfied;
- a requirement that each agency create and maintain a list of all legal matters and directing a system of how the records are to be labeled as privileged or work product;
- use of passwords in records (such as those for conference calls);
- a requirement that the public records officer under RCW 42.56 should be the same person as the records officer under RCW 40.14;
- procedures for data breaches; and,
- other similar matters on records creation, organization, management and recordkeeping, actions by agency personnel and officials, and use and purchase of agency equipment.

These new subjects for suggested rule making will be referred to as the “bulleted topics.”

Following consideration, and for the reasons explained below, the bulleted topics and their suggested amendments to chapter 44-14 WAC will not be included in the PRA Model Rules

amendments filed in 2018, except as otherwise addressed in the final amendments to the rules. See CR-103P (WSR 18-06-051).

In sum, the bulleted topics largely address new records topics beyond those listed in RCW 42.56.570, and are largely outside the stated limited purposes for the 2017 AGO proposed rule making (CR-102) to update the PRA Model Rules. See also the “Overall Response to Comments/Suggestions” Attachment A (Table).

The Model Rules already inform public agencies about the need to manage their records, for example, providing information about the guidance from Office of the Secretary of State – State Archives (OSOS- State Archives). OSOS-State Archives administers other state laws governing state and local agency records retention and management in chapter 40.14 RCW, and that agency provides formal rules and informal guidance for all state and local public agencies. To illustrate, these Model Rules alert readers to the following information:

**WAC 44-14-01002:** Provides that the PRA at RCW 42.56.100 requires agencies to adopt and enforce reasonable rules and regulations to provide full public access to public records, and to protect them from damage and disorganization.

**WAC 44-14-020:** Provides that the public records officer is to oversee an agency’s compliance with the PRA.

**WAC 44-14-02001:** Provides that an agency must publish its PRA procedures.

**WAC 44-14-030:** Provides that agencies will maintain their records in a reasonably organized manner.

**WAC 44-14-03003:** Provides that agencies are to have an index of listed records as provided in the PRA, and new language is added to suggest that agencies could consider using their records retention schedules adopted under RCW 40.14 as a way to describe the types of records an agency retains and for what period of time.

**WAC 44-14-03004:** Provides that agencies are to protect their records from damage and disorganization, and new language is added to direct agencies to OSOS-State Archives guidance on organizing, inventorying and managing public records.

**WAC 44-14-03005:** Provides agencies general information on records retention schedules available from the OSOS-State Archives.

**WAC 44-14-040:** Provides another reference to the PRA requirement that agencies adopt rules to protect records from damage and disorganization.

In addition, records of state and local agencies, and even records within particular state and local agencies, vary in content, format, size, complexity, location and uses. The same variances are true with agency technologies. Public agencies use numerous and diverse software and other programs and systems to manage and organize their particular records, which vary in capacity, age, and capabilities. It is not within the realistic scope of PRA Model Rules to describe particular

records systems or particular standard records labeling conventions, or records creation, organization, management or recordkeeping, for all state and local agencies, or for particular records, including on the bulleted topics. RCW 42.56.100, the suggested basis for engaging in rulemaking on the new subjects in the bulleted topics, reads the same today as it did in 2006-2007. The bulleted topics were not suggested as necessary for Model Rules during the formal rulemaking at that time, or identified as needed for agencies to implement RCW 42.56.100.<sup>1</sup>

As noted above, many of the bulleted topics would be better addressed to the OSOS-State Archives. As also noted, OSOS-State Archives administers other state laws governing state and local agency records in chapter 40.14 RCW, and provides formal rules and informal guidance for all state and local public agencies. *See* RCW 40.14.020; RCW 40.14.050; RCW 40.14.070.<sup>2</sup> Those laws, plus the rules adopted by OSOS in Title 434 WAC,<sup>3</sup> and the other significant informal

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<sup>1</sup> The AGO engaged in significant public outreach in 2006-2007 when the Model Rules were adopted. The commenters at that time did not indicate during the formal rulemaking that the Model Rules must be required to address the bulleted topics pursuant to RCW 42.56.100. No public comments during the formal rulemaking have been located from that time which suggested that RCW 42.56.100's reference to rules on protecting records from damage/disorganization should extend beyond the current Model Rules' current subjects and should include records creation/management/organization/recordkeeping topics such as those bulleted. In addition, the Model Rules cite to RCW 42.56.100 19 times.

<sup>2</sup> For example, RCW 40.14.020 provides in part that the State Archivist is authorized:

- (6) To adopt rules under chapter 34.05 RCW:
  - (a) Setting standards for the durability and permanence of public records maintained by state and local agencies;
  - (b) Governing procedures for the creation, maintenance, transmission, cataloging, indexing, storage, or reproduction of photographic, optical, electronic, or other images of public documents or records in a manner consistent with current standards, policies, and procedures of the office of the chief information officer for the acquisition of information technology;
  - (c) Governing the accuracy and durability of, and facilitating access to, photographic, optical, electronic, or other images used as public records; or
  - (d) To carry out any other provision of this chapter;
- (7) To gather and disseminate to interested agencies information on all phases of records management and current practices, methods, procedures, techniques, and devices for efficient and economical management and preservation of records;
- ...
- (10) To assist and train state and local agencies in the proper methods of creating, maintaining, cataloging, indexing, transmitting, storing, and reproducing photographic, optical, electronic, or other images used as public records[.]

<sup>3</sup>See Appendix 1 attached herein for examples of records topics covered in Title 434 WAC, including for example, email management, website management, and other topics.

records guidance by the State Archives,<sup>4</sup> provide substantial information, direction, and assistance on many of those topics for state and local agencies, including with respect to electronic records.<sup>5</sup> There is no need to duplicate such guidance in the Model Rules. There may be other relevant agencies to which the suggestions could be directed. For example, suggestions for security requirements for agency servers could be directed to Washington Technology Solutions (Wa-Tech), a state agency, and to its Office of the Chief Information Officer (OCIO).<sup>6</sup> Suggestions about organization of certain types of public records such as financial records, could be directed to the State Auditor's Office.

Finally, given the speed at which technology develops, proposals such as the bulleted topics' suggested practices related to electronic records lend themselves more logically to many of the informal guidance resources provided by the OSOS - State Archives in its advice sheets and similar information from the AGO such as in its *Open Government Resource Manual*. These resources are more nimble and, as compared to formal rule making, can be more quickly updated as new technologies are used, or old technologies are abandoned, and as the laws relating to technologies advance.

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<sup>4</sup> See Appendix 2 attached herein for examples of advice sheets and other guidance provided by the OSOS-State Archives on its website. Those online materials include, for example, recommendations and best practices on audio/visual recordings; appropriate use of portable media; text messages including their capture and retention; managing blogs, wikis, Facebook and Twitter records; keeping electronic records in an electronic format; imaging paper records; and, many other records management topics.

<sup>5</sup> This OSOS-State Archives guidance is consistent with the Legislature's finding located under RCW 40.14.027 in 1994, stating in part that, "The legislature finds that: (1) Accountability for and the efficient management of local government records are in the public interest and that compliance with public records management requirements significantly affects the cost of local government administration; (2) the secretary of state is responsible for insuring the preservation of local government archives and may assist local government compliance with public records statutes..." Laws of 1994 c 193 § 1.

<sup>6</sup> Washington Technology Solutions (WaTech) is "the consolidated technology services agency" (RCW 43.105.006) created to establish a streamlined, agile central IT organization that enables public agencies to better serve the people of Washington via technology. Wa-Tech's customers include state agencies, county, city and tribal governments as well as nonprofits. The agency's Office of the Chief Information Officer is charged with preparing and leading the implementation of a strategic direction and enterprise architecture for information technology for state government.

**Supplemental Memorandum Appendix 1 –  
Examples of OSOS-State Archives Rules**

**WAC 434-620-010 Powers and duties of the state archivist.**

The division of archives and records management is established in the office of the secretary of state. The division is administered by the state archivist and is the primary archival and records management agency of Washington state government. In order to insure the proper management and safekeeping of public records, the state archivist, through the several sections of the division, carries out the following functions:

- ..
- (6) Adopts rules under chapter 34.05 RCW:
- (a) Establishing standards for the durability and permanence of public records maintained by state and local agencies;
  - (b) Governing procedures for the creation, maintenance, transmission, or reproduction of public documents or records in a manner consistent with current standards, policies, and procedures of the department of information services for the acquisition of information technology;
  - (c) Governing the accuracy and durability of photographic, optical, electronic, or other images used as public records;
  - (d) Carrying out other provisions of chapter 40.14 RCW.
- ...
- (9) Provides assistance to agencies of local government in records management related matters [.]

**WAC 434-660-010 Statutory authority.**

The state archivist shall adopt rules under chapter 34.05 RCW setting standards for the durability and permanence of public records maintained by state and local agencies:

- (1) Governing procedures for the creation, maintenance, transmission, or reproduction of photographic, optical, electronic, or other images of public documents or records in a manner consistent with current standards, policies, and procedures of the department of information services;
- (2) Governing the accuracy and durability of photographic, optical, electronic or other images used as public records. Reference RCW 40.14.020.

## **Chapter 434-662 WAC**

### **PRESERVATION OF ELECTRONIC PUBLIC RECORDS**

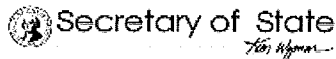
Complete Chapter

#### **WAC Sections**

- 434-662-010 Purpose.
- 434-662-020 Definitions applicable to all sections of this chapter.
- 434-662-030 Retention scheduling and disposition of electronic public records.
- 434-662-040 Agency duties and responsibilities.
- 434-662-050 Disposition of electronic public records identified by records committees as archival.
- 434-662-055 Disposition of electronic public records identified by records committees as nonarchival.
- 434-662-060 Authentication and chain of custody of electronic records.
- 434-662-070 Use of encryption on electronic records.
- 434-662-090 Transmittal agreement for transfer of electronic records.
- 434-662-100 Media format and protocol for transfer.
- 434-662-110 Metadata requirements.
- 434-662-140 Web site management.
- 434-662-150 Email management.



## Supplemental Memorandum Appendix 2 – Examples of Other OSOS-State Archives Online Records Guidance



Washington State Archives

Search...

BRANCHES RESEARCH TEACHERS & STUDENTS STATE AGENCIES LOCAL GOVERNMENTS IMAGING SERVICES DONATE

### Publications and Advice Sheets for State Agencies

#### Basics of Records Management...

- Benefits of Managing Public Records
- Laws and Rules for Records Management
- What is a Public Record?

#### Destroying Non-Archival Records...

- Documenting the Destruction of Public Records
- Methods for Destroying Electronic Records
- Methods for Destroying Paper Records

#### Developing Records Retention Schedules...

- Preparing State Agency Schedules for Submission
- State Agency Schedule Approval Process

#### Transferring Archival Records...

- How to Complete a Digital Transfer Inventory Sheet
- How to Fill Out a Records Transmittal and Box Content List
- Preparing Digital Records for Archival Transfer
- Preparing Paper Records for Archival Transfer

#### Using Records Retention Schedules...

- What Does "Until No Longer Needed for Agency Business" Mean?
- What to Do With State Publications
- What to Do With Subject Files
- Which Litigation Case Files are "Significant"?
- Why Isn't There Just One "Transitory" Records Series?

#### Electronic Records Management...

- Analog Audio/Visual Recordings - Recommendations & Best Practices
- Appropriate Use of Portable Media (CDs, DVDs, Flash Drives)
- Are Text Messages Public Records?
- Blogs, Wikis, Facebook, Twitter & Managing Public Records
- Capture and Retention of Text Messages
- Digital Audio/Visual - Recommendations & Best Practices
- Hard Drives and Multipurpose Copiers/Scanners
- How Long Do Database Records Need to be Kept?
- How Long Do Text Messages Need to be Kept?
- Keep Electronic Records in Electronic Format
- Managing Public Records Created or Received as Text Messages
- Text Messages and Public Records - The Basics
- What Happened to the EIS/DAD Approval Process?
- What to do with Archival Paper Records after Imaging

#### Other Publications...

Archival Records - Collection Policy and Transfer Manual

Essential Records and Disaster Preparedness Manual

Appendix A - Preparedness Templates

Appendix B - Risk Assessment Templates

Appendix C - Records Disaster Response and Recovery Procedures and Treatments

Appendix D - Recovery Supplies and Services Templates and Information

Appendix E - Media Types and Methods of Recovery

Inventorying & Scheduling Guidelines

Requirements for the Destruction of Non-Archival Paper Records after Imaging ("Scanning and Tossing")

Washington State Standards for the Production and Use of Microfilm

## Publications and Advice Sheets for Local Governments

### Basics of Records Management...

- Benefits of Managing Public Records
- Laws and Rules for Records Management
- What is a Public Record?

### Destroying Non-Archival Records...

- Documenting the Destruction of Public Records
- Methods for Destroying Electronic Records
- Methods for Destroying Paper Records
- Sensitive Cardholder Data Obtained During Payment Card Transactions

### Developing Records Retention Schedules...

- How Minor Updates to Local Government Schedules Are Made
- What About the Planned Major Revision of the Utility Services Schedule?

### Transferring Archival Records...

- How to Complete a Digital Transfer Inventory Sheet
- How to Fill Out a Records Transmittal and Box Content List
- Preparing Digital Records for Archival Transfer
- Preparing Paper Records for Archival Transfer

### Using Records Retention Schedules...

- How Long Do Police Body Cam Recordings Need to Be Kept?
- How Long Do Police Dash Cam Recordings Need to Be Kept?
- Notorious/Historically Significant...
  - Law Enforcement Incidents
  - Case Files/Inmate Records
  - Court Exhibits and Recordings of Proceedings

### Electronic Records Management...

- Analog Audio/Visual Recordings - Recommendations & Best Practices
- Appropriate Use of Portable Media (CDs, DVDs, Flash Drives)
- Are Text Messages Public Records?
- Blogs, Wikis, Facebook, Twitter & Managing Public Records
- Capture and Retention of Text Messages
- Digital Audio/Visual - Recommendations & Best Practices
- Hard Drives and Multipurpose Copiers/Scanners
- How Long Do Database Records Need to be Kept?
- How Long Do Text Messages Need to be Kept?
- Keep Electronic Records in Electronic Format
- Managing Public Records Created or Received as Text Messages
- Text Messages and Public Records - The Basics
- Website are Public Records
- What Happened to the EIS/DAD Approval Process?
- What to do with Archival Paper Records after Imaging

### Other Publications...

Essential Records and Disaster Preparedness Manual

Appendix A - Preparedness Templates

Appendix B - Risk Assessment Templates

Appendix C - Records Disaster Response and Recovery Procedures and Treatments

Appendix D - Recovery Supplies and Services Templates and Information

Appendix E - Media Types and Methods of Recovery

Requirements for the Destruction of Non-Archival Paper Records after Imaging ("Scanning and Tossing")

Washington State Standards for the Production and Use of Microfilm