CONCISE EXPLANATORY STATEMENT

Attachment C

WAC ch. 44-14

Office of the Attorney General

Public Records Act Model Rules –

2017 Proposed Updates;

2018 Final Rules

Comments on CR-102

(numbered)

(Received August 24, 2017 – October 4, 2017)

March 2018

Comments on CR-102 – WSR 17-17-157 (Proposed Rulemaking - 2017) – Chapter 44-14 WAC Model Rules

Received
August 24, 2017 –
August 31, 2017

Krier, Nancy (ATG)

From: Laurel.Holliday@gmail.com
Sent: Thursday, August 24, 2017 10:43 AM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Holliday
First Name:	Laurel
Middle Name:	G.
Email Address:	Laurel.Holliday@gmail.com
Comment:	I frequently request public records while doing research for my reporting/writing. I would like to ask that the following be considered while updating the Public Records Act: 1) All electronic records systems used to fulfill requests should identify the Public Records Officer assigned to the request and give contact information for that person. 2) All charges for providing records should be based on the *actual cost* of providing the records, not a standard amount for a given number of megabytes or pages. 3) Estimates of time required for fulfilling the request should be accurate and based on something besides a department policy that each incoming request should take six weeks or eight weeks or whatever. In other words, the time estimates should be based on factual evidence, not a standardized department boiler plate reply to a request. 4) Digital technology used to receive and fulfill each request should be much easier to use than the one I typically have to navigate in Seattle when requesting records from Seattle Police and other Seattle departments. The Seattle system has the look, feel, and ease of use of something designed in the 1980s. Plus the one size fits all standard Seattle department reply discourages requester interaction directly with the department by not showing "the face" of the individual department and providing the name and maybe even the image of the Public Records Officer for that department. 5) Requester payment information such as credit card information should only have to be entered once by each requester. Payment information should be stored by the records system rather than the requester having to enter all this information for each request. At least in Seattle, the whole payment process is unnecessarily time consuming for the requester as we have to jump through several hoops and wait up to two business days for electronic responses in order to electronically pay for records.

Section 2: Privacy Notice, Disclimer and signature

Signed name:	Laurel Holliday
Date:	August 24, 2017

Submitted on: 8/24/2017

Krier, Nancy (ATG)

From: Doug Mitchell <doug.mitchell@co.kittitas.wa.us>
Sent: Friday, August 25, 2017 12:17 PM
To: Krier, Nancy (ATG)
Subject: Model rule feedback

Nancy, I'll do these as I get to them, so there is a possibility that I may make a comment that turns out be superfluous.

I do like the changes to 44-14-01001; this is consistent with what I have believed.

44-14-01002: I never did wholeheartedly concur with the position that we could not require the use of a form. That said, we had adopted such as a regulation, but that's been legislatively ended. Is this a good place, or as good as any other, to reflect that change?

*_ _ *
Doug Mitchell
doug.mitchell@co.kittitas.wa.us

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Notice: Email sent to Kittitas County may be subject to public disclosure as required by law

Krier, Nancy (ATG)

From: along@kentwa.gov
Sent: Monday, August 28, 2017 4:28 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Long
First Name:	Adam
Middle Name:	
Email Address:	along@kentwa.gov
Comment:	In recently amended RCW 42.56.120(2)(b)(3), agencies may charge five cents per four electronic files. Agencies need guidance on what constitutes a "file." For example, oftentimes requests include a significant number of emails and perhaps thousands of emails are delivered in one .pst file. The .pst file must be opened where you can then view individual email files. If an agency produces four .pst files with thousands of individual files inside each, does it charge five cents for the four "files," or does it charge significantly more for each set of four emails within the .pst file? Or, another example, if numerous individual files are combined into one .pdf and emailed to the requestor, how would the charging work in that scenario? What is the definition of "electronic file?"

Section 2: Privacy Notice, Disclimer and signature

Signed name:	Adam Long
Date:	8/28/17
Submitted on:	8/28/2017

Krier, Nancy (ATG)

From: joseph.molenda@lni.wa.gov
Sent: Tuesday, August 29, 2017 12:44 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Molenda
First Name:	Joseph
Middle Name:	
Email Address:	joseph.molenda@lni.wa.gov
Comment:	Re WAC 44-14-00006: Why is it that proper nouns of government like "Attorney General" and "Municipal Research and Services Center" aren't capitalized? This practice may be customary in Washington State, but it allows public institution names to get lost in the rule text. Yet in this same rule, private organization names like Washington Coalition for Open Government and Washington State Bar Association ARE capitalized. Consider having rules of WAC writing for public institution names conform to those of common English grammar. Re WAC 44-14-07001(3): "If using the statutory flat fee, the agency can charge the flat fee only for the first installment for records produced in multiple installments, and no fees can be assessed for subsequent installments." WHY? Doesn't this restriction defeat the purpose of the statute providing for agency recovery of copying costs? It appears to be a blatant attempt to force ALL agencies, no matter what size or budget, to come up with an actual cost schedule of copying charges. In so doing, it makes the choice of using the statutory flat fee ridiculous for agencies processing large multi-installment requests. I don't see any statutory or case law basis for restricting the use of statutory flat fees to a first installment only. So why even have a flat fee in the statute? I don't think the legislature intended to restrict the flat fee use so severely, or they would have left it out completely. It's surprising the AGO would propose such an exaggerated interpretation of law. Re AGO Privacy Notice: The statutory citations are out-of-date. Please have someone update these and the text.

Section 2: Privacy Notice, Disclimer and signature

Signed name:	Joseph Molenda
Date:	08/29/2017
Submitted on:	8/29/2017

Krier, Nancy (ATG)

From: jaho461@ecy.wa.gov
Sent: Wednesday, August 30, 2017 3:40 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Howell
First Name:	Jason
Middle Name:	
Email Address:	jaho461@ecy.wa.gov
Comment:	WAC 44-14-08004(7) is devoid of reference to the per page penalty scenario presented in Wade's Eastside Gunshop v. L&I and suggests that the maximum possible penalty award for a PRA violation is $100/day. It may be worthwhile to include reference to the immense discretion of the superior court to award penalties for groups or pages of records so as not to create unrealistic assumptions in those readers that lack legal sophistication.

Section 2: Privacy Notice, Disclimer and signature

Signed name:	Jason Howell
Date:	8/30/2017
Submitted on:	8/30/2017

Krier, Nancy (ATG)

From: Tim Clemans <timacbackup@gmail.com>
Sent: Wednesday, August 30, 2017 8:24 PM
To: Krier, Nancy (ATG)
Subject: Comment about customized access

I recently got a fee estimate for 40 hours of SQL programming at $60/hour for a grand total of $2,400. I would like to see a suggestion at an agency explain exactly what they are going to program because in this case I wrote the query for them in 10 minutes. There was absolutely no transparency about the work they were estimating a fee for.

Also want constitutes use? If I request a week's worth of data that the software an agency uses is that data used by the agency?

Is a simple SQL query that just exports existing data considered custom access?

Krier, Nancy (ATG)

From: hissrattlesnap@yahoo.com
Sent: Thursday, August 31, 2017 9:17 AM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Atwood
First Name:	April
Middle Name:	
Email Address:	hissrattlesnap@yahoo.com
Comment:	This proposal is good, but needs a few additions: 1. Oversight is needed to ensure accountability, otherwise we won't know if the system is working properly. 2. Guidelines are needed for public agencies to help them keep their documents organized and to prevent their destruction. 3. Agencies need more guidance to stop officials from using personal phones and other electronic devices to do government business.

Section 2: Privacy Notice, Disclimer and signature

Signed name:	April Atwood
Date:	8/31/2017
Submitted on:	8/31/2017

Krier, Nancy (ATG)

From: johncruce@hotmail.com
Sent: Thursday, August 31, 2017 10:24 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Cruce
First Name:	John
Middle Name:	A.
Email Address:	johncruce@hotmail.com
Comment:	I served in the U.S. State Department in Washington, D.C. in the records management area for 30 years. I once told the National Archives that when people visit they have but a few hours and they know nothing about what the Archives has. I said they needed people there to quickly guide visitors to some useful records. They started to do so. Your web site is heavy on the legal side and light on the "What do you have side?":eg.: census, city directories, telephone directories, land grants & deeds, courts records, school records, Indian tribe census & treaties, maps, photographs, books, etc. Have a telephone contact number so people can speak to Records Officers to guide them in quickly locating the records the people really want. I have researched my family history to 1623 in Scituate, Massachusetts. Locating records over 400 years in the U.S. is a real challenge - "public records", church records, foreign owned U.S. property records, city & state records, personal records, etc. People need a lot of help up front!

Section 2: Privacy Notice, Disclimer and signature

Signed name:	John Cruce
Date:	8/31/2017
Submitted on:	8/31/2017

Comments on CR-102 – WSR 17-17-157 (Proposed Rulemaking - 2017) – Chapter 44-14 WAC Model Rules

Received

September 1, 2017 –

September 22, 2017

Krier, Nancy (ATG)

From: Plummer David F. <pdf3@comcast.net>
Sent: Tuesday, September 5, 2017 11:50 AM
To: Krier, Nancy (ATG)
Subject: Sugested Changes to Public Records Act – Model Rules Chapter 44-14 WAC

Hello Ms. Kier!

I recommend that WAC 44-14 (perhaps in WAC 44-14-08004) be further amended/expanded to clarify more specifically how an individual (who may not be an attorney, or may not be able to afford to retain an attorney) may file a 'show-cause' petition to seek judicial review of an agency's refusal to provide a record. An alternative would be to provide more specific guidance in a publication like "Sunshine Laws 2016".

Regards,

David F. Plummer

14414 NE 14th Place
Bellevue, WA. 98007

Krier, Nancy (ATG)

From: Cairns, Kelly (OIC)
Sent: Thursday, September 21, 2017 9:14 AM
To: Krier, Nancy (ATG)
Subject: RE: Proposed update to Public Records Act Model Rules

Hi Nancy,

One quick comment on the proposed rules. On page 26, subsection (7) of WAC 44-14-04003, I'd like to see the word "fully" removed from the title. The word is removed elsewhere in the subsection, so this may have been an oversight. It's nice for the model rules to support the practice of many agencies of providing an initial estimate of the time it will take to provide the first installment, recognizing that for large requests it is difficult to estimate a full response.

Thank you!

OFFICE of the INSURANCE COMMISSIONER

Kelly A. Cairns
Information Governance Manager
Washington State Office of the Insurance Commissioner

360.725.7003 | KellyC@oic.wa.gov

Protecting Insurance Consumers
www.insurance.wa.gov | twitter.com/WA_OIC | wainsurance.blogspot.com | email/text alerts

From: Nancy Krier, Open Government Ombuds [mailto:NancyK1=atg.wa.gov@mail133.suw16.rsgsv.net] **On Behalf Of** Nancy Krier, Open Government Ombuds
Sent: Wednesday, August 23, 2017 2:44 PM
To: Cairns, Kelly (OIC) <KellyC@oic.wa.gov>
Subject: Proposed update to Public Records Act Model Rules

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Greetings.

The Office of the Attorney General is proposing amendments to chapter 44-14 of the Washington Administrative Code (WAC). That chapter is the Public Records Act (PRA) Model Rules. The proposed amendments are in the CR-102 Proposed Rulemaking form, linked here. The CR-102 proposal will also be published in the *Washington State Register*.

The PRA is at chapter 42.56 RCW. The AGO adopted the advisory Model Rules and comments in 2006-2007 under the PRA at RCW 42.56.570(2) and (3), which provides:
(2) The attorney general, by February 1, 2006, shall adopt by rule an advisory model rule 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.

The advisory Model Rules (and their comments) provide information about the PRA and some suggested best practices. The AGO last revised the Model Rules in 2007. Since then, there have been a number of developments in statutes, case law and technology with respect to public agency records. In addition, in 2017 the State Legislature enacted RCW 42.56.570(4), providing that local public agencies should consult the Model Rules when establishing local PRA ordinances. RCW 42.56.152, another PRA statute enacted after 2007, provides that public records training must be consistent with the Model Rules.

Therefore, the proposed 2017 amendments address topics such as use of personal devices with respect to public records, electronic records, procedures to make requests, procedures to process requests, copying charges, other new PRA requirements, statutory citations, and other topics. For example, the proposed update:

- Confirms that the public is entitled to request public records stored on personal devices if those records concern agency business;
- Provides a model policy for handling requests with greater efficiency and transparency based off policies pioneered by the cities of Kirkland and Pasco; and
- Addresses relevant court rulings and changes to state law made by the Washington State Legislature.

The anticipated effect of the proposal is to modernize the Model Rules so they are a more functional resource for requestors, public agencies, the courts, the State Legislature and others who are navigating the PRA.

If you would like to comment on the proposed amendments to the Model Rules, see the information in the CR-102 and on the AGO Rulemaking Page under "AGO Public Record

Model Rules" linked here. Advance written comments are due by September 29. The CR-102 also provides information on the October 4, 2017 hearing where the public can also provide comments.

Thank you for your interest in open government.

Nancy Krier
Assistant Attorney General for Open Government

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Comments on CR-102 – WSR 17-17-157 (Proposed Rulemaking - 2017) – Chapter 44-14 WAC Model Rules

Received
September 23, 2017 –
September 30, 2017

Krier, Nancy (ATG)

From: terril@spokaneschools.org
Sent: Monday, September 25, 2017 11:13 AM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name: LeFors

First Name: Terri

Middle Name:

Email Address: terril@spokaneschools.org

Comment: I oversee the processing of public records requests in our office and value transparency. Am happy to see updates to the PRA! I strongly agree that "fair notice" should be given when making a records request and requests should be submitted in writing to the PRO if the agency is to be bound by PRA laws. Requestors should be invested in their requests and should be required to respond to agency request for communication, or agencies should be allowed to close requests after 30 days. We release records via email when requested, but rarely receive confirmation that records are received. Have huge ongoing requests with thousands of staff hours invested, incur legal expenses for advice/review but have no indication that requestor opens or remains interested in records. Clarification is not required so we can't close after 30 days of no response. Other requestors have to wait while we process these. Very concerned about formal priority category process. Places additional time requirements and burdens on agency when time is better spent processing requests. New reporting requirement already adds work and takes away from time processing requests. Feel additional agency requirements provide more opportunity for requestors to profit off the PRA. This is challenging work with a constant threat of legal action and financial penalties for honest mistakes. Requests should have real, legitimate purpose. Requests for email 'to see what they said about me' do not relate to conduct of government business but require a lot of staff time and cost a lot to process at agency expense. How do we determine fees for copies of emails? Example: Releasing one PDF attached to an email that consists of hundreds of emails, many of those with attachments that require redaction, released as one PDF via email. Is that PDF one attachment, is each email an attachment, or are the attachments included in the figure? The one PDF may be thousands of pages but is technically one attachment.

Section 2: Privacy Notice, Disclimer and signature

Signed name: Terri LeFors

Date: 09/25/17

Krier, Nancy (ATG)

From: Cal Taki <calt2846@gmail.com>
ent: Tuesday, September 26, 2017 9:58 AM
To: Krier, Nancy (ATG)
Subject: Model rules

With multiple egregious data breaches - Healthcare, Target, most and **most damaging - Equifax** (which I understand SSA uses to verify consumer ID), access to public records must be locked down and secured.

Currently these personal identifiable records are on systems publicly accessible to any one and data mining tools: Wa DOL Driver's License, auto VIM, County Property Records, Probate, Death Certificate, Birth Certificate

Washington State Law should require businesses and government that collect citizen's data should have their system locked down, patches constantly and immediately applied.

Regarding Public Record Request: All request must be be more securely trackable back to the requestor (location verified) with documentation proving the request is legitimate & legal need to know, notorized by Washington State licensed active notary.

Cost of the public record request billed by hours (length of time to verify requestor if legitimate and has right to know - increased based on urgency and turnaround), number of pages, etc.

Thank you for your immediate attention.

Krier, Nancy (ATG)

From: Nadelman, Jessica <Jessica.Nadelman@seattle.gov>
ent: Tuesday, September 26, 2017 3:53 PM
To: Krier, Nancy (ATG)
Subject: Public Records Model Rules Revisions
Attachments: Official ModRulesFilingCombined Seattle proposed edits-92517.docx; City of Seattle Comments to Proposed Changes to Public Records Model Rules_91217.pdf

Nancy:

Attached please find the City of Seattle's suggested edits to the proposed changes to the Model Rules on Public Disclosure, as well as comments explaining the City's basis for the edits. These materials represent the collective opinion of the City of Seattle public records staff, including the Executive and Legislative branches, the City Attorney's Office, and the Seattle Police Department. The City has significant concerns about a number of the proposed edits and we would appreciate your attention to these materials. Please let us know if you have any questions.

Thank you.

Jessica

Jessica Nadelman
Assistant City Attorney

Seattle City Attorney's Office
Civil Division
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Phone: 206-386-0075
FAX: 206-684-8284
jessica.nadelman@seattle.gov

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1) We suggest adding the Washington Association of Public Records Officers to the list of public records resources. See proposed amendment to WAC 44-14-010.
2) The revisions do not adequately incorporate language permitting agencies that use a web portal for submission of public records requests, communication with requestors, payments and production of records. See proposed amendments to WAC 44-14-020; 44-14-03006; 44-14-04002; 44-14-070(7);
3) The PRA does not require requestors to provide identifying information, address or telephone and email. A requestor should be able to submit requests anonymously with no physical address information or telephone number as long as they provide a means to be contacted for communication, payment and records production. See proposed amendment to WAC 44-14-030
4) Directing agencies to "prioritize" requests seems proscriptive and not consistent with the PRA's admonishment to treat requestors similarly. The terms "complexity" or "assessment" should be substituted. See proposed amendment to WAC 44-14-040.
5) The rules are inconsistent as to agency obligation to inform a requestor that their request is closed. See proposed amendment to WAC 44-14-040 (12) to create consistency with language in WAC 44-14-04003(8); 44-14-04004(6) and 44-14-04006(1).
6) The requirement that agencies "categorize" requests according to the criteria set for in the rule is excessively proscriptive and creates liability for agencies' failure to properly categorize a request. Agencies should have flexibility as to how they determine whether a request is complex and how that burden will be managed. See proposed amendment to WAC 44-14-04003.
7) Agencies should not be required to commit half-day intervals to records inspection. Any segment longer than two hours would impact the agency's ability to conduct its regular business. See proposed amendment to WAC 44-14-04005.
8) Agencies are subject the Records Retention Act. Additional requirements regarding commonly requested records are unnecessary. See proposed amendment to WAC 44-14-04006(3).
9) The statutory obligation that each agency compile and maintain a list of laws that prohibit disclosure is complex, onerous, and will inevitably result in inconsistencies. We suggest that agencies be permitted to meet this requirement by pointing to the code revisers schedule and/or the AGO website. See proposed amendments to WAC 44-14-06001.
10) Agencies should be permitted to calculate the overhead and administrative costs of transmitting electronic records. (RCW 42.56.070(7) See proposed amendment to WAC 44-14-07001(2).

CODE REVISER USE ONLY

PROPOSED RULE MAKING

CR-102 (August 2017)
(Implements RCW 34.05.320)
Do **NOT** use for expedited rule making

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: August 23, 2017
TIME: 9:39 AM

WSR 17-17-157

Agency: Office of the Attorney General

☒ **Original Notice**
☐ **Supplemental Notice to WSR _____**
☐ **Continuance of WSR _____**

☒ **Preproposal Statement of Inquiry was filed as WSR** 16-23-038 **; or**
☐ **Expedited Rule Making--Proposed notice was filed as WSR_____; or**
☐ **Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).**
☐ **Proposal is exempt under RCW_____.**

Title of rule and other identifying information: (describe subject) Public Records Act – Model Rules Chapter 44-14 WAC

Hearing location(s):

Date:	**Time:**	**Location:** (be specific)	**Comment:**
October 4, 2017	6:00 p.m. – 8:00 p.m.	Legislative Building Columbia Room, Washington State Capitol, 416 Sid Snyder Ave SW, Olympia, WA 98504	

Date of intended adoption: On or after October 13, 2017 (Note: This is **NOT** the **effective** date)

Submit written comments to:
Name: Nancy Krier
Address: 1125 Washington Street SE PO Box 40100 Olympia, WA 98504-0100
Email: nancyk1@atg.wa.gov
Fax:
Other: Written comments may also be submitted through the online comment form available on the website of the Office of the Attorney General on the Rulemaking Activity page at http://www.atg.wa.gov/rulemaking-activity.
By (date) September 29, 2017

Assistance for persons with disabilities:
Contact Nancy Krier
Phone: (360) 586-7842
Fax:
TTY:
Email: nancyk1@atg.wa.gov
Other: Alternate contact: Melissa Brearty, Rules Coordinator, (360) 534-4849; MelB@ATG.WA.GOV
By (date) September 29, 2017

Purpose of the proposal and its anticipated effects, including any changes in existing rules: The Office of the Attorney General has proposed amendments to several advisory Public Records Act (PRA) Model Rules (Model Rules) and comments in chapter 44-14 WAC, and proposed to repeal one comment (WAC 44-14-07003). The purpose of the proposal is to update the Model Rules and comments to reflect developments in statutes, case law and technology since the rules and comments were last revised in 2007. For example, the proposed amendments address use of personal devices with respect to public records, electronic records, procedures to make requests, procedures to process requests, copying charges, other new PRA requirements, statutory citations, and other topics. All the Model Rules and comments in chapter 44-14 WAC are proposed to be amended, except for WAC 44-14-04007 (Later-discovered records), WAC 44-14-060 (Exemptions), and WAC 44-14-08003 (Alternative dispute resolution). The proposal would repeal WAC 44-14-07003 (Charges for electronic records) since

such charges are now addressed in the PRA. Much of WAC 44-14-06002 (Summary of exemptions) is proposed to be repealed since the comment is quickly outdated when new court decisions concerning exemptions are issued, or when the State Legislature enacts or amends exemptions. Instead, the comment would refer readers to the office's online *Open Government Resource Manual*, which links to many court decisions and statutes concerning exemptions.

The anticipated effect is to modernize the Model Rules and comments so they are a more functional PRA resource for requestors, public agencies, the courts, the State Legislature and others.

Reasons supporting proposal: The Public Records Act (PRA) at chapter 42.56 RCW provides the public access to state and local government agency public records. The PRA directs the Office of the Attorney General to adopt, and from time to time revise, advisory Model Rules. RCW 42.56.570(2) and (3). Under RCW 42.56.570(2), the Attorney General is required to adopt Model Rules 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. RCW 42.56.570(4) provides that local agencies should consult the Model Rules when establishing local ordinances for compliance with the requirements and responsibilities under chapter 42.56 RCW. RCW 42.56.152 provides that records training must be consistent with the Model Rules.

The Model Rules are at chapter 44-14 WAC. The purpose of the Model Rules and their comments is to provide information to records requestors and state and local agencies about "best practices" for complying with the PRA. WAC 44-14-00001. The Model Rules are advisory but they provide public agencies model language, and other information in comments, to consider when adopting their PRA regulations, ordinances or policies.

In 2006-2007, the Attorney General adopted the Model Rules and comments. Several of the rules and their comments are now outdated in part due to multiple statutory, case law and technological developments since 2007. While the Model Rules and comments are advisory only, they are a resource. However, due to the passage of time the outdated provisions are currently less useful for public records requestors, public agencies, the courts, the State Legislature, and others.

The reasons to support the proposal to amend the Model Rules and comments, and to repeal one rule comment, include modernizing the rules and comments so they better reflect current laws and so they are a more functional resource about the PRA and suggested best practices.

Statutory authority for adoption: RCW 42.56.570

Statute being implemented: RCW 42.56.570; chapter 42.56 RCW

Is rule necessary because of a:

Federal Law?	☐ Yes	☒ No
Federal Court Decision?	☐ Yes	☒ No
State Court Decision?	☐ Yes	☒ No

If yes, CITATION: Note: While the rules are advisory and are not mandated by court decisions, several Public Records Act court decisions have been issued since the Model Rules and their comments were adopted in 2006-2007. The court decisions referred to in the Model Rules and comments, and in the proposed amendments, are listed in the footnotes to the Model Rules and comments.

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: The State Legislature enacted a number of changes in the Public Records Act since 2007. The State Legislature also recodified the PRA from chapter 42.17 RCW to chapter 42.56 RCW. In addition to other updates to statutory citations, the proposed amendments to chapter 44-14 WAC remove the citations to former chapter 42.17 RCW. A recodification table providing a crosswalk between chapter 42.17 RCW citations and chapter 42.56 RCW citations is available on the web site of the Office of the Attorney General.

Name of proponent: (person or organization) Bob Ferguson, Attorney General

☐ Private
☐ Public
☒ Governmental

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting:	Nancy Krier	Olympia, WA	(360) 586-7842
Implementation:	N/A		
Enforcement:	N/A		

Is a school district fiscal impact statement required under RCW 28A.305.135? ☐ Yes ☒ No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

Is a cost-benefit analysis required under RCW 34.05.328?

☐ Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

☒ No: Please explain: A cost-benefit analysis is not required under RCW 34.05.328. Pursuant to RCW 34.05.328 (5)(a)(i), this agency is not an agency mandated to comply with RCW 34.05.328. Further, the agency does not voluntarily make that section applicable to the adoption of this rule pursuant to subsection (5)(a)(ii), and to date, the joint administrative rules review committee has not made the section applicable to the adoption of this rule.

Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

☐ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.
Citation and description:]

☐ This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

☐ This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

☐ This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

- ☐ RCW 34.05.310 (4)(b) (Internal government operations)
- ☐ RCW 34.05.310 (4)(c) (Incorporation by reference)
- ☐ RCW 34.05.310 (4)(d) (Correct or clarify language)
- ☐ RCW 34.05.310 (4)(e) (Dictated by statute)
- ☐ RCW 34.05.310 (4)(f) (Set or adjust fees)
- ☐ RCW 34.05.310 (4)(g) ((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

☒ This rule proposal, or portions of the proposal, is exempt under RCW RCW 42.56.570; RCW 42.56.070; RCW 42.56.120.
Explanation of exemptions, if necessary: The Model Rules are advisory only and apply only to governmental agencies, not small businesses. RCW 42.56.570. To the extent there are costs assessed by public agencies providing records in response to PRA requests by small businesses, the authorized costs are set out in statute and apply to all requestors. RCW 42.56.070; RCW 42.56.120.

COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

☐ No Briefly summarize the agency's analysis showing how costs were calculated. _

☐ Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

Date: August 22, 2017	**Signature:** Bob Ferguson
Name: Bob Ferguson	
Title: Attorney General	

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00001 Statutory authority and purpose. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time. RCW ((~~42.17.348 (2) and (3)/~~)) 42.56.570 (2) and (3). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, ((~~RCW 42.17.250/42.56.040 through 42.17.348/42.56:570 (~~)) chapter 42.56 RCW ("PRA" or "act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance. The act provides that local agencies should consult the model rules when establishing local ordinances implementing the act. RCW 42.56.570(4). The act further provides that public records officer training must be consistent with the model rules. RCW 42.56.152(3).

The act applies to all state agencies and local units of government. The model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "name of agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, ((~~www.atg.wa.gov/records/modelrules~~)) http://www.atg.wa.gov/model-rules-public-disclosure.

The initial model rules ((~~are~~)) in 2006-2007 were the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments ((~~that are contained in the rule-making file~~)). The model rules reflect many of the points and concerns presented in those forums. For the model rules updates in 2017, the attorney general considered case law and legislative developments since 2006-2007. The attorney general sought additional comments from requestors, agencies, and others.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all" approach in the model rules, therefore, may not be best for requestors and agencies.[1]

Note: [1]See also *Hearst v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (agencies "are afforded some discretion concerning the procedures whereby agency information is made available.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00002 Format of model rules. ((~~We are publishing~~)) The model rules are published with comments. The comments have five-digit WAC numbers such as WAC 44-14-04001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-040.

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. To do so, the comments contain many citations to statutes, cases, and formal attorney ((~~general's~~)) general opinions.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and state agencies. ((~~The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.~~)) Local agencies are required to consider them in establishing local ordinances implementing the act. RCW 42.56.570. The Washington courts have also considered the model rules in several appellate decisions.[1]

Note: [1] See, e.g., *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009); *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 277 P.3d 670 (2011); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00004 Recodification of the act. On July 1, 2006, the act ((~~will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic.~~)) was recodified from chapter 42.17 to 42.56 RCW, and titled the "Public Records Act." The recodification ((~~does~~)) did not change substantive law. The initial model rules ((~~provide dual citations to the current act, chapter 42.17 RCW, and the newly codified act, chapter 42.56 RCW (for example, RCW 42.17.340/42.56.550)~~)) and older court decisions referred to the prior codification numbers in chapter 42.17 RCW. A recodification conversion chart (from chapter 42.17 to 42.56 RCW) is on the attorney general's office web site at http://www.atg.wa.gov/model-rules-public-disclosure.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00005 Training is ((~~critical~~)) required. The act is complicated, and compliance requires training. ((~~Training can be the difference between a satisfied requestor and expensive litigation. The~~

~~attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance.~~)) Training on the act is required for local elected officials, statewide elected officials, persons appointed to fill vacancies in a local or statewide office, and public records officers. RCW 42.56.150; 42.56.152. Public records officers must also receive training on electronic records. RCW 42.56.152(5). All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training. Agencies are encouraged to document training for persons required to receive training. The attorney general's office has training resources including sample training documentation forms available on its web site at http://www.atg.wa.gov/OpenGovernmentTraining.aspx. Training can be the difference between a satisfied requestor and expensive litigation. The courts can consider lack of training as a penalty factor in actions filed under RCW 42.56.550, the act's enforcement provision.[1]

Note: [1] *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 738 (2010).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-00006 Additional resources. Several web sites provide information on the act. The attorney general office's web site on public records is ((~~www.atg.wa.gov/records/deskbook.shtml~~)) http://www.atg.wa.gov/obtaining-records, which also includes a link to an *Open Government Resource Manual*. The municipal research and services center, an entity serving local governments, provides ((~~a~~)) public records ((~~handbook at www.mrsc.org/Publications/prdpub04.pdf~~)) resources on its web site at http://mrsc.org/Home.aspx. A requestor's organization, the Washington Coalition for Open Government, has materials on its web site at www.washingtoncog.org. The Washington Association of Public Records Officers (WAPRO) has resources for agency public records officers at https://wapro.memberclicks.net.

More materials are available from other organizations such as the Washington State Bar Association ((~~is publishing a twenty-two-chapter deskbook on public records in 2006. It will be available for purchase at www.wsba.org~~)).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-010 Authority and purpose. (1) RCW ((~~42.17.260(1)/~~)) 42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" at RCW 42.56.010(3) to include 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 the agency. RCW 42.56.010(3) excludes from the definition of "public record" the records of volunteers that are not otherwise required to be retained by the agency and which are held by volunteers who do not serve in an administrative ca-

pacity; have not been appointed by the agency to an agency board, commission or internship; and do not have a supervisory role or delegated authority. RCW ((~~42.17.260(2)/~~)) 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the procedures (name of agency) will follow in order to provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW ((~~42.17.260(1)/~~)) 42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW ((~~42.17.020(2)~~)) 42.56.010(1).

Court ((~~files and~~)) records, judges' files, and the records of judicial branch agencies are not subject to the act.[1] Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court or judicial branch records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

(1) Whether the entity performs a government function;

(2) The level of government funding;

(3) The extent of government involvement or regulation; and

(4) Whether the entity was created by the government((~~. Op. Att'y Gen. 2 (2002)~~)).[2]

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). The act includes a county "office" as an agency. RCW 42.56.010(1). However, the act ((~~defines~~)) also includes the county as a whole as an "agency" subject to the act. ((~~RCW 42.17.020(2). An agency should coordinate responses to records requests across departmental lines. RCW 42.17.253(1)~~)) *Id.* Therefore, some counties may have one public records officer for the entire county; others may have pub-

lic records officers for each county official or department. The act does not require a public agency that has a records request directed to it to coordinate its response with other public agencies.[3] Regardless, public records officers must be publicly identified. RCW 42.56.580 (2) and (3) (agency's public records officer must "oversee the agency's compliance" with act).

Notes: [1]*Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986); *West v. Washington State Assoc. of District and Municipal Court Judges*, 190 Wn. App. 931, 361 P.3d 210 (2015). See the courts' General Rule 31 and 31.1 regarding access to court records.

[2]((~~See also~~)) *Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 974 P.2d 886((~~, *review denied*, 138 Wn.2d 1015, 989 P.2d 1143~~)) (1999); *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 387 P.3d 690 (2017). See also Op. Att'y Gen. 2 (2002) and Op. Att'y Gen. 5 (1991).

[3]*Koenig v. Pierce County*, 151 Wn. App. 221, 211 P.3d 423 (2009).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides that state agencies are to publish a rule in the Washington Administrative Code (WAC) and local agencies are to make publicly available at the central office guidance for the public that includes where the public may obtain information and make submittals and requests. RCW 42.56.040.

The act provides: "Agencies shall adopt and enforce reasonable rules and regulations... 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." RCW ((~~42.17.290/~~)) 42.56.100. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."[1]

At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW ((~~42.17.270/~~)) 42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

The courts have held that the act requires strict compliance with its procedural provisions, but also that reasonable procedures will be sustained.[2]

Notes: [1]*Andrews v. Washington State Patrol*, 183 Wn .App. 644, 334 P.3d 94 (2014) (Court of Appeals recognized that agencies must provide fullest assistance to requestors, but also that "a flexible approach" that focuses on the thoroughness and diligence of an agency's response is most consistent with the concept of "fullest assistance.")

[2]*Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007); *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-01003 Construction and application of act. The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their 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 that they may maintain control over the instruments that they have created." RCW ((~~42.17.251/~~)) 42.56.030. The initiative creating the act further provides: "... mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW ((~~42.17.010(11)~~)) 42.17A.001(11). The act further provides: "Courts shall take into account the policy of (the act) that 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." RCW ((~~42.17.340(3)/~~)) 42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.[1]

The act emphasizes ((~~three separate times~~)) that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW ((~~42.17.010, 42.17.251/~~)) 42.56.030((~~, 42.17.920.[1]~~)). The act places the burden on the agency of proving a record is not subject to disclosure, or that its estimate of time to provide a ((~~full~~)) response ((~~is~~)) or its estimated copy charges are "reasonable." RCW ((~~42.17.340 (1) and (2)/~~)) 42.56.550 (1) and (2). The act also encourages disclosure by awarding a prevailing requestor reasonable attorneys' fees, costs, and a possible daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure, or its estimate of time, or its estimate of copying costs, is not "reasonable." RCW ((~~42.17.340(4)/~~)) 42.56.550(4).

An additional incentive for disclosure is RCW ((~~42.17.258~~)) 42.56.060, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

Note: [1]See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the ((~~three~~)) legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.")((.))

The courts have repeatedly held that the purpose of the act is a strongly worded mandate to provide access to public agency records concerning the workings of government, in order for the people to hold the government accountable. *Prog. Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994); *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). The legislature addressed concerns about uses of the act by prison inmates and persons residing in a civil commitment facility for sexually violent predators for purposes other than government accountability. RCW 42.56.565 (criteria for obtaining injunctions with respect to inmate requests, including requests made for the purposes of harassment); see also RCW 71.09.120(3) (persons residing in a civil commitment facility for sexually violent predators). The courts have also spoken with disfavor concerning use of the act for purposes other than government accountability. See, e.g., *Kozol v. Dept. of Corr.*, 191 Wn. App. 1034, 366 P.3d 933 (2015) (inmate "concocted a scheme in prison to make money off the Public Records Act"); *Mitchell v. Wash. State Inst. Of Pub. Policy*, 153 Wn. App. 803, 830 P.3d 280 (2009) ("Using the PRA as a vehicle of personal profit through false, inaccurate, or inflated costs is contrary to the PRA's stated purpose to keep the governed informed about their government and costs based on false, inaccurate, or inflated claims do not serve that purpose and are not reasonable.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-020 Agency description—Contact information—Public records officer. (1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) If an agency does not use a web portal to receive records requests, a~~A~~ny person wishing to request access to public records of (agency), or seeking assistance in making such a request should con- tact the public records officer of the (name of agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number if relevant)
(email)

If an~~Some~~ agency~~ies~~ uses a web portal~~s~~ to receive records requests,~~.~~ i~~I~~nformation about the portal and a link to an agency records request web portal directing any person wishing to request access to public records of (agency), should be made~~, if applicable, is also~~ available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW ((~~42.17.250(1)/~~)) 42.56.040(1).[1] A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local agency. RCW ((~~42.17.250(1)/~~)) 42.56.040(1). An agency should post its public records rules on its web site. An agency cannot invoke a procedure if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW ((~~42.17.250(2)/~~)) 42.56.040(2).

Note: [1]See, e.g., WAC 44-06-030 (attorney ((~~general office's~~)) general's office organizational and public records methods statement); WAC 388-01-020 (department of social and health services organizational structure rule); City of Kirkland Public Records Act Rule 020 available at http://www.kirklandwa.gov/depart/Finance_and_Administration/Public_Records/Public_Records_Request.htm (agency description).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW ((~~42.17.253(1)~~)) 42.56.580(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. RCW 42.56.580(2). A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public, such as posting it on the agency's web site. RCW ((~~42.17.253(3)~~)) 42.56.580(3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency). Many public records are also available for inspection and copying on the (name of agency's) web site at any time, at no cost.

(2) **Records index.** (*If agency keeps an index.*) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed online at (web site address). (If there are multiple indices, describe each and its availability.)

(*If agency is local agency opting out of the index requirement.*) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to

view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form or through an online portal, or by letter, fax (if the agency uses fax), or email addressed to the public records officer at the email address publicly designated by (name of agency), or by submitting the request in person at (name of agency and address) and including the following information:

~~• Name of requestor;~~

~~• Address of requestor;~~

~~• Other contact information, including telephone number and any email address;~~

• Sufficient requestor identifying and contact information to allow an agency to communicate regarding the request and provide requested records;

• Identification of the public records adequate for the public records officer or designee to locate the records; and

• The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), ((~~standard photocopies will be provided at (amount) cents per page~~)) charges for copies are provided in a fee schedule available at (agency office location and web site address).

(c) A records request form is available for use by requestors at the office of the public records officer and online at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03001 "Public record" defined. For most public records, the courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.((~~1~~)) Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW ((~~42.17.020(41)~~)) 42.56.010(3). "Writing" is defined very broadly as: "... 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 record-

ings, magnetic or punched cards, discs, drums, diskettes, sound re-

cordings, and other documents including existing data compilations from which information may be obtained or translated." RCW ((~~42.17.020(48)~~)) 42.56.010(4). An email ((~~is a "writing~~)), text, social media posting and database are therefore also "writings."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW ((~~42.17.020(41)~~)) 42.56.010(3).[1] Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be if its existence was used for a governmental purpose.[2] For example, a record showing the existence of a purely personal email sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the email itself were not.((~~2~~)) [3]

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW ((~~42.17.020(41)~~)) 42.56.010(3).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."((~~3~~)) [4] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.((~~4~~)) [5] The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a public record to a third party for the sole purpose of avoiding disclosure.((~~5~~)) [6]

Sometimes agency employees or officials may work on agency business from home computers((~~. These home computer~~)) or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's employment, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."[7] RCW ((~~42.17.020(41)~~)) 42.56.010(3). However, the act does not authorize unbridled searches of agency property.((~~6~~)) [8] If agency property is not subject to unbridled searches, then neither is the home computer, or personal device or personal account of an agency employee or official. Yet, because the ((~~home computer documents~~)) records relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees and officials that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees and officials to keep agency-related documents with any retention requirements on home computers or personal devices in separate folders ((~~and~~)) temporarily, until they are provided to the agency. An agency could also require an employee or official to routinely blind carbon copy ("bcc") work emails in a personal account back to ((~~the employee's~~)) an agency email account. If the agency receives a request for records that are located solely on employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the ((~~employee~~)) individual to ((~~for-~~

~~ward~~)) search for and provide any responsive documents ((~~back~~)) to the agency, and the agency should process the request as it would if the records were on the agency's computers((~~.~~)) or in agency-owned devices or accounts. The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.[9]

Agencies could provide employees and officials with an agency-issued device that the agency retains a right to access. Or an agency could limit or prohibit employees' and officials' use of home computers, personal devices or personal accounts for agency business. Agencies should have policies describing permitted uses, if any, of home computers, personal devices or personal accounts for agency business. The policies should also describe the obligations of employees and officials for retaining, searching for and producing the agency's public records.[10]

Notes:

[1]*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998)((~~. For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41)~~)) (broadly interpreting the provision concerning governmental function).

[2]See *Mechling v. Monroe*, 152 Wn. App. 830, 867, 222 P.3d 808 (2009) ("[P]urely personal emails of those government officials are not public records."); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) (describing that an employee or official must provide the agency responsive "public records" but is not required to provide "personal records").

[3]*Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (record of volume of personal emails used for governmental purpose).

((~~(3)~~)) [4]*Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999)((~~.~~)); *Nissen*, 183 Wn.2d at 882. (For a record to be "used" 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 an agency "uses" it.)

((~~[4]*Id.*~~))[5]*Concerned Ratepayers*, 138 Wn.2d 950.

((~~(5)~~)) [6]See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

((~~(6)~~)) [7]*Nissen*, 183 Wn.2d at 882; *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). In *Nissen* the State Supreme Court held that a 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.

[8]See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

[9]*Nissen*, 183 Wn.2d at 886-887.

[10]*Id.* at 877, 886-887.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW ((~~42.17.280/~~)) 42.56.90. If the agency is very small and does not have customary office hours of at least thirty hours per week, and while the act does not specify a particular schedule, making the records ((~~must be~~)) available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. satisfies the thirty-hour requirement. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03003 Index of records. State and local agencies are required by RCW ((~~42.17.260/~~)) 42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW ((~~42.17.260(6)/~~)) 42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies.

A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW ((~~42.17.260(5)/~~)) 42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW ((~~42.17.260 (4)(a)/~~)) 42.56.070 (4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records, the vast majority of records were paper, and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records. Agencies could also consider using their records retention schedules as their index, or direct requestors to the schedules as a way to describe the types of records an agency retains and for what periods of time. See chapter 40.14 RCW and WAC 44-14-03005.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03004 Organization of records. An agency must "protect public records from damage or disorganization." RCW ((~~42.17.290/~~)) 42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy non- exempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. An agency's information "must be managed with great care to meet the objectives of citizens and their governments." RCW 43.105.351. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office, or alter or damage an original record. An agency may send original records to a reputable commercial copying center to fulfill a records request if

the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).[1]

The legislature encourages agencies to electronically store and provide public records:

> Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens((~~...and~~)), organizations, business, and governments. Information must be managed with great care to meet the objectives of citizens and their governments. ((~~...~~))
>
> 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.

RCW ((~~43.105.250~~)) 43.105.351. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. RCW 42.56.520. Agencies are encouraged to do so, and requestors are encouraged to access records posted online in order to preserve taxpayer resources.[2] For those requestors without access to the internet, an agency ((~~could provide a~~)) is to provide copies or allow the requestor to view copies using an agency computer terminal at its office. RCW 42.56.520.

Notes:

[1]See also *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015) (agency can send records to outside vendor for copying).

[2]See legislative findings in chapter 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.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.[1] Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at ((~~www.secstate.wa.gov/archives/gs.aspx~~)) www.sos.wa.gov/archives/ (select "Records Management").

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling

emails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all emails after a short period of time (such as thirty days). While many of the emails (like other public records) could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all emails or other public records after a short period no matter what their content may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules. Public records officers must receive training on retention of electronic records. RCW 42.56.152(5).

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW ((~~42.17.290/~~)) 42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. An exception exists for certain portions of a state employee's personnel file. RCW ((~~42.17.295/~~)) 42.56.110.

Note: [1]An agency can be found to violate the Public Records Act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record after a request is made. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989). However, it is not a violation of the Public Records Act if a record is destroyed prior to an agency's receipt of a public records request for that record. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009); *West v. Dep't of Nat. Res.*, 163 Wn. App. 238, 258 P.3d 78 (2011). The Public Records Act (chapter 42.56 RCW) and the records retention statutes (chapter 40.14 RCW) are two different laws.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request.((~~1~~)) RCW 42.56.080(2). Agencies may recommend that requestors submit requests using an agency-provided form or web page. However, a person seeking records must make a "specific request" for "identifiable records" which provides "fair notice" and "sufficient clarity" that it is a records request.[1] An agency may prescribe the means of requests in its rules. RCW 42.56.040; RCW 42.56.070(1); RCW 42.56.100; RCW 34.05.220 (1)(b) (state agencies). An agency can adopt reasonable procedures requiring requests to be submitted only to designated persons[2] (such as the public records officer), or a specific agency address (such as a dedicated agency email address for receiving requests, or a mailing/street address of the office where the public records officer is located, or a web portal).

Agency public internet web site records - No request required. A requestor is not required to make a public records request before inspecting, downloading or copying records posted on an agency's public web site. To save resources for both agencies and requestors, agencies are strongly encouraged to post commonly requested records on their

web sites. Requestors are strongly encouraged to review an agency's web site before submitting a public records request.

In-person requests. An agency must honor requests received in person during normal business hours. RCW 42.56.080(2). An agency should have its public records request form available at the office reception area so it can be provided to a "walk-in" requestor. The form should be directed to the agency's public records officer.

Mail, email and fax requests. A request can be sent ((~~in~~)) to the appropriate person or address by U.S. mail. RCW ((~~42.17.290/~~)) 42.56.100. A request can also be made by email, fax (if an agency still uses fax), or orally((~~. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies)~~)) (but should then be confirmed in writing; see further comment herein).

Public records requests using the agency's form or web page. An agency should have a public records request form. An agency is encouraged to make its public records request form available at its office, and on its web site((~~.~~

~~A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-04002(1), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.~~

~~An agency should have a public records request form~~)). Some agencies also have online public records request forms or portals on a page on their web sites, set up to specifically receive public records requests. Agencies may recommend that requestors submit requests using an agency-provided form or web page. RCW 42.56.080(2). In this comment, requestors are strongly encouraged to use the agency's public records request form or online form or portal to make records requests, and then provide it to the designated agency person or address. Following this step begins the important communication process under the act between the requestor and the agency.[3] This step also helps both the requestor and the agency, because it better enables the agency to more promptly identify the inquiry as a public records request, timely confirm its receipt with the requestor, promptly seek clarification from the requestor if needed, and otherwise begin processing the agency's response to the request under the act.

An agency request form or online form or portal should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form or online portal should recite that inspection of records is free and provide ((~~the~~

~~per-page charge for standard photocopies~~)) information about copying fees.

An agency request form or online form or portal should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or email should be provided. Requestors should provide an email address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

Bot requests. An agency may deny a "bot" request, which is one of multiple requests from a requestor to the agency within a twenty-four-hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential agency functions. RCW 42.56.080(3). A "bot" request means a records request that an agency reasonably believes was automatically generated by a computer program or script.

Oral requests. A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger or complex ones, oral requests may be allowed but are problematic.[4] An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in this comment and in WAC 44-14-04002(1), a requestor must provide the agency with fair notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required notice or satisfy the agency's Public Records Act procedures. Therefore, requestors are strongly encouraged to make written requests, directed to the designated agency person or address.

If an agency receives an oral request, the agency staff person authorized to receive the request such as the public records officer, should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorialized the request. If the staff person is not the proper recipient, he or she should inform the person of how to contact the public records officer to receive information on submitting records requests. The public records officer serves "as a point of contact for members of the public in requesting disclosure of public records and oversees the agency's compliance with the public records disclosure requirements." RCW 42.56.580.

Prioritization of records requested. An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

Purpose of request. An agency cannot require the requestor to disclose the purpose of the request ((~~with two~~)), apart from exceptions permitted by law. RCW ((~~42.17.270/~~)) 42.56.080. ((~~First~~)) For example, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a com-

mercial purpose and require the requestor to provide information about the purpose of the use of the list.((2)) [5] An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW ((~~42.17.260(9)/~~)) 42.56.070(9).

((~~Second~~)) And, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to ((~~a claimant for benefits or his or her representative~~)) identified persons. In such cases, an agency is authorized to ask the requestor if he or she fits ((~~this criterion~~)) the statutory criteria for disclosure of the record.

Indemnification. An agency is not authorized to require a requestor to indemnify the agency. ((~~Op. Att'y Gen. 12 (1988).~~[3])) [6]

Notes:

[1] RCW 42.56.080 (1) and (2); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA [PRA] request.")((.)); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (an agency's duty under the act is triggered when it receives a "specific request" for records and when the requestor states "the request with sufficient clarity to give the agency fair notice that it had received a request for public records").

[2] ((~~Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.~~)) *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008) (upholding agency's procedures requiring public records requests to be made to a designated person).

[3] See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3) ("Communication is usually the key to a smooth public records process for both requestors and agencies.").

[4] Oral requests make it "unnecessarily difficult" for the requestor to prove what was requested. *Beal v. City of Seattle*, 150 Wn. App. 865, 874-75, 209 P.3d 872 (2009); see also *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010) (holding that an oral request for "that email" did not provide the city with sufficient notice that metadata was also being requested).

[5] *SEIU Healthcare 775W v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016).

[6] Op. Att'y Gen. 12 (1988). See also RCW ((~~42.17.258/~~)) 42.56.060 which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." ((~~Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.~~))

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-040 Processing of public records requests—General. (1) **Providing "fullest assistance."** The (name of agency) is charged by statute with adopting rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests. The public records officer or designee will process requests in the order allowing the most requests to be processed in the most efficient manner.

((~~(2)~~)) (a) Upon receipt of a request, the (name of agency) will assign it a tracking number and log it in.

(b) The public records officer or designee ~~will~~ may evaluate the request according to the nature of the request, volume, and availability of requested records, and may give it a ~~priority~~ complexity category or otherwise assess the agency burden involved in responding to the request.

(i) The ~~priority~~ complexity category or assessment guides the (name of agency) in determining its reasonable level of effort to devote to responding to the request, as the (name of agency) is obligated to prevent public disclosure demands from causing excessive interference with other essential agency functions. RCW 42.56.100.

(ii) The ~~priority~~ complexity category or assessment also guides the (name of agency) in providing a reasonable estimate of time to respond to a request. RCW 42.56.520.

(iii) The ~~priority~~ complexity category or assessment also guides the (name of agency) in determining the order of requests processed. Responding to a records request is not always a sequential process. The (name of agency) may process requests out of order, enabling it to better respond to simple as well as complex requests. At any given time, the (name of agency) may have multiple records requests in the queue. The processing of requests in the queue will depend upon the priority category; the number of records responsive to a request; the number and size of other records requests in the queue; the amount of processing required for a request or other requests in the queue; the status of a particular request, such as whether the (name of agency) is awaiting clarification or payment from the requestor, a response to a third-party notice, or legal review; and, the current volume of other (name of agency) work, as it affects the amount of staff time that can be devoted to a request or requests.

(2) The request will be evaluated for ~~prioritization~~ complexity or assessed using the following criteria: The immediacy of the required response in the interest of public safety (documented imminent danger); the complexity of the records request in terms of breadth, ease of identification of potentially responsive records, clarity and accessibility; the amount of coordination required between (departments) (divisions); the number of records requested; the extent of research and searching needed by staff who are not primarily responsible for public disclosure; the format of the records; the need for legal review and/or additional assistance from third parties in identification and assembly; the need to notify affected third parties; the need to consider customized access, and, other criteria the public records officer deems appropriate.

(3) ~~Following evaluation, the (name of agency) will assign a category number.~~ After initial ~~categorization~~assessment, requests may be ~~recategorized~~reassessed in response to unanticipated circumstances or additional information. The estimated time periods for each category are goals; the (name of agency) may not be able to comply with the goals but will notify the requestor if the estimated time periods will not be met and need to be adjusted.

(4) **Acknowledging receipt of request.** Following the initial evaluation of the request under (2) and (3) of this subsection, and within five business days[1] of receipt of the request, the public records officer will do one or more of the following, depending upon the category assigned to the request:

(a) Make the records available for inspection or copying((~~;~~ ~~(b)~~)) including:

(i) If copies are available on the (name of agency's) internet web site, provide an internet address and link on the web site to specific records requested;

(ii) If copies are requested and payment of a deposit for the copies, if any, is made or other terms of payment are agreed upon, send the copies to the requestor;

((~~(c)~~)) (b) Acknowledge receipt of the request and provide a reasonable estimate of when records or an installment of records will be available (the public records officer or designee may revise the estimate of when records will be available); or

((~~(d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor.~~)) (c) Acknowledge receipt of the request and ask the requestor to provide clarification for a request that is unclear, and provide, to the greatest extent possible, a reasonable estimate of time the (name of agency) will require to respond to the request if it is not clarified.

(i) Such clarification may be requested and provided by telephone((~~. The public records officer or designee may revise the estimate of when records will be available~~)), and memorialized in writing;

(ii) If the requestor fails to respond to a request for clarification and the entire request is unclear, the (name of agency) need not respond to it. The (name of agency) will respond to those portions of a request that are clear; or

((~~(c)~~)) (d) Deny the request.

((~~(3)~~)) (5) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should ((~~consider contacting~~)) contact the public records officer to determine the reason for the failure to respond.

((~~(4)~~)) (6) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

((~~(5)~~)) (7) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief written explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

((~~(6)~~)) (8) **Inspection of records.**

(a) Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

(b) The requestor must claim or review the assembled records within thirty days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

((~~(7)~~)) (9) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying. Where (name of agency) charges for copies, the requestor must pay for the copies.

((~~(8)~~)) (10) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments, if he or she reasonably determines that it would be practical to provide the records in that way. If, within thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

((~~(9)~~)) (11) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a ((~~diligent~~)) reasonable search for the requested records and made any located nonexempt records available for inspection.

((~~(10)~~)) (12) **Closing withdrawn or abandoned request.** When the requestor either withdraws the request, or fails to clarify an entirely unclear request, or fails to fulfill his or her obligations to inspect the records ((~~or~~)), pay the deposit, pay the required fees for an installment, or make final payment for the requested copies, the public records officer will close the request and, unless the agency has already indicated in previous communication that the request will be closed under the above circumstances, indicate to the re- questor that the (name of agency) has closed the request.

((~~(11)~~)) (13) **Later discovered documents.** If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

Note: [1]In calculating the five business days, the following are not counted: The day the agency receives the request, Saturdays, Sundays and holidays. RCW 1.12.040. See also WAC 44-14-03006.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04001 Introduction. Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to give fair notice that he or she is making a records request, request identifiable records,[2] follow the agency's reasonable procedures, inspect the assembled records or pay for the copies, and be respectful to agency staff. ((~~2~~)) Both the agency and the requestor have a responsibility to communicate with each other when issues arise concerning a request.[3]

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW ((~~42.17.290/~~)) 42.56.100.

Therefore, while providing public records is an essential function of

an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests to that agency, agency resources, and the agency's other functions.

The burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable." RCW ((~~42.17.340(2)/~~)) 42.56.550(2). An agency should be prepared to explain how it arrived at its estimate of time and why the estimate is reasonable.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. An agency is allowed, of course, to do more for the requestor than is required by the letter of the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW ((~~43.105.270 (state~~)) chapter 69, Laws of 2010 (agencies encouraged to post frequently sought documents on the internet); RCW 43.105.351 (legislative intent that agencies prioritize making records widely available electronically to the public).

Notes: [1]RCW ((~~42.17.260(1)/~~)) 42.56.070(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

[2]See RCW ((~~42.17.270/~~)) 42.56.080 ("identifiable record" requirement); RCW ((~~42.17.300/~~)) 42.56.120 (claim or review requirement); RCW ((~~42.17.290/~~)) 42.56.100 (agency may prevent excessive interference with other essential agency functions).

[3]See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3). ("Communication is usually the key to a smooth public records process for both requestors and agencies.")

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04002 Obligations of requestors. (1) **((~~Reasonable~~)) Fair notice that request is for public records.** A requestor must give an agency ((~~reasonable~~)) fair notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.[1] A request using the agency's request form or online request form or portal, or using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests), especially in the subject line of an email or letter, is recommended. The request should be directed to the agency-designated person to receive requests (such as the public records officer) or the agency-designated address for public records requests, or submitted through the agency web portal, which should provide an agency with ((~~reasonable~~)) fair notice in most cases. A requestor should not sub- mit a "stealth" request, which is buried in another document in an at- tempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW ((~~42.17.270/~~)) 42.56.080 and ((~~42.17.340(1)/~~)) 42.56.550(1).

An "identifiable record" is one that is existing at the time of the request and which agency staff can reasonably locate.((~~[2]~~)) The act

does not require agencies to be "mind readers" and to guess what records are being requested.[2] The act does not allow a requestor to make "future" or "standing" (ongoing) requests for records not in existence; nonexistent records are not "identifiable."[3]

A request for all or substantially all records prepared, owned, used or retained by an agency is not a valid request for identifiable records, 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. RCW 42.56.080(1). A "keyword" must have some meaning that reduces a request from all or substantially all of an agency's records. For example, a request seeking any and all records from the department of ecology which contain the word "ecology" is not a request containing a keyword. The word "ecology" is likely on every agency letterhead, email signature block, notice, order, brochure, form, pleading and virtually every other agency document. A request for all of an agency's emails can encompass substantially all of an agency's records, and such a request contains no keywords. The act does not allow a requestor nor require an agency to search through agency files for records which cannot be reasonably identified or described to the agency.((~~3~~))[4] It benefits both the requestor and the agency when the request includes terms that are for identifiable records actually sought by the requestor, and which produce meaningful search results by the agency.

However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.((~~4~~)) [5]

An "identifiable record" is not a request for "information" in general.((~~5~~)) [6] For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."[6] A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories (questions). An agency is not required to answer questions about records, or conduct legal research for a requestor.[7] A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor or explain how the agency is interpreting the requestor's request.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW ((~~42.17.270/~~)) 42.56.080. However, if such a request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes: [1]*Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

~~(e)**Category 2.** Requests that are routine or readily filled because they request easily identified and immediately accessible records requiring little or no coordination among departments or divisions, and do not require clarification or production in installments. Examples include records that are available on the agency's web site, records typically made available at an office reception or often provided without a formal records request (such as copies of current agency brochures or forms, sometimes called "counter records"), and similar records.~~

~~(f)Generally, the agency will respond to Category 2 requests within five business days. If the records cannot be made available within five business days, the agency may extend the time to respond.~~

~~(g)**Category 3.** Requests that are routine and involve a large number of records; responsive records are not easily identified (thus clarification may be needed) or are not easily located or accessible; and, processing the request requires some coordination among departments or divisions.~~

~~(h)The agency will provide a written response to the requestor with in five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 3 requests usually require between five and thirty business days.~~

~~(i)**Category 4.** Requests that are complex and which may be especially broad and vague and which involve: A large number of records that are not easily identified (thus clarification may be needed) or are not easily located or accessible; require significant coordination among multiple departments or divisions; require research by agency staff who are not primarily responsible for public disclosure; and/or require review by public disclosure staff to determine whether any of the records are exempt from production; and/or involve third-party notice to one person or entity.~~

~~(j)The agency will provide a written response to the requestor with in five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 4 requests may require several weeks or months.~~

~~(k)**Category 5.** Requests that meet the criteria of Category 4 and in addition: Require legal review and creation of an exemption log or other multiple brief explanations of withheld or redacted information; and/or involve third-party notice to multiple persons or entities.~~

~~(l)Category 5 also separately includes a request for customized access to information under RCW 42.56.120(3) where the request would require the use of information technology expertise to prepare data compilations, or notice that the agency may proceed with the request by providing customized access services when such compilations and customized access services are not used by the agency for other agency purposes.~~

~~(m)The agency will provide a written response to the requestor with in five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed, or notice of customized access service procedures and charges if relevant. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 5 requests may require several weeks or months, or longer.~~

[2]*Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), ((~~*review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999)~~)) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

[3]*Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002); *Sargent v. Seattle Police Dep't*, 16 Wn. App. 1, 260 P.3d 1006 (2011), *aff'd in part, rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013) ("We hold that there is no standing request under the PRA."); *Smith v. Okanogan County*, 100 Wn. App.7, 994 P.2d 857 (2000) (agency not required to create a record to respond to a PRA request).

[4]*Bonamy*, 92 Wn. App. at 409.

[5]*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).

((~~[5]*Bonamy*, 92 Wn. App. at 409.~~))

[6]((~~*Id.*~~)) *Bonamy*, 92 Wn. App. at 409.

[7]See *Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public((.))").

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is seeking a list of individuals for a commercial use or would violate another statute prohibiting disclosure or restricting disclosure to only certain persons). RCW ((~~42.17.270/~~)) 42.56.080.[1] The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW ((~~42.17.290/~~)) 42.56.100 and ((~~42.17.270/~~)) 42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger or more complex request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order. ((~~[3]~~))

(a) Agencies can use criteria to assess whether the request is routine or complex (WAC 44-14-040) in order to assist them in calculating their estimate of time and in their processing. Complex and broad requests typically take more time to process and may require an agency to provide records in installments, and use additional time to locate and assemble records, notify third parties, and determine if information is exempt.[2]

~~(b)~~ For example, upon receipt of a request, an agency will log it in (see subsection (14) of this section). Then, an agency could apply categories of similar requests and thus treat them similarly in processing the request. ~~To further illustrate, an agency could consider the following processing categories or similar categories with response goal initial estimates:~~

~~(c) **Category 1.** Requests requiring immediate response in the interest of public safety (requestor has documented imminent danger), and limited redaction or legal review is needed. These requests take priority over all other requests.~~

~~(d) Generally, the agency will respond to these requests immediately (including to seek clarification if necessary), or within the next business day or thereafter as soon as possible.~~

(2) **Purpose of request.** An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW ((~~42.17.270/~~)) 42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

((~~(2)~~)) (3) **Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor. RCW ((~~42.17.290/~~)) 42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW ((~~42.17.290/~~)) 42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW ((~~42.17.290/~~)) 42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

((~~(3)~~)) (4) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies.[3] Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If a requestor asks for a summary of applicable charges before any copies are made, an agency must provide it. RCW 42.56.120 (2)(f). The requestor may then revise the request to reduce the number of requested copies. If the request is clarified or modified orally, the public records officer or designee should memorialize the communication in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

((~~(4)~~)) (5) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;

(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to ((~~fully~~)) further respond;

(c) Seek a clarification of the request and if unclear, provide to the greatest extent possible a reasonable estimate of time the agency will require to respond to the request if it is not clarified; or

(d) Deny the request. RCW ((~~42.17.320/~~)) 42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.((~~2~~)) 4

((~~(5)~~)) (6) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.((~~(4)~~)) 5 However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. With respect to databases, for example, there is not always a simple dichotomy between producing an existing record and creating a new record.[6] In addition, an agency may decide to provide a customized service and if so, assess a customized service charge for the actual costs of staff technology expertise needed to prepare data compilations, or when such customized access services are not used by the agency for other business purposes. RCW 42.56.120.

If the agency is considering creating a new record instead of disclosing the underlying records, or creating new records from a database, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records, and describe any customized service charges that may apply.

Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. If an agency translates a record into an alternative electronic format at the request of a requestor, the copy created does not constitute a new public record. RCW 42.56.120(1). Similarly, eliminating a field of an electronic record can be a method of redaction; it is ((~~similar to~~)) like redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying. Scanning paper copies to make electronic copies is a method of copying paper records and does not create a new public record. RCW 42.56.120(1).

((~~(6)~~)) (7) **Provide a reasonable estimate of the time to fully respond.** Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to ((~~fully~~)) respond to the request. RCW ((~~42.17.320/~~)) 42.56.520. ((~~Fully~~)) Responding can mean processing the request (locating and assembling records, redacting, preparing a withholding ((~~index~~)) log, making an installment available, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW ((~~42.17.340(2)/~~)) 42.56.550(2). See WAC 44-14-08004 (5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW ((~~42.17.340(2)/~~)) 42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. It can consider if a request falls

into a category it has defined for processing purposes. See subsection (1)(b) of this section. Some very large requests can legitimately take months or longer to fully provide. See WAC 44-14-040. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates for every requestor, regardless of the nature of the request, are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

While not required,[7] in order to avoid unnecessary litigation over the reasonableness of an estimate, an agency ((~~should~~)) could briefly explain to the requestor the basis for the estimate in the initial response, including describing or referring to its processing categories. See WAC 44-14-040. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate.[8] An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

((~~(7)~~)) (8) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" or partially unclear request. RCW ((~~42.17.320/~~)) 42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an entirely unclear request, the agency need not respond to it further. RCW ((~~42.17.320/~~)) 42.56.520. However, an agency must respond to those parts of a request that are clear. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request or other specified time, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor if it has not already explained when it will close a request due to lack of response by the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW ((~~42.17.320/~~)) 42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

((~~(8)~~)) (9) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW ((~~42.17.290/~~)) 42.56.100.((~~(5)~~)) [9] Once a request

has been closed, the agency can destroy the requested records in accordance with its retention schedule.

((~~(9)~~)) (10) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. The adequacy of a search is judged by the standard of reasonableness.[10] A requestor is not required to "ferret out" records on his or her own.((~~6~~)) A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees and officials if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments.

If agency employees or officials are using home computers, personal devices, or personal accounts to conduct agency business, those devices and accounts also need to be searched by the employees or officials who are using them when those devices and accounts may have responsive records.[11] If an agency's contractors performing agency work have responsive public records of an agency as a consequence of the agency's contract, they should also be notified of the records request. It is better to be over inclusive rather than under inclusive when deciding which staff or others should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An email to staff or agency officials selected as most likely to have responsive records is usually sufficient. Such an email also allows an agency to document whom it asked for records. Documentation of searches is recommended. The courts can consider the reasonableness of an agency's search when considering assessing penalties for an agency's failure to produce records.[12]

Agency policies should require staff and officials to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed potentially responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents. If an agency does not find responsive documents, it should explain, in at least general terms, the places searched.[13]

((~~(10)~~)) (11) **Expiration of reasonable estimate.** An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. ((~~Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record~~)) A failure of an agency to meet its own internal deadline is not a violation of the act, assuming the agency is working diligently to respond to the request.[14] Nevertheless, an agency should promptly communicate with a requestor when it determines its original estimate of time needs to be adjusted.

((~~(11)~~)) (12) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure. ((~~7~~)) RCW ((~~42.17.330/~~)) 42.56.540. Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW ((~~42.17.330/~~)) 42.56.540.[15] This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW ((~~42.17.330/~~)) 42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW ((~~42.17.258/~~)) 42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW ((~~42.17.258/~~)) 42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date on which it must receive a court order enjoining disclosure, to avoid any confusion or potential liability. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include in its calculation the notice period in the "reasonable estimate" of time it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

((~~(12)~~)) (13) **Later discovered records.** If the agency becomes aware of the existence of records responsive to a request which were not provided, the agency should notify the requestor in writing, and

provide a brief explanation of the circumstances, and provide the non-exempt records with a written explanation of any redacted or withheld records.

(14) **Maintaining a log.** Effective July 23, 2017, the agency must maintain a log of public records requests to include the identity of the requestor if provided by the requestor, the date the request was received, the text of the original request, a description of the records redacted or withheld and the reasons therefor, the date of the final disposition of the request. Section 6, chapter 303, Laws of 2017 (to be codified in chapter 40.14 RCW).

Notes:

[1]See also Op. Att'y Gen. 2 (1998).

[2]*West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014).

[3]See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004, n.12 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their records requests).

[4]See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty."); *West v. State Dep't of Natural Res.*, 163 Wn. App. 235, 243, 258 P.3d 78 (2011) (failure to respond within five business days); *Rufin v. City of Seattle*, X Wn. App. X, X P.3d X (2017) (failure to respond within five business days entitles plaintiff to seek attorneys' fees but not penalties).

((~~[3]While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large r~~equests.

~~[4]~~)) [5]*Smith*, 100 Wn. App. at 14.

((~~[5]~~))[6]*Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014).

[7]*Ockerman v. King County Dep't of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 214, 6 P.3d 1215 (2000) (agency is not required to provide a written explanation of its reasonable estimate of time when it does not provide records within five days of the request).

[8]*Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014) (the act recognizes that agencies may need more time than initially anticipated to locate records).

[9]An exception is some state-agency employee personnel records. RCW ((~~42.17.295/~~)) 42.56.110.

((~~[6]*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent r~~esearch'").

~~[7]~~)) [10]*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P. 3d 384 (2012).

[11]*O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010); *Nissen v. Pierce County*, 182 Wn.2d 363, 357 P.3d 45 (2015); *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016).

[12]*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010); *Neighborhood Alliance*, 172 Wn.2d at 728.

[13]*Neighborhood Alliance*, 172 Wn.2d at 728.

[14]*Andrews v. Wash. State Patrol*, 183 Wn. App. 644 at 653; *Hikel v. Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

[15]The agency holding the record can also file a RCW ((~~42.17.330/~~)) 42.56.540 injunctive action to establish that it is not required to release the record or portion of it. An agency can also file an action under the Uniform Declaratory Judgments Act at chapter 7.24 RCW. *Benton County v. Zink*, 191 Wn. App. 194, 361 P.2d 283 (2015).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-04004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or email briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or email might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests.

An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on

the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW ((~~42.17.270/~~)) 42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.[1] Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.[2] The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its public internet web site. Once an agency provides a requestor an internet address and link on the agency's web site to the specific records requested, the agency has provided the records, and at no cost to the requestor. RCW 42.56.520. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency ((~~is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per-page copying charge~~)) shall not impose copying charges for access to or downloading records that the agency routinely posts on its web site prior to receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

(3) **Providing records in installments.** The act ((~~now~~)) provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW ((~~42.17.270/~~)) 42.56.080. An installment can include links to records on the agency's internet web site. The purpose of this installments provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments. An agency can assess charges per installment for copies made for the requestor, unless it is using the up to two-dollar flat fee charge. RCW 42.56.120(4).

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example,

calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW ((~~42.17.290/~~)) 42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

((~~Does not have the record;~~))

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; ((~~or~~))

Without justification, fails to provide the record after the reasonable estimate of time to respond expires((~~.~~

~~(a)**When the agency does not have the record**~~)); or

Determines the request is an improper "bot" request. An agency is only required to provide access to public records it has or has used.[3] An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency (agency A), ((~~the first~~)) agency A cannot respond to the request by telling the requestor to obtain the record from the second agency (agency B). Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

However, an agency is not required to go outside its own public records to respond to a request.[5] If agency A never prepared, owned, used or retained a record, but the record is available at agency B, the requestor must make the request to agency B, not agency A.

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

((~~(b)~~)) (5) **Claiming exemptions.**

((~~(i)~~)) (a) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW ((~~42.17.310(2)/~~)) 42.56.210(1). There are a few exceptions. ((~~5~~)) 6 Withholding an entire record where only a portion of it is exempt violates the act.((~~6~~)) 7 Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure if certain conditions are met. RCW ((~~42.17.310 (1)(e)/~~)) 42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, and the conditions of RCW 42.56.240(2) are met, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW ((~~42.17.310(2)/~~)) 42.56.210(1). For example, if a statute exempted the identity of a person who had been assessed a particular

kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. Another approach is to scan the paper record and redact it electronically. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted; in addition, an agency is required under its records retention schedules to keep responses to a public records request for a defined period of time. For electronic records such as databases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. For other electronic records, an agency may use software that permits it to electronically redact on the copy of the record. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). ((~~See (b)(ii) of this subsection.~~

~~(ii)~~))

~~(b)~~ **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW ((~~42.17.310(4)/~~)) 42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding ((~~index. It~~)) log, along with the statutory citation permitting withholding, and a description of how the exemption applies to the information withheld. The log identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).((~~7~~)) 8 The withholding ((~~index~~)) log need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

Another way to properly provide a brief explanation is to use another format, such as a letter providing the required exemption citations, description of records, and brief explanations. Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency's response.

((~~(5)~~)) (6) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.((~~8~~)) 9 The notification

should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. Such notice by the agency with a summary of applicable estimated charges is required when the requestor asks for an estimate. RCW 42.56.120 (2)(f). The notification can be oral to provide the most timely possible response, although it is recommended that the agency document that conversation in its file or in a follow-up email or letter.

((~~(6)~~)) (7) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided; and, an agency is required to keep copies of its response to a request for the time period set out in its records retention schedule. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so. For example, it may not be necessary to affix a number on the pages of records provided in response to a small request.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making ((~~an index or~~)) a list of the files or records made available for inspection.

Notes:

[1]*Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

[2]*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997); RCW 42.56.120.

[3]*Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

[4]*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

[5]*Limstrom v. Ladenburg (Limstrom II)*, 136 Wn.2d 595, 963 P.2d 896 (1998) n.3 ("On its face the Act does not require, and we do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested."); *Koenig v. Pierce County*, 151 Wn. App. 221, 232-33, 211 P.3d 423 (2009) (agency has no duty to coordinate responses with other agencies, citing to and quoting *Limstrom II*).

[6]The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases ((~~(*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997))~~)) *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

((~~(6)~~)) [7]*Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

((~~(7)~~)) [8]*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

((~~(8)~~)) [9]For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04005 Inspection of records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW ((~~42.17.300/~~)) 42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period. Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW ((~~42.17.300/~~)) 42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW ((~~42.17.290/~~)) 42.56.100.

If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors (see WAC 44-14-040), can process the repeat request for the now-refiled records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW ((~~42.17.280/~~)) 42.56.090. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW ((~~42.17.290/~~)) 42.56.100. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW ((~~42.17.270/~~)) 42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not altered, destroyed ((~~or~~)), disorganized, or removed. RCW ((~~42.17.290/~~)) 42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as ~~half days~~ two hours. However, inspection times cannot be broken down into un- reasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: [1]See, e.g., WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-04006 Closing request and documenting compliance. (1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an entirely unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A

closing letter may not be necessary for smaller requests, or where the last communication with the requestor established that the request would be closed on a date certain. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW ((~~42.17.270/~~)) 42.56.080. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW ((~~42.17.290/~~)) 42.56.100.

(3) **Retain copy of records provided.** ~~In some cases, particularly for commonly requested records, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. ((This allows the agency to document what was provided.)) A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor.~~

The copy of the records provided should be retained for ((~~a~~)) the period of time con- sistent with the agency's retention schedules for records related to disclosure of documents.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-050 Processing of public records requests—Electronic records. (1) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

(2) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the (name of agency) and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by ((~~WAC 44-14-07003~~)) RCW 42.56.120 and 42.56.130. The fee schedule is available at (agency address and web site address).

(3) **Customized electronic access ((~~to databases~~)) services.** While not required, and with the consent of the requestor, the (name of agency) may decide to provide customized ((~~access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested~~)) electronic access services and assess charges under RCW 42.56.120 (2)(f). A customized service charge applies only if the (name of agency) estimates that the request would

require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other purposes. The (name of agency) may charge a fee consistent with RCW ((~~43.105.280~~)) 42.56.120 (2)(f) for such customized access. The fee schedule is available at (agency address and web site address).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05001 Access to electronic records. The Public Records Act does not distinguish between access to paper and electronic records. Instead, the act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be obtained or translated." RCW ((~~42.17.020(48) (incorporated by reference into the act by RCW 42.56.010)~~)) 42.56.010(4). Many agency records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW ((~~43.105.250~~)) 43.105.351 provides: "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."

In general, an agency should provide electronic records in an electronic format if requested in that format, if it is reasonable and feasible to do so.[1] While not required, an agency may translate a record into an alternative electronic format at the request of the requestor if it is reasonable and feasible to do so, and that action does not create a new public record for the purposes of copying fees. RCW 42.56.120(1). For example, an agency may scan a paper record to make an electronic copy, and that action does not create a new public record. *Id.* An agency can provide links to specific records on the agency's public internet web site. RCW 42.56.520. An agency shall not impose copy charges for access to or downloading records that the agency routinely posts on its internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records by other means. RCW 42.56.120 (2)(e).

Reasonableness and technical feasibility ((~~is~~)) are the touchstones for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally

commercially available format or are not reasonably translatable into one, the agency might consider customized access. ((~~See WAC 44-14-05004. An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC 44-14-050(3).~~))

Delivering electronic records can be accomplished in several ways or a combination of ways. For example, an agency may post records on the agency's internet web site and provide the requestor links to specific documents; make a computer terminal available at the agency so a requestor can inspect electronic records and designate specific ones for copying; send records by email; copy records onto a CD, DVD or thumb drive and mail it to the requestor or making it available for pickup; upload records to a cloud-based server, including to a file transfer protocol (FTP) site and send the requestor a link to the site; provide records through an agency portal; or, through other means. Practices may vary among agencies in how they deliver records in an electronic format; the act does not mandate only one method and the courts have said agencies have some discretion in establishing their reasonable procedures under the act.[2] Finally, other delivery issues may be relevant to a particular agency or request. For example, there may be limits with the agency's email system or the requestor's email account with respect to the volume, size or types of emails and attachments that can be sent or received.

What is reasonable and technically feasible for copying and delivery of electronic records in one situation or for one agency may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC 44-14-05003. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.

An agency is not required to buy new software, hardware or licenses to process a request for production or delivery of public records. However, an agency lacking resources to provide, redact or deliver more records electronically may want to consider seeking funding or other arrangements in an effort to obtain such technologies. See RCW 43.105.355 (state and local agencies); chapter 40.14 RCW (local agencies - competitive grant program).

Notes:

[1] *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009) ("[T]here is no provision in the PDA that expressly requires a governmental agency to provide records in electronic form. ... [a]lthough the City has no express obligation to provide the requested email records in an electronic format, consistent with the statutory duty to provide the fullest assistance and the model rules, on remand the trial court shall determine whether it is reasonable and feasible for the City to do so."); *Mitchell v. Dep't of Corr.*, 164 Wn. App. 597 (2011) ("Nothing in the PRA obligates an agency to disclose records electronically.")

[2] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records. (1) **"Reasonably locatable" electronic records.** The act obligates an agency to provide nonexempt "identifiable ... records." RCW 42.56.080. An "identifiable record" is essentially one

that agency staff can "reasonably locate." WAC 44-14-04002(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the agency's current software. For example, a retained email containing the term "XYZ" is usually reasonably locatable by using the email program search feature. However, ((~~an~~)) some email search ((~~feature has~~)) features have limitations, such as not searching attachments, but ((~~is~~)) are a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained emails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's email program, such as a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a database of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the database to determine which businesses are publicly traded corporations.

(2) **"Reasonably translatable" electronic records.** The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine, or scanning it into Adobe Acrobat PDF®. Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take ((~~reasonable~~)) steps to translate the agency's original into a useable copy for the requestor, if it is reasonable and feasible for it to do so.

The "reasonably translatable" concept typically operates in three kinds of situations:

(a) An agency has only a paper record;

(b) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or

(c) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

(i) **Agency has paper-only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual or statutory cost for scanning. See RCW 42.56.120 and WAC 44-14-07003.

While not required, providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.

(ii) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. An agency cannot instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect® "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

(iii) **Agency has electronic records in an electronic format other than the format requested.** When an agency has an electronic record in an electronic format (such as a Word® document) but the requestor seeks a copy in another format (such as WordPerfect®), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, and the agency has a WordPerfect® license, this would be "reasonably translatable." The agency's record might not translate perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a database in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a database program (such as Access®) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word®) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word® format but the requestor refuses. The agency can easily convert the Word® document into a standard text file which, in turn, can be converted into most programs. The Word® document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, an agency

should keep((~~, when feasible,~~)) an electronic copy of the electronic records it provides to a requestor to show the exact records it provided, for the time period required in its records retention schedule. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05003 Parties should confer on technical issues. Technical reasonableness and feasibility can vary from request to request. When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them. Often a telephone conference will be sufficient. This approach is consistent with the requirement that agencies provide the "fullest assistance" to a requestor. RCW 42.56.100 and WAC 44-14-04003(2). Furthermore, if a requestor files an enforcement ac- tion under the act to obtain the records, the burden of proof is on the agency to justify its refusal to provide the records. RCW 42.56.550(1). If the requestor articulates a reasonable technical alternative to the agency's refusal to provide the records electronically or in the requested format, and the agency never offered to confer with the requestor, the agency will have difficulty proving that its refusal was justified.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05004 Customized access. When locating the requested records or translating them into the requested format cannot be done without specialized programming, RCW ((~~43.105.280 allows agencies to charge some fees for "customized access." The statute provides: "Agencies should not offer customized electronic access services as the primary way of responding to requests or as a primary source of revenue."~~)) 42.56.120(3) authorizes agencies to assess a customized service charge if the agency estimates that the request would require use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other business purposes.

Most public records requests for electronic records can be fulfilled based on the "reasonably locatable" and "reasonably translatable" standards. Resorting to customized access should not be the norm. An example of where "customized access" would be appropriate is if a state agency's old computer system stored data in a manner in which it was impossible to extract the data into comma-delimited or tab-delimited formats, but rather required a programmer to spend more than a nominal amount of time to write computer code specifically to extract it. Before resorting to customized access, the agency should confer with the requestor to determine if a technical solution exists not requiring the specialized programming. An agency must notify the reques-

tor to provide an explanation of the service charge including why it applies, a description of the specific expertise, and a reasonable estimate of the cost of the charge. The notice must also provide the requestor the opportunity to amend his or her request in order to avoid or reduce the customized service charge. RCW 42.56.120(3).

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information." The ((~~December 2006 amendments to the~~)) Federal Rules of Civil Procedure provide guidance to parties in litigation on their respective obligations to provide access to, or produce, "electronically stored information." See Federal Rules of Civil Procedure 26 and 34. The obligations of state and local agencies under those federal rules (and under any state-imposed rules or procedures that adopt the federal rules) to search for and provide electronic records may be different, and in some instances more demanding, than those required under the Public Records Act. The federal discovery rules and the Public Records Act are two separate laws imposing different standards. However, sometimes requestors make public records requests to obtain evidence that later may be used in non-Public Records Act litigation against the agency providing the records. Therefore, it may be prudent for agencies to consult with their attorneys regarding best practices of retaining copies of the records provided under the act so there can be no question later of what was and what was not produced in response to the request in the event that electronic records, or records derived from them, become issues in court.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-06001 Agency must publish list of applicable exemptions. An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. RCW ((~~42.17.260(2)/~~)) 42.56.070(2). The list is "for informational purposes" only and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW ((~~42.17.260(2)/~~)) 42.56.070(2). A list of possible "other statute" exemptions is posted on the attorney general's office web site ((~~of the Municipal Research Service Center at www.mrsc.org/Publications/prdpub04.pdf (scroll to Appendix C)~~)). See WAC 44-14-06002. An agency may also provide a link to the code reviser's annual list of exemptions in the state code available at http://www.atg.wa.gov/sunshine-committee.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-06002 Summary of exemptions. ((~~(1) **General.**~~)) The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. ((~~Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to the model rules merely provide guidance on a few of the most common issues.~~

~~An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251/42.56.030. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1)/42.56.070(1). An exemption will not be inferred.~~[1]

~~An agency cannot define the scope of a statutory exemption through rule making or policy.~~[2] ~~An agency agreement or promise not to disclose a record cannot make a disclosable record exempt from disclosure. RCW 42.17.260(1)/42.56.070(1).~~[3] ~~Any agency contract regarding the disclosure of records should recite that the act controls.~~

~~An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4)/42.56.210(4). One way to describe why a record was withheld or redacted is by using a withholding index.~~

~~After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.~~[4]

~~Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. Therefore, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). If a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.~~[5] ~~Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).~~

~~(2)~~**~~"Privacy" exemption~~**~~. There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).~~[6] ~~However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b)/42.56.210 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b)/42.56.210 (1)(b), that an agency or a third party resisting disclosure must prove.~~

~~"Privacy" is defined in RCW 42.17.255/42.56.050 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a~~

~~two-part test requiring the party seeking to prevent disclosure to prove both elements.[7]~~

~~Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255/42.56.050 as an exemption.[8]~~

~~(3)**Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.[9] In addition, RCW 42.17.310 (1)(j)/42.56.210 (1)(j) exempts attorney work-product involving a "controversy," which means completed, existing, or reasonably anticipated litigation involving the agency.[10] The exact boundaries of the attorney-client privilege and work-product doctrine is beyond the scope of these comments. However, in general, the attorney-client privilege covers records reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. The attorney-client privilege does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.[11] A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product doctrine is available at www.atg.wa.gov/records/modelrules.~~

~~(4)**Deliberative process exemption.** RCW 42.17.310 (1)(i)/42.56.210 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.~~

~~In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[12] Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.[13] It applies only to those portions of a record containing recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.[14] The exemption does not apply to records or portions of records concerning the implementation of policy or the factual basis for the policy.[15] The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.[16]~~

~~(5)**"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270/42.56.080. See WAC 44-14-04002(3).~~

~~(6)**Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9)/42.56.070(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.[17] This authori-~~

~~ty is limited to a list of individuals, not a list of companies.[18] A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could arguably be charged with the crime of false swearing. RCW 9A.72.040.[19]~~

~~(7)~~ ~~**Trade secrets**~~. ~~Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.[20] However, the definition of a "trade secret" can be very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.~~

~~When an agency receives a request for a record that might be a trade secret, often it does not have enough information to determine whether the record arguably qualifies as a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320/42.56.520.~~

~~When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330/42.56.540. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of why it contends the record is a trade secret, and state that if the record is not a trade secret or otherwise exempt from disclosure that the agency intends to release it. The agency should inform the potential holder of a trade secret that its explanation will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330/42.56.540.~~

~~As a general matter, many agencies do not assert the trade secret exemption on behalf of the potential holder of the trade secret but rather allow the potential holder to seek an injunction.~~

~~Notes:~~

~~[1]*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) ("*PAWS II*").~~

~~[2]*Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).~~

~~[3]*Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).~~

~~[4]*PAWS II*, 125 Wn.2d at 253.~~

~~[5]Op. Att'y Gen. 7 (1986).~~

~~[6]*See* RCW 42.17.255/42.56.050 ("privacy" linked to rights of privacy "specified in (the act) as express exemptions").~~

~~[7]*King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).~~

~~[8]Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").~~

~~[9]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).~~

~~[10]*Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).~~

~~[11]This summary comes from the attorney general's proposed definition of the privilege in the first version of House Bill No. 1758 (2005).~~

~~[12]*PAWS II*, 125 Wn.2d at 256.~~

~~[13]*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.~~

~~[14]*PAWS II*, 125 Wn.2d at 256.~~

~~[15]*Cowles Pub. Co. v. City of Spokane*, 69 Wn. App. 678, 685, 849 P.2d 1271 (1993).~~

~~[16]*Dawson*, 120 Wn.2d at 793.~~

~~[17]Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9)/42.56.070(9).~~
~~[18]Op. Att'y Gen. 2 (1998).~~
~~[19]RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270/42.56.080 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. *See* Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).~~
~~[20]*PAWS II*, 125 Wn.2d at 262.))~~

For a discussion of several commonly used exemptions, see these documents on the attorney general's office web site: *Open Government Resource Manual* at http://www.atg.wa.gov/open-government-resource-manual (the manual contains a discussion and summaries of many exemptions, links to statutes, and links to many court decisions and several attorney general opinions); the code reviser's annual list of exemptions in the state code, available at http://www.atg.wa.gov/sunshine-committee; and a guidance document on the attorney-client privilege and work-product doctrine, available at http://www.atg.wa.gov/model-rules-public-disclosure.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-070 Costs of providing copies of public records. (1) **((~~Costs for paper copies~~)) Inspection.** There is no fee for inspecting public records, including inspecting records on the (name of agency) web site.

((~~A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.~~

~~(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white photocopy of a record selected by a requestor.~~)) (2) **Actual costs.** (*If the agency determines it will charge actual costs for copies, it may do so after providing notice and a public hearing.*) A statement of the factors and the manner used to determine ((~~this charge~~)) the charges for copies is available from the public records officer. The costs for copies of records are as follows (provide details):

(3) (*Alternative*) **Statutory default costs.** (*If the agency determines it will not charge actual costs for copies but instead will assess statutory costs, it must have a rule or regulation declaring the reasons that determining actual costs would be unduly burdensome*). The (name of agency) is not calculating actual costs for copying its records because to do so would be unduly burdensome for the following reasons: The (name of agency) does not have the resources to conduct a study to determine actual copying costs for all its records; to conduct such a study would interfere with other essential agency functions; and, through the legislative process, the public and requestors have commented on and been informed of authorized fees and costs provided in the Public Records Act including RCW 42.56.120 and other laws. Therefore, in order to timely implement a fee schedule consistent with the Public Records Act, it is more cost efficient, expeditious and in the public interest for the (name of agency) to adopt the state legislature's approved fees and costs for most of the (name of agency) records, as authorized in RCW 42.56.120 and as published in the agency's fee schedule.

(4) **Fee schedule.** The fee schedule is available at (office location) and on (name of agency) web site at (insert web site address).

(5) **Processing payments.** Before beginning to make the copies or processing a customized service, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

((~~(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the agency has scanning equipment at its offices: The cost of scanning existing (agency) paper or other nonelectronic records is (amount) per page.) There will be no charge for emailing electronic records to a requestor, unless another cost applies such as a scanning fee.~~

~~(3)~~)) (6) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.

((~~(4)~~)) (7) **Payment.** Payment may be made by cash, check, or money order to the (name of agency). Agencies may additionally accept credit card or online payments.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07001 General rules for charging for copies. (1) **No fees for costs of locating records or preparing records for inspection or copying.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW ((~~42.17.300/~~)) 42.56.120.[1] An agency cannot charge fees for a person to inspect or access records on the agency's public internet web site. An agency cannot charge a fee for access to or downloading records the agency routinely posts on its public internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from ((~~offsite~~)) off-site. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

(2) ((~~**Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.~~

~~If it attempts to charge more than the fifteen cents per page maximum for photocopies,~~)) **Actual costs.** If assessing actual costs, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to the determine the actual per page cost." RCW ((~~42.17.260(7)/~~)) 42.56.070(7). ((~~An agency may include the costs "directly incident" to providing the copies such as paper, copying equip-~~

~~ment, and staff time to make the copies. RCW 42.17.260 (7)(a)/42.56.070 (7)(a).~~[2]

~~An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260 (7)(a) and (b)/42.56.070 (7)(a) and (b) and 42.17.300/42.56.120.~~

~~If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.~~[3] ~~A price list with no analysis is insufficient~~))[2] The actual costs include the actual cost of the paper and the per page cost for use of agency copying (including scanning) equipment; the actual cost of the electronic production or file transfer of the record; the use of any cloud-based data storage and processing service; costs directly incident to the cost of postage or delivery charges and the cost of any container or envelope used; and, the costs directly incident to transmitting such records in an electronic format, including the cost of any transmission charge and the use of any physical media device provided by the agency. An agency may include staff salaries, benefits or other general administrative or overhead charges only if those costs are directly related to the actual cost of copying or transmitting the public records. Staff time to copy and send or transmit the records may be included in an agency's actual costs. An agency's calculations and reasoning need not be elab- orate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers.

An agency's statement of such actual costs may be adopted by an agency only after providing notice and public hearing. RCW 42.56.070(3).

(3)**Statutory default costs.** If an agency opts for the default copying charges ((~~of fifteen cents per page~~)) pursuant to RCW 42.56.120, it need not calculate its actual costs. RCW ((~~42.17.260(8)/42.56.070(8).~~

~~(3)**Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photographs. An agency can charge its actual costs for nonstandard photocopies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.~~

~~(4)~~)) 42.56.120 (2)(b). However, it must declare the reasons for why calculating the actual costs would be unduly burdensome, and then it is limited to the statutory costs for those records. *Id.*

The statutory default costs include different charges per record or groups of records, or an alternative flat fee of up to two dollars for any request when the agency reasonably estimates and documents that the allowable statutory costs are clearly equal to or more than two dollars. RCW 42.56.120 (2)(d). If using the statutory flat fee, the agency can charge the flat fee only for the first installment for records produced in multiple installments, and no fees can be assessed for subsequent installments.

Statutory default charges can be combined to the extent that more than one type of charge applies to a particular request, unless the agency is assessing the statutory flat fee for a request. RCW

42.56.120 (3)(c). The statutory default costs include actual costs of digital storage media, mailing containers, and postage. RCW 42.56.120 (3)(d).

~~(4)~~**Fee schedule.** The agency should make its fee schedule publicly available on its web site and through other means.

~~(5)~~**Estimate of costs for requestor.** If a requestor asks, an agency must provide a summary of the applicable charges before copies are made and the requestor may revise the request to reduce the number of copies to be made, thus the applicable charges. RCW 42.56.120 (2)(f). An agency must also provide a requestor, in advance, information concerning customized service charges if the request involves customized service. RCW 42.56.120(3).

~~(6)~~ **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW ((~~42.17.300/~~)) 42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed((~~, provided that the requestor is informed that inspection is free~~)). Informing the requestor on a request form that inspection is free is sufficient.

((~~(5)~~)) (7) **Use of outside vendor.** Typically an agency makes the requested copies. However, an agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor.[3] An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. This is an example of where any agency might enter into an alternative fee arrangement under RCW 42.56.080(4). An agency cannot charge the default ((~~fifteen cents per page rate~~)) charges when its "actual cost" at a copying vendor is less. The default rates ((~~is~~)) are only for agency-produced copies. RCW ((~~42.17.300/~~)) 42.56.120.

((~~(6)~~)) (8) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

((~~(7)~~)) (9) **Costs of mailing or sending records.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope or CD mailing sleeve). RCW ((~~42.17.260 (7)(a)/~~)) 42.56.070 (7)(a).

(10) **Sample fee statutory default schedule.** A sample statutory default fee schedule is provided in this comment. Some agencies may have other statutes that govern fees for particular types of records and which they may want to also include in the schedule. See RCW 42.56.130. Or, an agency may use the statutory default schedule for the majority of its records and go through the process to determine actual costs for some specialized records (for example, for large blueprints or oversized colored maps that are printed onto paper). While not included in the sample schedule below, an agency might also

decide to use the up to two dollar statutory flat fee for some types of requests, per RCW 42.56.120 (2)(d).

(Name of Agency) Fee Schedule	
Inspection:	
No fee	Inspection of agency records on agency public internet web site or scheduled at agency office.
No fee	Accessing or downloading records the agency routinely posts on its public internet web site, unless the requestor asks the agency for records to be provided through other means (the following copy charges below then apply).
Copies:	
15 cents/page	Photocopies, printed copies of electronic records when requested by the requestor, or for the use of agency equipment to make photocopies.
10 cents/page	Scanned records, or use of agency equipment for scanning.
5 cents/each 4 electronic files or attachment	Records uploaded to email, or cloud-based data storage service, or other means of electronic delivery.
10 cents/gigabyte	Records transmitted in electronic format or for use of agency equipment to send records electronically.
Actual cost	Digital storage media or devices (*list*): • CD • DVD • Thumb drive • Other
Actual cost	Postage or delivery charges – Specific amount based upon postage/delivery charges for specific mailings or deliveries.
(Varies)	Records for which other costs are authorized pursuant to specific fee statutes (describe).
↑ *Copy charges above may be combined to the extent more than one type of charge applies to copies responsive to a particular request.*	
Customized Service:	
Actual cost	Data compilations prepared or accessed as a customized service (cost is in addition to above fees for copies).

Notes: [1]See also Op. Att'y Gen. 6 (1991).

[2]The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. See RCW ((~~42.17.300/~~)) 42.56.120. ("No fee shall be charged for locating public documents and making them available for copying.")((.))

[3]((~~See also Op. Att'y Gen. 6 (1991) (agency must "justify" its copy c~~harges).)) *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07004 Other statutes govern copying of particular records. The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW ((~~42.17.305/~~)) 42.56.130. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07005 Waiver of copying charges; other fee arrangements. (1) An agency ((~~has the discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies~~)) may waive charges pursuant to its rules and regulations. RCW 42.56.120(4).

(2) An agency may enter into a contract, memorandum of understanding or other agreement with a requestor that provides an alternative fee arrangement to the charges, or in response to a voluminous or frequently occurring request. RCW 42.56.120(4).

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-07006 Requiring partial payment. (1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request, including a customized service charge, before beginning to copy the records. RCW ((~~42.17.300/~~)) 42.56.120(4).((~~1~~)) The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.

When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ((~~ten~~)) fifteen cents per page so the cost would be three hundred fifty dollars. The agency obtains a ten percent

deposit of ((~~thirty~~)) thirty-five dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The ((~~thirty~~)) thirty-five dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining ((~~two hundred sixty dollars~~)) amount before providing the records to the requestor.

(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment, unless the agency is assessing a two-dollar flat fee. RCW ((~~42.17.300/~~)) 42.56.120. The agency may agree to provide an installment without first receiving payment for that installment.

((~~Note: [1]*See* RCW 42.17.300/42.56.120 (ten percent deposit for "a request").~~))

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-080 Review of denials of public records. (1) **Petition for internal administrative review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including email) to the public records officer for a review of that decision. The petition shall include a copy of or reasonably identify the written statement by the public records officer or designee denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official designated by the agency to conduct the review). That person will immediately consider the petition and either affirm or reverse the denial within two business days following the (agency's) receipt of the petition, or within such other time as (name of agency) and the requestor mutually agree to.

(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW ((~~42.17.325/~~)) 42.56.530, if the (name of state agency) denies a requestor access to public records because it claims the record is exempt in whole or in part from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.

(4) **Judicial review.** Any person may obtain court review of denials of public records requests pursuant to RCW ((~~42.17.340/~~)) 42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-08001 Agency internal procedure for review of denials of requests. The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records re-

quests. RCW ((~~42.17.320/~~)) 42.56.520. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency. The act deems agency review to be complete two business days after the initial denial, after which the requestor may obtain judicial review. Large requests or requests involving many redactions may take longer than two business days for the agency to review. In such a case, the requestor could agree to a longer internal review period.

Requestors are encouraged to use such internal review procedures. The procedures give the requestor an opportunity to communicate his/her issues with respect to the request, give the agency a chance to do a "second look," and may result in release of additional records or other favorable outcomes at no cost to the requestor.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-08002 Attorney general's office review of denials by state agencies. The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW ((~~42.17.325/~~)) 42.56.530. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or publicrecords@atg.wa.gov.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-08004 Judicial review. While a full discussion of judicial review is not provided in these comments, a few processes in the act are described.

(1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW ((~~42.17.320/~~)) 42.56.520.[1] Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.[2] An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW ((~~42.17.320/~~)) 42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW ((~~42.17.340 (1) and (2)/~~)) 42.56.550 (1) and (2). The court proceeding is a civil action, seeking judicial review. The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.[3] To speed up the court process, a public records case may be decided merely on the "motion"

of a requestor and "solely on affidavits." RCW ((~~42.17.340 (1) and (3)/~~)) 42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW ((~~42.17.340(6)/~~)) 42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW ((~~42.17.340 (1) and (2)/~~)) 42.56.550 (1) and (2).[4] A requestor can also file a summons and complaint, initiating the civil action, and then file a motion. The case must be filed in the superior court in the county in which the record is maintained. RCW ((~~42.17.340 (1) and (2)/~~)) 42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW ((~~42.17.340(5)/~~)) 42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.[5] ((~~However, most cases are decided on a motion to show cause.~~[6]))

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW ((~~42.17.340 (1) and (2)/~~)) 42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW ((~~42.17.340(1)/~~)) 42.56.550(1). This is the most common kind of case.

(b) **((~~"Reasonable estimate."~~)) Estimates.** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response or estimated charges for copies. RCW ((~~42.17.340(2)/~~)) 42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW ((~~42.17.330/~~)) 42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.((~~7~~)) [6] The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.((~~8~~)) [7]

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW ((~~42.17.340(3)/~~)) 42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.((~~9~~)) [8]

However, in camera review is not always required, and it is up to the discretion of the trial court.[9]

A court may have local court rules on Public Records Act cases and in camera review procedures. In the alternative, an agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in

camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees((~~,~~)) and costs((~~, and~~)). In addition, it is within the discretion of a court to assess a daily penalty against the agency, considering several factors. RCW ((~~42.17.340(4)/~~)) 42.56.550(4).[10] Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.((~~10~~)) [11]

A special process regarding attorneys' fees and penalties applies to actions involving the disclosure of body worn camera recordings governed by RCW 42.56.240. Another process applies to requests by inmates; penalties may not be awarded to an inmate unless a court determines the agency acted in bad faith. RCW 42.56.565.

A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.((~~11~~)) [12] In an injunctive action under RCW ((~~42.17.330/~~)) 42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.((~~12~~)) [13]

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.((~~13~~)) [14] However, a court is only authorized to award "reasonable" attorneys' fees. RCW ((~~42.17.340(4)/~~)) 42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.((~~14~~)) [15]

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.((~~15~~)) [16]

((~~A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."~~[16] ~~An agency's "bad faith" can warrant a penalty on the higher end of this scale.~~[17] ~~The penalty is per day, not per-record per day.~~[18])) The penalty range is up to one hundred dollars a day. RCW

42.56.550(4). Courts will consider a nonexclusive list of penalty factors in determining whether to assess a penalty, and the amount.[17]

Notes:

[1]*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW ((~~42.17.320/~~)) 42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days."); a request is required to have a "final action" taken on it by the agency denying the record, prior to a requestor filing a lawsuit. *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014).

[2]See, e.g., WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

[3]*Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA [PRA] is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

[4]See generally *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

[5]*Id.* at 106.

[6]((~~*Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).~~

[7])) *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

((~~(8)~~)) [7]*PAWS II*, 125 Wn.2d at 257-58. See also *SEIU Healthcare 775 NW v. State et al*, 198 Wn. App. 745, X P.3d X (2017) (party seeking injunction under RCW 42.56.540 must show that (1) record pertains to that party, (2) exemption applies, and (3) disclosure would not be in the public interest and would substantially and irreparably harm the party or a vital governmental function.)

((~~(9)~~)) [8]*Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

[9]*Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 122 (2015); *Nissen v. Pierce County*, 182 Wn.2d 863, 357 P.3d 45 (2015).

[10]*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (factors).

[11]RCW ((~~42.17.340(4)/~~)) 42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

((~~(11)~~)) [12]*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

((~~(12)~~)) [13]*Confederated Tribes*, 135 Wn.2d at 757; *Doe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016).

((~~(13)~~)) [14]*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU II*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

((~~(14)~~)) [15]*Id.* at 118.

((~~(15)~~)) [16]*Id.* at 115.

((~~[16]*American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").~~

~~[17]*Id.*~~

~~[18]~~)) [17]*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 44-14-07003 Charges for electronic records.

Krier, Nancy (ATG)

From: Flannary Collins <fcollins@mrsc.org>
Sent: Wednesday, September 27, 2017 11:02 AM
To: Krier, Nancy (ATG)
Subject: RE: AGO Model Rules - CR-102 Proposal

Nancy:

Below are my comments to the model rules. I highlighted my additions.

WAC 44-14-01003, page 6: Add the highlighted reference after the following sentence: "The act also encourages disclosure by awarding a prevailing requestor reasonable attorneys' fees, costs, and a possible daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure, or its estimate of time, or its estimate of copying costs, is not "reasonable." RCW 42.56.550 (2) and (4).

> *Explanation:* I think these two sections of RCW 42.56.550 need to be cited to support the additions since I didn't find any reference to reasonable estimate of time or reasonable estimate of copying costs in subsection (4).

WAC 44-14-03002, page 11: I think there is something missing in here – specifically, the reference in RCW 42.56.090 for making records available for at least 30 hours/week. Suggested change to first sentence: "An agency must make records available for inspection and copying for a minimum of thirty hours per week (except weeks that include state legal holidays) during the "customary office hours of the agency."

WAC 44-14-040, page 17: I am surprised to see this priority categorization as a mandate and think it should be an option instead. (Optional language is used in WAC 44-14-04003.) Suggested language follows (and if you agree with this, subsections (2) and (3) also need to be softened from mandatory to optional):

- (1)(b): The public records office or designee will evaluate the request according to the nature of the request, volume and availability or requested records, and give it a priority category if the agency has adopted priority categories for requests.
- (i) Although not mandatory for agencies to adopt, agencies are encouraged to adopt priority categories. The priority categories can guide the (name of agency) in determining its...

WAC 44-14-04003, page 30:

- It looks like you are missing an "and" in subsection (14): Effective July 23, 2017....and the date of the final disposition of the request.
- Footnote 13 has the wrong page cite – it should be page 722 of the *Neighborhood Alliance* case.

WAC 44-14-05001, page 37:

- I am suggesting the following change: "While not required, an agency may translate a record into an alternative electronic format at the request of the requestor if it is reasonable and feasible to do so, and that action does not create a new public record for the purposes of ~~copying fees~~ the PRA."

WAC 44-14-05002, page 39

- I don't see the model rules clearly addressing the question of whether an agency is obligated to provide hard copy records in electronic format, if requested in electronic format. I see that section -05002 indicates the agency needs to provide a "reasonably translatable" copy of paper record, but I think it would be helpful to mirror the statement in -05001, but apply it to paper records: "In general, if an agency only has a paper copy of a record and the record is requested in electronic format, the agency should provide that record in electronic format, if it is reasonable and feasible to do so."

- One issue that comes up with providing records via email is the email getting caught in the requestor's spam filter because the requestor's email does not recognize the agency email address. The agency does not receive a bounce back, but the requestor doesn't check his spam filter and assumes the agency did not respond which can lead to issue. It may be a helpful to address this – perhaps recommend agencies apply a "read receipt" rule to their email or ask the requestor for confirmation that he/she received the email with responsive records. I don't know of any elegant way to do this, and this is largely up to the requestor whether or not they want to make life easy for the agency by confirming receipt.

WAC 44-14-07001, page 47:

- The statement regarding not charging requestors a fee for getting records from archives made me wonder whether an agency can direct a requestor to archives to get the records (if the records has already been transferred to archives per the retention schedule). I think the agency can and is not required to get the records for the requestor, but this statement made me wonder.

- **Page 50:**

  - In the sample fee schedule, the word *(list)* appears after "Digital storage media or devices" – is this an unnecessary word? I see you also put in the word (describe) after "Records for which other costs are authorized pursuant to specific fee statutes" – so maybe it's intentional. Maybe italicize both or remove *(list)* since you have "other" as the last bullet point.

  - In Footnote 2, I suggest the following change: "The costs of staff time is allowed only for making copies and sending records."

Flannary P. Collins
Legal Consultant
206.625.1300 | MRSC.org | Local Government Success

From: Krier, Nancy (ATG) [mailto:NancyK1@ATG.WA.GOV]
Sent: Thursday, August 24, 2017 12:46 PM
To: Flannary Collins <fcollins@mrsc.org>; jmanix@stevensclay.org; jsrobertson@comcast.net; afoster@cityofpoulsbo.com
Subject: AGO Model Rules - CR-102 Proposal

Hello.

This email concerns the Public Records Act (PRA) at RCW 42.56. You may recall that the Office of the Attorney General is tasked in the PRA with developing advisory Model Rules. The Model Rules (and their comments) were adopted in 2006-2007, in chapter 44-14 of the Washington Administrative Code (WAC). While nonbinding, they are a PRA resource.

Since 2006-2007, there have been developments in statutes (including in the PRA itself), case law and technology. As a result, the office is proposing amendments to the Model Rules and their comments. The proposed amendments are with the CR-102 Proposed Rulemaking form, attached and also linked on the office's rulemaking page here. The CR-102 proposal has been filed with the Code Reviser and will be published in the *Washington State Register*. It is also being distributed to stakeholders. We are inviting public comments. Here are more details below.

(Some members of your organizations or firms may have already received notice yesterday, via our Model Rules stakeholder distribution list. I did not see your names on the list but I had spoken with you about the Model Rules in the last couple of years, so I have added your names to the stakeholder

list now, and future updates about the Model Rules will come to you via that distribution. I hope that works for you.)

Public comments on the CR-102 will become part of the rulemaking file and we will be posting public omments received on the CR-102 on our office's web page.

* * *

Specifically, the AGO adopted the advisory Model Rules and comments in 2006-2007 under the PRA at RCW 42.56.570(2) and (3), which provides:

(2) The attorney general, by February 1, 2006, shall adopt by rule an advisory model rule 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.

The Model Rules provide information about the PRA and some suggested best practices. Since 2006-2007, there have been a number of developments in statutes, case law and technology with respect to public agency records. In addition, in 2017 the State Legislature enacted RCW 42.56.570(4), providing that local public agencies should consult the advisory Model Rules when establishing local PRA ordinances. RCW 42.56.152, another PRA statute enacted after 2007, provides that public records training must be consistent with the Model Rules.

Therefore, the proposed 2017 amendments to the Model Rules address topics such as use of personal devices with respect to public records, electronic records, procedures to make requests, procedures to process requests, copying charges and other new PRA requirements such as those in ESHB 1594 and EHB 1595 from the 2017 legislative session, statutory citations, and other topics. For example, the proposed update:

- Confirms that the public is entitled to request public records stored on personal devices if those records concern agency business;
- Provides a model policy for handling requests with greater efficiency and transparency based off policies pioneered by the cities of Kirkland and Pasco; and
- Addresses relevant court rulings and changes to state law made by the Washington State Legislature.

The details are in the CR-102.

The anticipated effect of the proposal is to modernize the Model Rules so they are a more functional resource for requestors, public agencies, the courts, the State Legislature and others who are navigating the PRA.

The CR-102 provides information on the October 4, 2017 hearing where the public can also provide comments. The hearing is in the Legislative Building, in the Columbia Room, at 6:00 – 8:00 p.m.

Thank you.

Nancy Krier
Assistant Attorney General for Open Government
Office of the Attorney General
(360) 586-7842
Nancyk1@atg.wa.gov

Krier, Nancy (ATG)

From: cheris@spokaneschools.org
Sent: Wednesday, September 27, 2017 12:40 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name: Skutley

First Name: Cheri

Middle Name:

Email Address: cheris@spokaneschools.org

Comment: Proposal change-30 days required to respond to clarify from agency. If not received w/in 30 days, the entire request closed? Now if request not clear, portion I think understand is processed. If requestor no answer request to clarify, it be helpful to close request=abandoned. The Proposal states both agency/requestor responsible to communicate w/eachother. Hrs spent processing request, install. sent via email w/attachment. No cost to requestor as emails bound together in single PDF & is able to send via email. Requestor rarely confirms email received or if wants next install. I do ask if records sufficient to satisfy request. W/out requestor written/verbal s/he no longer wants records, I must cont. to spend hrs each month til request complete. Archived email search of 1000s agency employees w/ search term is normal record processed. If requestor no reply w/in 30 days of request for clarify or install. sent, the request should be closed=abandoned. If requestor wants agency to check w/ vendor for records requestor should ask agency for them. The agency shouldn't be one stop shop for requestor, w/ threat of fine/penalty. If requestor thinks vendor has records & agency no release, requestor should be required to tell agency wants vendor records. The Priority categories proposal- PRO know if a record is at fingertips, no redactions, is few pages, it will be released ahead of large requests w/ multi facets. OK to suggest as model rule, but not force agency to separate requests into categories. The Fee schedule change was suppose to help diminish burdensome requests. Installments released via email (less than 20MB) in multiple installments, will cause PRO lots of work & nothing to deter requestor, decrease timeframe in email name search for ex. Agency process should be allowed to change, ex: keep emails as native format, change emails needing redaction to PDF, but not bind together, which allows agency to collect nominal fee, as legislature intended.

Section 2: Privacy Notice, Disclimer and signature

Signed name: Cheri Skutley

Date: Sept 27, 2017

Submitted on: 9/27/2017

Krier, Nancy (ATG)

From: Sarah.Leffler@clark.wa.gov
Sent: Wednesday, September 27, 2017 1:47 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Leffler
First Name:	Sarah
Middle Name:	
Email Address:	Sarah.Leffler@clark.wa.gov
Comment:	In WAC 44-14-07001 General rules for charging for copies, (10) Sample fee statutory default schedule: please consider addressing or defining "5 cents/each 4 electronic files or attachments". Unless the requestor dictates they want to receive electronic records in native format, my agency routinely combines multiple electronic files into one PDF record for ease of bates numbering, reviewing for redactions, and transmitting to the requestor. This practice is also to the requestor's benefit, as they need only open one file per installment to review their records, rather than having dozens or even hundreds of separate attachments to open and review per installment. It would be helpful if the Model Rules affirmed this as a reasonable practice and clarified that charges may be assessed for each individual electronic file that comprises a PDF package. For example, if I combine 100 responsive emails into one PDF package for an installment, I may still charge 5 cents for each 4 emails (plus 10 cents/GB), rather than being limited to charging only $0.0125 cents (plus 10 cents/GB) for the single PDF into which the emails were combined.

Section 2: Privacy Notice, Disclimer and signature

Signed name:	Sarah Leffler
Date:	09/27/2017
Submitted on:	9/27/2017

Krier, Nancy (ATG)

From: johncar3@comcast.net
ent: Friday, September 29, 2017 12:36 AM
To: Krier, Nancy (ATG)
Subject: Comments on proposed revisions to the Public Records Act advisory model rules
Attachments: Comments by J. Klinkert on AGO 2017 proposed revisions to PRA model rules.docx

Dear Ms. Krier,

I have attached my comments about the Attorney General's proposed revisions to the advisory model rules for the Public Records Act.

If you have any questions or need any clarification, just let me know.

Thank you.

Yours truly,

John F. Klinkert
(425) 771-7195
johncar3@comcast.net

Dear Ms. Krier:

I understand that you are the person in the Attorney General's Office (AGO) who drafted the proposed revisions to the "advisory model rules" for the Public Records Act, and that you are also the current ombudsman for the Public Records Act.

Thanks for providing an opportunity to comment. In my opinion both the current "advisory model rules" and the proposed revisions have a number of flaws.

1. They are not worded as rules. They are worded as advice, and therefore can't adopted by an agency as a "rule" without a great deal of rewriting.

   They can't legally constitute binding rules on records requesters.

   Yet the Washington Supreme Court has cited them as justification for some of its decisions.

   Requesters can't be required to follow them, even if an agency adopts them, so therefore courts should not refer to them in their decisions, because unlike with the ABA model rules adopted by state bar associations, there is no guarantee that a requester or agency following advice will guarantee a decision in the requester's (or agency's) favor.

   This practice of the Washington Supreme Court (and possibly of lower courts) should be forbidden by the Washington Supreme Court. I ask you to use the AGO's influence and write the Washington Supreme Court about this contradiction.

2. In both the current rules and the proposed revisions the AGO actually often seems intent on explaining, for particular situations, the likely effect of an agency's or a requester's complying or not complying, by citing cases in the footnotes to the rules. But these comments by the AGO are only predictions, extrapolations, or conjectures from current case law, and they might be incorrect.

   Also, although lawyers who study the model rules will benefit from the citations to cases in the footnotes of the model rules, many readers, perhaps most, will not, because they are not lawyers who know how to use case citations or care to read court decisions.

3. One can clarify only so much in an "advisory" model rule. Give only essential advice to agencies or requesters. This would greatly reduce the number and length of model rules.

4. Litigation over the PRA statute is guaranteed, and model rules (model WACs) can't solve this problem. But it often seems that the model rules (model WACs) are intended to help agencies and requesters avoid litigation, an impossibility. The model rules can't prevent all litigation.

   Solutions: Avoid this impossibility by not giving legal advice or citing cases in footnotes to the model rules.

   Give your advice to both agencies and citizens in a separate "Comments" section after the end of a model rule.

Submitted on September 29, 2017
by John F. Klinkert
Email: johncar3@comcast.net
Phone: (425) 771-7195

Add advice (not to be written by the AGO itself, for reasons stated below in this commentary) to the existing pamphlet created for the general public by the AGO. The current pamphlet is a first-rate product – supremely clear and helpful to records requesters.

Urge Washington courts not to justify their PRA decisions by referring to model rules (model WACs). Such references to the model rules creates unnecessary apprehension in agencies and requesters about what a court might rule if they don't follow the advice of a particular model rules – yet the model rules are supposed to be only "advisory".

5. A major irony (or contradiction) regarding the so-called "advisory model rules" required by RCW 42.56.570 is that the Public Records Act (PRA), a statute, was written by the citizenry and enacted in 1972 by the citizenry via an initiative written in 1971-72, but years later the statute was given related "advisory model rules" by a state/govt. agency (the AGO) which was ordered by the legislature (another government institution) to write the model rules. Since the PRA's enactment, the citizenry has neither created any of the subsequent amendments to the PRA nor created the model rules.

   Creation of the model rules was put in the hands of a state agency (the AGO) whose interests conflict with those of the citizenry (record requesters).

   Putting citizens and agency representatives together on a joint writing task (such as the AG's Open Government Resource Manual) is not a solution for a statute created by a citizens' initiative.

   Note that it is the AGO that under the Washington Administrative Procedures Act gets to decide, after the period for submitting comments has ended, on what is written into the final version of the model rules (model WACs)

   Yet the AGO is an interested party because it is the legal advisor to, and in essence the law firm for, all state agencies.

   Therefore, it is naïve to think that the government's interest won't manifest itself and influence the wording of at least some of the model rules (model WACs).

   The Washington Supreme Court, by citing the model rules as partial justification for its appellate decisions on the Public Records Act, has given the AGO undue influence over future PRA litigation. The AGO cannot help but notice the influence it now has on agency and requester behavior in responding to PRA record requests, and therefore the AGO is likely to include wording in any new model rules, or proposed revisions to the current model rules, that will further increase its influence on agency and requester behavior and PRA litigation.

   And since the AGO is itself (as a state agency) subject to the PRA, the AGO is also likely to favor the interests of other agencies (both state and local) rather than furthering the interests of both requesters and agencies equally.
   The Public Records Act was not originally intended to be a two-way street. Or at least the requesters' lane on the street or freeway was intended to be much wider than the agencies' lane. Treating the

Submitted on September 29, 2017
by John F. Klinkert
Email: johncar3@comcast.net
Phone: (425) 771-7195

interests of agencies and requesters equally is contrary to the intent of the Public Records Act, which was designed originally and explicitly to favor the interests of citizens over government agencies' avoidance of openness, and, thereby, accountability to the people/citizens. That is, the two interests should not be treated equally: the interests of citizens should prevail or at least outweigh the interests of government agencies as to disclosure of public records, but it seems to me that the model rules (model WACs) treat those interests as equal.

6. The valid but incorrectly implemented idea of an ombudsman

   The current ombudsman's conflict of interest is a separate problem and is not actually a cause of any of the previously mentioned problems.

   The source of the ombudsman's conflict of interest is that the ombudsman works for the AGO, which is an interested party in all potential battles between requesters and state agencies, including legal disputes between a requester and the AGO itself.

   It is unfair to the ombudsman to put him/her under this job pressure, and is also unfair to citizens/requesters to have their complaints mediated by an employee of an interested party.

   An ombudsman should not draft model rules, nor be part of a government office that has the AGO's responsibilities.

7. The legislature needs to acknowledge the hostility of government agencies to the Public Records Act, due to a variety of factors, including sometimes a desire to hide lawlessness by government officials.

   Ideally, personnel working for government agencies would be able to consider their interests as citizens – as one citizen among many – whose interests in a competent, accountable government coincide with those of record requesters. However, unfortunately, agency personnel and Public Records Officers who work for the agencies often come to the opposite conclusion – whether or not they even think of this topic in these terms.

   Q: What are the causes of employees' misidentification of interests/allegiances?

8. Consider the current violations of the Public Records Act caused by the definition of "agency" in RCW 42.56.010 and the requirement in RCW 42.56.580 that each agency must have its own Public Records Officer.

   Note that one local agency, the Seattle Police Department (SPD) and one county (Snohomish County) both violate the "one Public Records Officer rule" contained in RCW 42.56.580 but for different reasons.

   Mary Perry, the SPD's Transparency Officer told me yesterday that the SPD receives over 7000 public records requests per year. This equals roughly 19 requests per day. The one Public Records Officer required by RCW 42.56.580 can have one or more helpers, but the sole and named (on an agency's website) point of contact for requesters is required to be the Public Records Officer.

Submitted on September 29, 2017
by John F. Klinkert
Email: johncar3@comcast.net
Phone: (425) 771-7195

A few months ago I came across a published court of appeals decision which stated that inadequate staffing is not excuse for unreasonable delays in an agency's satisfying public records requests: the agency must provide adequate staffing for dealing with public records requests. Unfortunately, and annoyingly, I did not print that court opinion and I haven't been able to locate it using Google Scholar.

Examine the websites of a variety of Snohomish County agencies.

Do they each list and name the agency's Public Records Officer?

How easy is it to make records requests to the Public Records Officer by using the website? Does the agency have only one point of contact for a citizen to use for all records requests to an agency, as required by RCW 42.56.580?

9. Suggest a new citizens' initiative that contains amendments to the PRA, and among the amendments should be the following additional types of penalties: for late responses; for not naming the agency's sole Public Records Officer on its website; for destroying public records whether accidentally or intentionally; for not obtaining, from another source, records which the agency has destroyed, lost, or given away.

10. My understanding, which could be wrong (and if I am wrong, please tell me) is that a set of WACs is created by one particular state agency, the same agency that is to use the WACs.

    Here, with the Public Records Act, we have a myriad of types of public agencies, both state and local, that are subject to the Act. This great number of different agencies increases the diversity of situations which agencies and requesters might experience when requesters seek public records from a public agency.

    I think the AGO's attempt to provide advice for too many hypothetical legal disputes is the cause of the great number of advisory model rules and the legal advice contained in them.

    In this situation isn't it more desirable to have only a few "advisory model rules" offering only a few recommendations /guidelines?

11. If state and local agencies on their websites are to be allowed to promote their own request form (supposedly advisory, not mandatory, but this non –mandatoriness of the agency's form is sometimes not mentioned by the agency promulgating its own request form), then require the agencies to state, near the form, that requesters need not use it and that no particular format for a public records request is required.

12. Has the AGO itself officially adopted the rules to apply to itself?

    Does it have a different set of Public Records Act rules for itself?

    Where is the evidence of the AGO's formal/official adoption? Is it published somewhere?

Submitted on September 29, 2017
by John F. Klinkert
Email: johncar3@comcast.net
Phone: (425) 771-7195

What is the procedure for an agency to officially/formally adopt a WAC? Follow the Washington Administrative Procedures Act?

13. Is there a danger that the model rules will override the intent of the citizens who wrote the original Public Records Act if the model rules are used to provide for agency adoption a rule that is contrary to the original Public Records Act's intent?

14. A reminder: Just as with California's non-use of the American Bar Association's model rules of professional conduct, a state or local agency need not formally adopt any of the "advisory model rules".

    But RCW 42.56.070 requires state and local agencies to adopt some rules, unless the agencies provide a formal statement (available for public inspection where?) of why adoption is impractical .

    Realistically, how many agencies do you think have either (1) adopted rules or (2) stated why they have not done so?

Well, Ms. Krier, that's it. I hope my comments are helpful.

Yours truly,

John F. Klinkert
(425) 771-7105
Johncar3@comcast.net

Krier, Nancy (ATG)

From: Kim Reber <kreber@stevensclay.org>
Sent: Friday, September 29, 2017 3:26 PM
To: Krier, Nancy (ATG)
Subject: Memorandum
Attachments: Stevens Clay Memo - Comments to Proposed PRA Rules.pdf

Nancy,

Attached please find a Memorandum from our firm regarding proposed PRA rules. Thank you.

Kim

KIMBERLY N. REBER

STEVENS CLAY

421 W. Riverside • Suite 1575
Spokane, Washington 99201
T: 509.838.8330
F: 509.623.2131

E-MAIL: kreber@stevensclay.org
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421 West Riverside, Ste. 1575
Spokane, WA 99201-0402
Phone: (509)838-8330

STEVENS | CLAY PS

MEMORANDUM

To: Nancy Krier
From: Stevens Clay, P.S.
Date: September 29, 2017
Re: Comments to Proposed PRA Rules

Thank you for the opportunity to comment on the proposed model rules. They are a significant improvement and will help agencies efficiently process requests.

We also appreciate how they clear up many points not directly addressed by the courts. For example, the proposal clarifies an agency's ability to require submission of requests directly to the Public Records Officer. It will be helpful to explain to a requestor that a school custodian, for example, wouldn't need to accept a request.

That said, we offer a few thoughts, explained below, about the 'priority categories'.

Priority Categories May Create Conflict with Requestors

We are concerned that the 'priority categories' may be too prescriptive. As such, they may result in otherwise avoidable disputes with requestors. Take for example a common scenario:

> A requestor insists they are only seeking 'readily identifiable' records. However, their request actually requires significant coordination amongst agency employees. Based on the priority categories, the agency may place the request in 'category four'. That would mean several weeks or months for a response. The requestor, however, might insist that it falls in 'category two'. That would mean a response within five business days. And, an argument ensues.

In our experience, these arguments create distrust. They also impede a collaborative process. They also would force agencies to defend the estimated production date, as well as the assigned priority category. As such, we think the benefits of priority categories may be outweighed by their propensity to drive conflict.

Estimated Timelines Are Not the Same for All Agencies

The priority category timelines may not sufficiently take into account individual circumstances. For instance, an agency's size and available labor should be a significant factor in whether a production date is reasonable.

We represent small school districts where the Superintendent, School Principal, and Public Records Officer are the same person. These agencies could not produce records in a timeframe comparable to larger agencies. Yet, that is what we see in the priority category timelines.

Additionally, some of our clients receive requests that require minimal (if any) legal review. But, the request may still take years to complete. Under the proposed rules, such requests would likely fall within category four. This means the agency has only weeks or months to complete the request. That type of prescriptive approach could mislead requestors (and courts) as to the reasonableness of an agency's estimated timeline.

The Suggested Timelines may be Misinterpreted by the Courts

We are also concerned that judges will adopt the priority categories as a 'reasonable standard'. And, then they will hold all agencies to that same standard. Further, an attempt by an agency to expand on the estimated timelines (e.g., by modifying its own categories) may be viewed as presumptively unreasonable.

Because these timelines are 'one-size fits all' and are likely to be adopted as a reasonable standard, we again wonder if it may be best to remove them.

Suggested Additions to the 'Prioritization Factors'

For sake of clarity, the concerns addressed here are not about the broad concept of prioritizing. Our clients routinely prioritize requests. And, proposed WAC 44-14-040, which outlines prioritization factors, is of great value for that. We simply want agencies to be given more discretion in prioritizing requests.

As to the 'prioritization factors' listed in WAC 44-14-040, we respectfully suggest adding the following:

- The number of redactions to be applied;
- The number of different exemptions or redactions;
- The need to draft of an exemption log;
- Reliance on seasonal or part-time employees (e.g. coordinating the search with a teacher on summer break);
- The non-public records duties of employees who coordinate responses (e.g. a PRO who has other duties that require at least 85% of the employee's time);
- The cooperation of a requestor;
- The responsiveness of a requestor in responding to a legitimate need for clarification; and
- The volume and nature of other requests in need of contemporaneous processing.

Conclusion

It bears repeating that, despite the above suggestions, the proposed model rules are a ***significant*** improvement. We offer our thoughts to enhance, not criticize, the proposal. Should you or your staff have any questions about the above, please don't hesitate to let us know.

Krier, Nancy (ATG)

From: hjgale@gmail.com on behalf of Howard Gale <hjgale@post.harvard.edu>
ent: Friday, September 29, 2017 4:13 PM
To: Krier, Nancy (ATG)
Subject: Public comments regarding the CR-102

Over the last few years our PRA has been hobbled by a series of confusing Washington state appeals court decisions -- often motivated by arguments concerning cost -- and a failure by the Washington attorney general to address the attempts by state, county, and municipal agencies to take advantage of these confusions. To the contrary, the state attorney general's current attempt to update the state "Model Rules" on public disclosure have only added to the confusion, notably through proposed rules that allow agencies to:

Avoid timely production through "*installments.*" The original PRA legislation in 1972 stated "*Public records shall be available to any person for inspection and copying, and agencies shall, upon request for identifiable records, make them promptly available to any person.*" In 2005 the state legislature saw fit to add the following clause to the end of that sentence: "*including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.*" Washington's appeals courts have recently ruled that agencies have no responsibility to state or explain how many installments there might be, or when the final installment (if it exists) might be provided. These court rulings are clearly contrary to the original intent of the legislation mandating that records be made "*promptly available*": if legislators in 1972 wanted an exception to "*promptly available*," or wanted agencies to endlessly string out disclosure, they would have written that. The new model rules should provide clear guidance here that agencies should clarify how many installments they plan and when they will be completed, and not allow "installments" to be used as a means to subvert the clear intent of the original law.

Underfund services to respond to public records requests. The proposed rules state that "*an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an 'excessive interference' with the agency's 'other essential functions.*" This is a formula for encouraging agencies, or departments within agencies, to ***not*** have specialized or full-time employees to both honor public record requests and to insure records are well organized and maintained. The agency can then claim that answering such requests is interfering with their essential functions.

Charge for "customized services." While this may sound reasonable, technologically naive requestors and courts can be mislead by a term without clear definition. For example, in a 2013 public records request I made to the City of Seattle's Seattle Center, a huge number of relevant documents were not found because the City claimed obscure and expensive forensic software was required to search email attachments, a patently absurd claim. Should requestors face delays and prohibitive costs for claims like these?

Avoid providing records in their original digital format. The proposed rules note state court findings that "*nothing in the PRA obligates an agency to disclose records electronically.*" While an agency certainly is not required to render an original paper document digitally, an original digital document must be offered in its original format. Digital records need to be provided in their original digital format to guarantee authenticity, to preserve metadata for properly determining

dates and creators, and to insure that attachments, senders, and recipients are not lost. There are aspects of the original PRA, and numerous court decisions, which require that original documents be provided in their original format.

Treat multiple requests from a requestor as a single request. This can result in agencies unnecessarily delaying a simple and narrowly tailored request, and also confusing the substance of requests. This is exactly what happened with my 2013 request to the City when they intentionally reduced multiple requests to a single simple concept, failing to produce scores of relevant documents.

Have subjective discretion in deciding what records "relate" to a specific request. The proposed rules state that "*When a request uses an inexact phrase such as all records 'relating to' a topic (such as 'all records relating to the property tax increase'), the agency may interpret the request to be for records which directly and fairly address the topic.*" Given that the vast majority of records are digital, this provision actually complicates a rather objective initial search, e.g. all records containing the terms "property tax*" and words like "increase," "raise," "higher," etc. While this sort of search method may be over inclusive, it avoids the problem that a worker at an agency might decide that a developers e-mail request to speak with a government worker about potential property tax increases is not relevant to actual property tax increases. There must be objective search methods that avoid placing a worker in a situation where they feel compelled to avoid releasing a document that embarrasses their boss.

Maintain antiquated search methods. The proposed rules repeatedly outline "reasonable" search methods, methods that would have been appropriate in the last century. With the vast majority, if not nearly all records, being digital, the first step in most searches should be on servers (or on specific computers if they are not backed up to servers), searching digital storage broadly (as opposed to specific record types). This would avoid the problem noted above.

Multiple requests from a single requestor can be considered a bot (automated) request and refused. The current proposed rules would allow two requests in 24 hours to be considered a bot request, clearly far too simplistic a basis for determining if a request is automated.

Allows agencies to abandon requests if a requestor does not pickup documents within 30 days. For an average citizen who is doing an investigation alone and on their own time, and needs to prioritize work and family obligations, this is unfairly punitive. Recognizing that the existing law ***allows*** agencies to stop searching for records if an initial installment is not retrieved within 30 days, the model rules should not encourage such behavior as a "best practice." Additionally, due to the problems noted above with "installments," this provision provides further incentive to agencies to make use of such a scheme to possibly curtail fully responsive records production.

The attorney general's rules do not address a recent area of confusion. Recent Washington court rulings have established that federal court decisions, involving federal FOIA and notions of "*reasonable*" and "*adequate*" search, can apply to Washington state's PRA. While the legal issues cannot be analyzed here, there is a belief among many state agencies that missing records are no longer a cause of action if the agency can claim that an "*adequate*" search for records was performed. This conclusion ignores that federal FOIA has no provision for fines for missing records, whereas Washington's PRA does and makes this a stand-alone cause of action. Facile comparisons between federal and state laws have allowed our PRA to be eviscerated in cases where missing documents can prove that a search was not adequate.

Howard J. Gale
702 2nd AVE W, #304
Seattle, WA 98119-4519
06-548-5665

Comments on CR-102 – WSR 17-17-157 (Proposed Rulemaking - 2017) – Chapter 44-14 WAC Model Rules

Received
October 1, 2017 –
October 4, 2017

Krier, Nancy (ATG)

From: shelder@gth-gov.com
Sent: Monday, October 2, 2017 2:46 PM
To: Krier, Nancy (ATG)
Subject: Model Rules Comment Form

The following message has been submitted.

Information Submitted:

Section 1: Comment

Last Name:	Helder
First Name:	Shelly
Middle Name:	
Email Address:	shelder@gth-gov.com
Comment:	This comment is being submitted on behalf of the City of Kenmore. Relating to the priority categories, WAC 44-14-040(1b), replace 'will' with 'should' evaluate the request…and give it a priority category. The word change would align with WAC 44-14-04003(1b) … "Then, an agency could apply categories of similar requests…" Also, City of Kenmore prioritizes requests based on the nature of the request, volume, and availability of the requested records, but does not have a priority category system in place. The volume and nature of requests for our City has not necessitated implementing a system of categorizing requests. WAC 44-14-040 Processing of public records requests—General. (1) Providing "fullest assistance." (b) The public records officer or designee will <should> evaluate the request according to the nature of the request, volume, and availability of requested records, and give it a priority category. WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) Similar treatment and purpose of the request. (b) For example, upon receipt of a request, an agency will log it in (see subsection (14) of this section). Then, an agency could apply categories of similar requests and thus treat them similarly in processing the...

Section 2: Privacy Notice, Disclimer and signature

Signed name:	Shelly Helder
Date:	10/2/2017
Submitted on:	10/2/2017

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info@washingtoncog.org
6351 Seaview Ave NW
Seattle, WA 98107-2664
Phone: 206.782.0393 FAX: 206.623.4474

Washington Coalition *for* Open Government

washingtoncog.org

October 4, 2017

Via Email (PDF)
nancyk1@atg.wa.gov

Nancy Krier
Washington Attorney General
PO Box 40100
Olympia WA 98504-0100

RE: WAC Chap. 44-14 Model Rules - Proposed Rule Making

Dear Ms. Krier:

The Washington Coalition for Open Government (WCOG) appreciates the opportunity to comment on the Proposed Rule Making (WSR 17-17-157) published on August 23, 2017. The WCOG legal committee has carefully evaluated the existing rules in WAC Chap. 44-14 as well as the proposed amendments published by the Attorney General's Office (hereafter "AGO proposal").

This letter includes WCOG's comments on both the existing rules and the AGO proposal for all sections of Chapter 44-14 WAC except WAC 44-14-040 through -04005. WCOG's comments on those sections will be provided in a separate letter. A complete copy of WCOG's proposed revisions to the model rules is attached to this letter as Appendix A.

Summary. The existing rules focus on procedures for responding to PRA requests. But the requirement that agencies adopt and enforce reasonable rules is broader in scope than the existing rules recognize. RCW 42.56.100 provides, in relevant 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.

This requirement has been part of the PRA since its enactment by initiative in 1972. *See* Laws of 1973, ch. 1, § 29; former RCW 42.56.290.

The drafters of the PRA understood that disorganized public records are a significant impediment to transparency, making prompt responses difficult. RCW 42.56.100 recognizes that the goals of fullest assistance and the most timely possible action on PRA requests cannot be achieved unless public records are kept organized. Consequently, an agency's responsibilities under the PRA start with keeping public records organized.

To date the requirement that agencies adopt and enforce reasonable rules to protect public records from disorganization and destruction has been largely overlooked. The few existing rules that address "organization of records" have no substantive provisions that actually address the organization of public records. The AGO proposal does not correct these defects.

WCOG proposes a new WAC 44-14-03004 that actually addresses the ***organization*** of various types of commonly requested public records and the problems associated with PRA requests for such records. These proposed rules address the organization of records on agency computer systems as well as personal devices and accounts. These rules are intended to assist agencies with organizing—for the purpose of promptly responding to PRA requests—all kinds of public records including emails, text messages, social media, word processing files, drafts shared with others, exempt information in common forms, records of PRA compliance, attorney invoices, records of external legal counsel, multi-agency organizations, correspondence with legislators, and identifiable future records. This is ***not*** an exhaustive list. Each agency is different, and each agency will need to adopt specific rules to address the particular type and organization of the records of the agency.

WCOG also proposes a new WAC 44-14-06002 pertaining to exemptions. The AGO proposal notes that the existing "summary" of exemptions is outdated and should be deleted. WCOG concurs. Rather than attempt to summarize exemptions, the model rules need to address the ***organization*** of records that are subject to commonly-asserted exemptions so that agencies can respond to PRA requests more quickly, and without the need for time consuming reviews by attorneys. Pursuant to RCW 42.56.100 each agency must adopt and enforce specific rules to prevent common exemptions from causing excessive delay or disruption in responding to PRA requests. WCOG is not aware of any agency that has actually adopted such rules. WCOG proposes five rules dealing with attorney-client privilege, work product (RCW 42.56.290), litigation correspondence and pleading files, common interest and joint defense agreements, and passwords. Again, this is ***not*** an exhaustive list. Each agency is different, and each agency will need to adopt specific rules to address the particular type and organization of the records of the agency.

It is important to note that the burden of adopting and enforcing proper rules is on the AGO and the agencies. WCOG has pointed out various defects in the existing rules, and proposed various amendments to address these defects, in an effort to assist the AGO in promulgating effective model rules. If the AGO disagrees with WCOG's proposed rule text then the AGO should treat WCOG's comments and suggestions as a starting point for developing a more complete set of model rules to comply with RCW 42.56.100. WCOG asks the AGO to perform its duties under RCW 42.56.570(2) by promulgating model rules that achieve all the requirements of RCW 42.56.100.

The existing rules contain incomplete, inaccurate and/or out-of-date discussions of PRA case law. For example, the third paragraph in existing WAC 44-14-01003 contains an incomplete discussion of the burden of proof in PRA cases, and an incorrect explanation of when an agency may be liable for attorney fees under RCW 42.56.550(4). WCOG believes such discussions of case law do not belong in the AGO model rules, which are supposed to address PRA compliance, not PRA litigation.

Existing WAC 44-14-03001 contains a problematic discussion of "searches" under the PRA, as well as an incomplete discussion of the problem of public records on personally owned devices. WCOG is concerned that these provisions reinforce the common misunderstanding that the lack of specific enforcement procedures in the PRA itself makes the PRA unenforceable with respect to records in the possession of agency employees, officials or contractors. **The right and duty of an agency to control its own records is a function of other pre-existing areas of the law, including property, agency, and employment law.** Furthermore, the unauthorized destruction of public records is a crime. *See* Chap. 40.16 RCW. The PRA is neither unconstitutional nor unenforceable with respect to records in the possession of agency officials, employees, or contractors; it simply does not address how an agency obtains or retains control over such public records. A PRA request may trigger an agency's obligation to obtain control over public records pursuant to other laws.

WCOG proposes changes to this section to make clear that (i) an agency's right and duty to control its own records comes from ***other areas of the law***, not the PRA, and (ii) a public records officer who encounters any difficulty in retrieving public records from any agency official, employee or contractor should immediately contact the agency's legal advisor. Any discussion of how an agency might take legal action to recover public records from an uncooperative public official, employee or contractor is beyond the proper scope of the model rules. The purpose of the model rules is to prevent such problems from arising in the first place.

Accordingly, WCOG has proposed amendments to prevent such problems. WCOG has also provided comments and proposed amendments for most of the remaining sections of the model rules.

WCOG appreciates your consideration of various defects in the existing rules, and proposed amendments to address them.

INTRODUCTORY COMMENTS
WAC 44-14-00001 et seq.

RCW 42.56.570(2) provides that the AGO shall adopt advisory rules for "(a) [p]roviding fullest assistance to requestors; (b) [f]ulfilling large requests in the most efficient manner; (c) [f]ulfilling requests for electronic records; and (d) [a]ny other issues pertaining to public disclosure as determined by the attorney general." WAC 44-14-00001 provides that the purpose of the AGO model rules is to provide information to agencies about "best practices" for complying with the PRA, defined as former RCW 42.17.250 through -.348. That range includes former RCW 42.17.290, which is now codified as RCW 42.56.100.

RCW 42.56.100 provides, in relevant 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.

This requirement has been part of the PRA since its enactment by initiative in 1972. *See* Laws of 1973, ch. 1, § 29; former RCW 42.56.290.

The drafters of the PRA understood that disorganized public records are a significant impediment to transparency, and that an agency's responsibilities under the PRA start with keeping public records organized. Agencies have never been permitted to charge requestors for the cost of locating public records or making them available for copying. Laws of 1973, 1st Ex. Sess., ch. 1; RCW 42.56.120(1). The burden of keeping public records organized is on the agencies. Agencies are also required to adopt and enforce rules to prevent responding to PRA requests from causing "excessive interference with other essential functions of the agency." RCW 42.56.100. That means agencies must take both PRA requests and the need to redact records into consideration when adopting rules for the organization of agency records.

RCW 42.56.100 recognizes that the goals of fullest assistance and most timely possible action on PRA requests cannot be achieved unless public records are kept organized. Consequently, this section unambiguously requires agencies to (i) adopt and enforce reasonable rules (ii) to protect public records from disorganization, (iii) in order to provide the fullest assistance and most timely action on PRA requests.

To date the requirement that agencies adopt and enforce reasonable rules has been largely overlooked by agencies and the courts. Only two published cases address an agency's obligation to adopt and enforce rules under RCW 42.56.100. *Kleven v. Des Moines*, 111 Wn. App. 284, 296-97, 44 P.3d 887 (2002) (no violation of former RCW 42.17.290 where agency merely mislabeled a single audiotape); *ACLU v. Blaine School Dist.*, 88 Wn. App. 688, 695, 937 P.2d 1176 (1997) (agency violated duty of fullest assistance by refusing to mail records to requester). These cases provide no real guidance on an agency's obligation to adopt and enforce rules to protect public records from disorganization.

Agencies have largely ignored the unambiguous command in RCW 42.56.100 that agencies enforce rules to organize public records. Agencies all over the state have allowed public records, particularly email records, to become disorganized. Agencies routinely allow tens of thousands of email messages to accumulate in the Inbox and Sent items folders of particular employees instead of filing these important public records in organized files where they can be easily located and copied. Agencies have failed to revise their forms and office processes to separate exempt and non-exempt information in commonly requested records. Agencies and their PRA officers erroneously assume that an agency has no obligations under the PRA unless and until particular records are requested, and they respond to PRA request by proposing key word searches through mountains of data rather than providing copies of previously organized records.

The existing and proposed rules in Chap 44-14 WAC (WSR 06-04-079) do not adequately address the requirement in RCW 42.56.100 that agencies "adopt and enforce reasonable rules ... to protect public records from damage or disorganization." Nor do the additional rules for electronic records, adopted in 2007 (WSR 07-13-058), address this requirement. In fact, several existing rules mischaracterize the very purpose of model rules and the obligations of an agency to adopt and enforce reasonable rules:

- WAC 44-14-0003 notes that the AGO model rules are nonbinding but neglects to state that agencies must adopt reasonable rules whether or not an agency chooses to adopt the AGO model rules.
- WAC 44-14-010(2) (authority and purpose) fails to mention an agency's obligation to adopt and enforce reasonable rules.
- WAC 44-44-01002 is internally inconsistent and omits some of the requirements of RCW 42.56.100. The AGO proposal does not correct this defect in the existing rule.
- WAC 44-14-020(3) and WAC 44-14-02002 discuss the functions of a public records officer, but omit the responsibility of a public records officer to ensure that an agency enforces the reasonable rules adopted by the agency pursuant to RCW 42.56.100.
- WAC 44-14-03004, which addresses "Organization of records," inaccurately paraphrases the requirements of RCW 42.56.100, and contains no substantive provisions for the organization of records.

In sum, the existing model rules fail to address the requirement in RCW 42.56.100 that agencies adopt and enforce reasonable rules to protect public records from damage or disorganization as required by RCW 42.56.100. **The AGO proposal does not correct these defects in the existing rules.**

Agencies have largely failed to adopt the rules required by RCW 42.56.100. This may be due, in part, to the fact that the AGO model rules mischaracterize RCW 42.56.100 and do not provide any real guidance on how an agency should comply with that section of the PRA.

WCOG proposes various revisions to the existing model rules. WCOG's comments and proposed rules are organized in the same manner as the existing rules in Chapter 44-14 WAC. WCOG proposes a new WAC 44-14-03004 to specifically address the organization of various common types of records. Finally, WCOG proposes extensive revisions to WAC 44-14-060 to address particular exemptions.

WAC 44-14-00001 Statutory authority and purpose.

WCOG concurs in the AGO's proposed amendments to WAC 44-14-00001.

WAC 44-14-00002

WCOG concurs in the AGO's proposed amendments to WAC 44-14-00001.

WAC 44-14-00003 Model rules and comments are nonbinding

The AGO Proposed Rule would amend this section as follows:

> **WAC 44-14-00003 Model rules and comments are nonbinding**. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.
>
> While the model rules and comments are nonbinding, they should be carefully considered by requestors and state agencies. ((~~The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties~~)). Local agencies are required to consider them in establishing local ordinances implementing the act. RCW 42.56.570. The Washington courts have also considered the model rules in several appellate decisions.1 (footnote deleted)

The existing rule correctly notes that the AGO model rules are not binding on any agency. WCOG suggests revising this rule to clarify that agencies are still required to adopt and enforce rules under RCW 42.56.100 whether or not they choose to adopt these particular model rules. Neither the existing rule nor the AGO Proposal makes this point clearly.

WCOG opposes the insertion of the word "state" in the first sentence of the second paragraph, as that revision erroneously implies that the duties of state and local agencies are different with respect to the adoption of rules.

WCOG has no objection to the deletion of the second sentence in the second paragraph.

The proposed third sentence of the second paragraph notes that agencies are required to adopt local ordinances but neglects to mention the specific requirement that local agencies adopt rules pursuant to RCW 42.56.100.

The proposed fourth sentence and footnote, while correct, are irrelevant, implying that the model rules would have less importance if the appellate courts had not mentioned them in a few cases. That sentence and footnote should be deleted.

The AGO proposal should be revised to reflect the statement in RCW 42.56.570(4) that agencies "should" consult the model rules.

In lieu of the AGO proposal WCOG suggests amending the second paragraph of WAC 44-14-00003 as follows:

> While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. ((~~The model rules~~

~~and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.~~)) Local agencies are encouraged to consider them in establishing local ordinances implementing the act. RCW 42.56.570. Agencies are required to adopt and enforce rules pursuant to RCW 42.56.100 whether or not agencies adopt these model rules in whole or in part. Local agencies should consult these model rules when establishing their own local ordinances.

WAC 44-14-00004

WCOG concurs in the AGO's proposed amendments to WAC 44-14-00004.

WAC 44-14-00005

WCOG concurs in the AGO's proposed amendments to WAC 44-14-00005.

WAC 44-14-00006

WCOG concurs in the AGO's proposed amendments to WAC 44-14-00006.

AUTHORITY AND PURPOSE
WAC 44-14-010 et seq.

WAC 44-14-010 Authority and purpose.

RCW 42.56.100 requires agencies to "adopt and enforce reasonable rules and regulations" 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." The rules in Chap 44-14 WAC (adopted in 2006-07) do not address these issues. The existing rule lacks a clear statement of an agency's obligation under RCW 42.56.100 to adopt and enforce reasonable rules. The AGO proposal does not correct this deficiency in the existing rule.

The AGO proposal adds a sentence to address the definition of "public record" with respect to records of volunteers. WCOG believes this revision, if necessary at all, belongs in WAC 44-14-00001 which addresses the scope of the PRA. WCOG concurs in the updated statutory citations suggested by the AGO proposal.

WCOG proposes revising the rule as follows:

WAC 44-14-010 Authority and purpose. (1) RCW ((~~42.17.260(1)/~~)) 42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" at RCW 42.56.010(3) to include 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 the agency. RCW ((~~42.17.260(2)~~)) 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the reasonable rules and regulations that ~~procedures~~ (name of agency) will enforce pursuant to RCW 42.56.100 ~~follow~~ in order to provide fullest assistance to requesters, provide the most timely possible action on requests, protect public records from damage or disorganization and provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act, ((~~and~~)) these model rules, and the rules adopted by (name of agency) will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

WAC 44-14-01001 Scope of coverage of Public Records Act

WCOG opposes the AGO's proposed deletion of the sentence that says "An agency should coordinate responses to records requests across departmental lines." In addition, WCOG proposes adding language to the rule to more clearly explain that cities and counties are agencies under the PRA, and they must have a public records officer for the entire agency even if the agency also has public records officers for individual departments.

WCOG proposes revising the last paragraph of the rule as follows:

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). The act includes a county "office" as an agency. RCW 42.56.010(1). However, the act ((~~defines~~)) also includes the county as a whole as an "agency" subject to the act. Id. ((~~RCW 42.17.020(2)~~)). An agency should coordinate responses to records requests across departmental lines as needed to ensure that each agency as a whole properly responds to request for records. ((~~RCW 42.17.253(1)~~)) Some counties may have only one public records officer for the entire county; others may have public records officers for each county official or department. But each county and city is an agency under the PRA and must have a public records officer for the entire county or city. The act does not require a public

agency that has a records request directed to it to coordinate its response with other public agencies.3 Regardless, public records officers must be publicly identified. RCW 42.56.580 (2) and (3) (agency's public records officer must "oversee the agency's compliance" with act).

WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests.

The existing rule is inconsistent and omits the requirement in RCW 42.56.100 that agencies "adopt and enforce" reasonable rules. The AGO proposal does not correct these deficiencies in the existing rule.

The AGO proposal would add to the confusion by discussing an agency's duties under RCW 42.56.040 immediately after the rule heading, which clearly refers to the obligation in RCW 42.56.100 to adopt and enforce rules. The proposed additional language relating to RCW 42.56.040 should go at the end of the rule or perhaps in an entirely new section.

The AGO has proposed an additional sentence that addresses "strict compliance" and "reasonable procedures." This language is confusing and does not belong in this rule. The existing case law on compliance with RCW 42.56.100 is confusing and inconsistent, and the AGO should not attempt to summarize or codify such case law in a model rule.

WCOG proposes the following revision to more accurately state the obligations of an agency:

> **WAC 44-14-00002 Requirement that agencies adopt reasonable regulations for public records requests.** The act provides: "Agencies shall adopt and enforce reasonable rules and regulations...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." RCW ((~~42.17.290/~~)) 42.56.100. Therefore, an agency must adopt and enforce "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."
>
> At the same time, an agency ((~~'s regulations~~)) must adopt and enforce reasonable rules and regulations to "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW ((~~42.17.270/~~)) 42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.
>
> [optional text based on AGO proposal] The act also provides that state agencies are to publish a rule in the Washington Administrative

Code (WAC) and local agencies are to make publicly available at the central office guidance for the public that includes where the public may obtain information and make submittals and requests. RCW 42.56.040.

WAC 44-14-01003 Construction and application of act.

WCOG concurs in the AGO proposal with respect to the minor changes in the first paragraph of WAC 44-14-01003.

The third paragraph in existing WAC 44-14-01003 contains an incomplete discussion of the burden of proof in PRA cases, and an incorrect explanation of when an agency may be liable for attorney fees under RCW 42.56.550(4). The existing rule erroneously suggests that attorney fees are only awarded for certain types of PRA violations. *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014), makes clear that agencies are liable for attorney fees for any violation of the PRA. Numerous cases make clear that a *partially prevailing* requestor is also entitled to attorney fees.

WCOG believes such discussions of case law do not belong in the AGO model rules, which are supposed to address PRA compliance, not PRA litigation. However, if the AGO believes that such a discussion is appropriate then the third paragraph of WAC 44-14-01003 should be revised as follows:

> The act emphasizes ((~~three separate times~~)) that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW ((~~42.17.010, 42.17.251~~/)) 42.56.030((~~, 42.17.920.1~~)). The act places the burden on the agency of proving that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records, and/or ((~~a record is not subject to disclosure or~~)) that its estimate of time to provide a full response is "reasonable." RCW ((~~42.17.340(1) and (2)~~/)) 42.56.550 (1) and (2). The act also encourages disclosure by awarding a prevailing or partially-prevailing requestor reasonable attorneys fees, costs. In addition, (~~and~~) a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure. ((~~or its estimate is not "reasonable."~~)) RCW ((~~42.17.340(4)~~/)) 42.56.550(4).

The additional footnotes in the AGO proposal are an incomplete discussion of case law. As the AGO notes in its discussion of WAC 44-14-060, comments based on existing case law quickly become outdated. This discussion of case law does not belong in the model rules. Those footnotes should be deleted.

AGENCY DESCRIPTION—CONTACT INFORMATION —PUBLIC RECORDS OFFICER (WAC 44-14-020 et seq.)

WAC 44-14-020 Agency description—Contact information—Public records officer

WCOG believes the reference to "fax number" should be removed from subsection (1) of the rule. Facsimile transmission is an obsolete technology that should be completely replaced by electronic transmission of PDF files.

WCOG has no comments on subsection (2) of WAC 44-14-020.

Subsection (3) of the existing rule provides that public records officers will "ensure that public records are protected from damage or disorganization." This language omits the essential requirement of RCW 42.56.100 that agencies "adopt and enforce reasonable rules and regulations…to protect public records from damage or disorganization." This rule should be revised to (i) track the language of the statute and (ii) clarify that the public records officer is primarily responsible for ensuring that the agency actually enforces the rules adopted by the agency. WCOG proposes the following revision to more accurately state the obligations of an agency:

> (3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer ((~~or designee and the (name of agency)~~)) will ensure that (name of agency) actually enforces the reasonable rules adopted by (name of agency) to provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

WAC 44-14-02001 Agency must publish its procedures

No comments.

WAC 44-14-02002 Public records officers

The existing rule contains out-of-date citations to Chap. 42.17 RCW. WCOG proposes updating these citations to the re-codified PRA, Chap. 42.56 RCW.

The existing rule omits the requirement in RCW 42.56.580 (former RCW 42.17.253) that the responsibilities of a public records officer "oversee the agency's compliance with the public records disclosure requirements of this chapter," which includes an agency's responsibility to

adopt and enforce rules pursuant to RCW 42.56.100. WCOG proposes the following revision to more accurately state the obligations of a public records officer:

> **WAC 44-14-02002 Public records officers.** An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records and to "oversee the agency's compliance" with the PRA, including the enforcement of reasonable rules pursuant to RCW 42.56.100. RCW ((42.17.253(1))) 42.56.580(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. RCW 42.56.580(2). A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW ((~~42.17.253(3)~~)) 42.56.580(3).
>
> The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

AVAILABILITY OF PUBLIC RECORDS
WAC 44-14-030 et seq.

WAC 44-14-030 Availability of public records

The AGO proposal makes minor changes to subsections (1) and (4). WCOG concurs in the AGO proposed changes to subsection (1). WCOG believes all the references to "fax" should be removed from subsection (4) the rule. Facsimile transmission is an obsolete technology that should be completely replaced by electronic transmission of PDF files.

Subsection (3) of the existing rule inaccurately paraphrases the requirements of RCW 42.56.100, omitting the essential requirement of RCW 42.56.100 that agencies "adopt and enforce reasonable rules and regulations…to protect public records from damage or disorganization." **The AGO proposal does not address these defects in the existing rule.**

Existing subsection (4) overstates how much information a requestor is actually required to provide when making a PRA request. WCOG proposes revising that subsection to state that the requestor must provide sufficient contact information.

WCOG proposes the following revision to more accurately state the obligations of requestors and agencies:

(3) Organization of records. The (name of agency) shall adopt and enforce reasonable rules and regulations to ((~~will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to~~)) protect records from damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) Making a request for public records. (a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing((. The request may be made)) on the (name of agency's) request form or through an online portal, or by letter, fax (if the agency uses fax), or email addressed to the public records officer at the email address publicly designated by (name of agency), or by submitting the request in person at (name of agency and address). The request may include ((~~and including~~)) the following information: ((

- ~~Name of requestor;~~
- ~~Address of requestor;~~
- ~~Other contact information, including telephone number and any email address;~~)) Contact information sufficient for the agency to respond to the request;
- Identification of the public records adequate for the public records officer or designee to locate the records; and
- The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), ((~~standard photocopies will be provided at (amount) cents per page~~)) charges for copies are provided in a fee schedule available at (agency office location and web site address).

(c) A records request form is available for use by requestors at the office of the public records officer and online at (web site address)....

WCOG proposes additional revisions to WAC 44-14-03004 to clarify these requirements. See below.

WAC 44-14-03001 "Public record" defined

The AGO proposal makes minor changes to the first paragraph of WAC 44-14-030001. WCOG believes the reference to "courts" as well as the lack of a citation to the actual statute, makes this rule confusing, implying that the three-part test for "public record" was created by "courts" rather than defined by statute. WCOG proposes revising the first paragraph of the rule as follows:

> **WAC 44-14-03001 "Public record" defined.** The PRA uses ((~~Courts use~~)) a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.((~~1~~)) RCW 42.56.030. Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

The AGO proposal would revise the second sentence of WAC 44-14-03001(1) to note that text messages, social media postings and databases are also "writings." WCOG believes this sentence should be further revised to clarify that this is ***not*** an exhaustive list, and that all forms of electronic records and data are also writings:

> (1) **Writing.** A public record... RCW 42.56.010(4). Emails, text messages, social media postings, databases and all other forms of electronic records and data are therefore also "writings."

a. Minor revisions. The AGO proposal makes minor revisions to WAC 44-14-03001(2) (relating to the conduct of government). WCOG has no comments on these proposed changes.

The AGO proposal makes minor revisions to the first two paragraphs of WAC 44-14-03001(3), correcting an old RCW citation and adding the word "public" to the last sentence. WCOG concurs in these revisions, which are included in WCOG's proposed rule (below).

b. Records possessed by agency officials and employees. The AGO proposal revises the first two sentences of the third paragraph of subsection (3) (starting with "Sometimes,"). AGO proposal at 10. These revisions explain that records not actually possessed by an agency may still be public records. WCOG concurs in these revisions, which are included in WCOG's proposed rule (below).

c. Retrieving public records from agency officials and employees. The existing comment (03001) includes two statements about how an agency might retrieve public records in the possession of agency officials or employees:

- a sentence in the existing second paragraph of subsection (3) states that "The agency could be required to obtain the public record, unless doing so would be impossible;" and
- the third paragraph of subsection (3) contains two sentences (starting with "However,") that address "searches" of agency property and home computers.

The AGO has proposed some revisions to these parts of subsection (3). AGO proposal at 10. These parts of subsection 03001(3) are problematic for several reasons.

First, the existing rule cites *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004), for the proposition that the PRA "does not authorize unbridled searches of agency property." The cited portion of *Hangartner*, which held that the PRA request at issue was "overbroad," was reversed by the legislature in 2005. Former RCW 42.17.270; Laws of 2005, ch. 483, § 1 (now codified at RCW 42.56.080(2)). That reference to *Hangartner* was already out-of-date when the existing rule was enacted in 2006, and it should be deleted.

Second, the references to "searches" in the existing comment are potentially misleading. The word "search" is a term of art that means different things in different legal contexts. In the context of the PRA the word "search" should refer to an agency's efforts to locate requested records. The term "search" also refers to a constitutional privacy concept that implicates the Fourth Amendment and/or article I, section 7 of the Washington Constitution. But discussions of constitutional law do not belong in the model rules.

Third, the rule should be revised to clarify that an agency's right and duty to retain control over its own public records is ***not*** found in the PRA. After discussing an example in which a technical documents is in the possession of a contractor, existing subsection (3) states that "[t]he agency could be required to obtain the public record, unless doing so would be impossible." Apart from stating the obvious, this provision is unhelpful because it does not explain ***how*** an agency might be "required" to obtain a public record from an uncooperative agency official, employee or contractor, or why that might be "impossible." The AGO proposal does not revise this part of subsection (3).

The PRA requires agencies to adopt and enforce rules to protect public record from disorganization and destruction and to make such public records available for inspection or copying. RCW 42.56.070, -.100. But the PRA itself does ***not*** address an agency's legal right or duty to retrieve public records from the possession of agency officials or employees. Although a PRA request may trigger an agency's legal obligation to retrieve public records from the possession of an agency official, employee, or contractor, the PRA does ***not*** address how that might be accomplished.

Nor is it necessary for the PRA (or the model rules) to address how an agency might retrieve public records from a recalcitrant agency official or employee. A PRA request is just one of several events that might make it necessary to take disciplinary or legal action against an official or employee who refuses to return public records to the agency. For example, if a mayor wanted to retrieve public records from a recalcitrant city employee, the mayor would not file a PRA case against his or her own city. Rather, the mayor would instruct the city's attorney to take whatever action was necessary to recover the records, including terminating the employee and/or charging the employee with crime.

Some agencies and their attorneys have labored under the mistaken impression that the lack of specific enforcement procedures in the PRA make the PRA unenforceable with respect to records in the possession of agency employees. In *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), the agency erroneously equated the mere request for records with an

unconstitutional "search" of the prosecuting attorney's smart phone. WAPA erroneously argued that an agency that receives a request for records on an employee's cell phone "is powerless to compel production of the writings." *WAPA Amicus Br.* (4/27/15) at 10. These erroneous (and unsuccessful) arguments overlooked the fact that an agency's right and duty to control its own public records comes from other areas of law, including property, agency and employment law.[1] Furthermore, destruction or concealment of public records is a crime, and an agency could (and should) use prosecution (or the mere threat of prosecution) to recover records from recalcitrant officials, employees or contractors. *See* Chap. 40.16 RCW (penal provisions).

When an agency seeks to recover a public record from the possession of an agency's officer, employee or contractor it does not matter whether the record was requested under the PRA or whether the agency simply wants to recover the record for its own purposes. The agency's legal rights and remedies are the same, and they are ***not*** a function of the PRA. Any discussion of how an agency might take legal action to recover public records from an uncooperative public official, employee or contractor is beyond the proper scope of the model rules. The purpose of the model rules is to prevent such problems from arising in the first place.

WCOG proposes revising subsection (3) to make each of the above points clear, and to note that a public records officer who encounters any difficulty in retrieving public records from any agency official, employee or contractor should immediately contact the agency's legal advisor.

Finally, the third paragraph of the existing rule, beginning with the word "Yet," contains provisions relating to agency records on home computers and personal devices. The AGO has proposed substantial revisions to this portion of subsection (3). AGO Proposal at 10-11. These provisions relate to the protection of particular public records from disorganization or destruction. These provisions do *not* belong in this subsection, which addresses the scope of "public record." WCOG believes such provisions should be moved to WAC 44-14-03004 (organization of records). See WAC 44-14-03004 (below) for WCOG's comments on the AGO proposed revisions to the third paragraph of existing WAC 44-14-03001.

The existing subsection (3) of WAC 44-14-03001 should be revised as follows:

> **(3) "Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW ((~~42.17.020(41)~~)) 42.56.010(3).
>
> A record can be "used" or "owned" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."((~~3~~)) 4 For example, if an

[1] An article published in the Washington Law Review, prior to the Supreme Court's decision in *Nissen*, makes this erroneous understanding explicit. That article, which is posted on the website of a large law firm that represents agencies, erroneously asserts that "the PRA does not provide the necessary tools, such as a warrant provision" that would allow agencies to obtain records from recalcitrant official or employee. Note, *Public Records in Private Devices: How Public Employees' Article I, Section 7 Privacy Rights Create a Dilemma for State and Local Government*, 90 Wash. L. Rev. 545, 546 (2015). This article fails to grasp that the right and duty of agencies to retrieve public records from the possession of agency officials or employees is ***not*** a function of the PRA, but of other, pre-existing areas of law.

agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.((4)) 5 ((~~The agency could be required to obtain the public record, unless doing so would be impossible~~.)) An agency cannot send its only copy of a public record to a third party for the sole purpose of avoiding disclosure. ((~~5~~)) 6

Sometimes agency employees or officials may work on agency business from home computers((~~. These home computer~~)) or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's government work or official duties, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."7 RCW ((~~42.17.020(41)~~)) 42.56.010(3).

((~~6~~)) 7 *Nissen*, 183 Wn.2d at 882; *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). In *Nissen* the State Supreme Court held that a 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.

~~However, the act does not authorize unbridled searches of agency property.6 If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee.~~

((~~6 *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).~~))

An agency's right and duty to retain or recover control over its own public records is ***not*** found in the PRA itself, but is a function of other areas of law, including but not limited to, the law of property, agency, and employment. In addition, destruction of public records is a crime. *See* Chap. 40.16 RCW. Although a PRA request may trigger an agency's legal obligation to retrieve public records from the possession of an agency official, employee, or contractor, the PRA does ***not*** address how that might be accomplished. A discussion of how an agency might take legal action to recover public records in the possession of an agency official, employee or contractor is beyond the scope of these model rules. A public records officer who encounters any difficulty in retrieving public records from any agency official, employee or contractor should immediately contact the agency's legal advisor.

~~Yet, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related~~

~~documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work emails back to the employee's agency email account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers. (Footnotes omitted).~~))

WAC 44-14-03002 Times for inspection and copying of records

Existing WAC 44-14-03004 ("Organization of records") addresses (i) the agency's obligation to maintain custody of public records and (ii) the legislative policy to encourage agencies to make public records available on a web site. These provisions are more appropriately addressed in this rule (03002) because they relate to inspection and copying of records. WCOG proposes moving the first paragraph of existing WAC 44-14-03004 to this rule.

The AGO proposal includes changes to WAC 44-14-03004. Those changes are considered here in section 03002.

The AGO proposal to add an additional sentence and citation to RCW 43.105.351 should be rejected. That statement of legislative intent is ***not*** the legal source of an agency's obligation to protect records from disorganization. See RCW 42.56.100.

The entire rule should be revised as follows:

> **WAC 44-14-03002 Times for inspection and copying of records.** An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW ((~~42.17.280/~~)) 42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, and while the act does not specify a particular schedule, making the records ((~~must be~~)) available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. satisfies the thirty-hour requirement. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.
>
> ~~**WAC 44-14-03004 Organization of records.**~~ An agency must "protect public records from damage or disorganization." RCW ((~~42.17.290/~~)) 42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office, or alter or damage an original record. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).

The legislature encourages agencies to electronically store and provide public records:

> Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens, organizations, business, and governments. Information must be managed with great care to meet the objectives of citizens and their governments.
>
> 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.

RCW ((~~43.105.250~~)) 43.105.351. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. RCW 42.56.520. Agencies are encouraged to do so, and requestors are encouraged to access records posted online in order to preserve taxpayer resources.[2] For those requestors without access to the internet, an agency ((~~could provide a~~)) is to provide copies or allow the requestor to view copies using an agency computer terminal at its office. RCW 42.56.520.

WAC 44-14-03003 Index of records

No comments.

WAC 44-14-03004 Organization of records.

a. Existing rule does not address organization of records. The existing rule does not actually address the organization of records. This rule should be deleted and replaced in its entirety. The text of the existing rule, and any proposed changes to the existing rule, should be moved to WAC 44-14-03002. See WCOG's comments and proposed revisions to WAC 44-14-03002 (above).

b. Each agency needs particular rules. RCW 42.56.100 requires agencies to (i) adopt and enforce reasonable rules (ii) to protect public records from disorganization, (iii) in order to provide the fullest assistance and most timely action on PRA requests. Each agency is different, and each agency will need to adopt specific rules to address the particular type and organization of the records of the agency.

WCOG suggests adopting model rules to address the organization of various types of commonly requested records. The following proposed rules address some of the most common public record organization problems that WCOG has encountered. This is not an exhaustive list.

c. Personal computers, devices and accounts. Agencies should adopt rules generally prohibiting the use of personal electronic devices and/or accounts to conduct public business. Exceptions to these rules should be narrow (emergencies, etc.) and clearly stated. Agencies should adopt rules requiring employees, elected and appointed officials, contractors, and other agents to immediately forward public records received on a personal device or account to an official device or account where the record can be processed appropriately.

Existing WAC 44-14-03001(3) addresses instructing agency employees to store public records on agency devices and accounts. The AGO proposal at 10 makes revisions to this text as follows:

> Agencies should instruct employees and officials that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees and officials to keep agency-related documents with any retention requirements on home computers or personal devices in separate folders ((~~and~~)) temporarily, until they are provided to the agency. An agency could also require an employee or official to routinely blind carbon copy ("bcc") work emails in a personal account back to ((~~the employee's~~)) an agency email account.

This rule text relates to the organization of public records, and does not belong in WAC 44-14-03001 (which defines "public record"). This text should be moved here to WAC 44-14-03004.

In addition, there are a number of problems with this rule text. First, the suggestion that public records should "eventually" be stored on agency computers understates the urgency of properly preserving public records on agency computers. WCOG proposes changing the text to "promptly and consistently."

Second, the suggestion that agencies "ask" their employees to organize their records is inconsistent with the statutory requirement that each agency adopt and enforce rules. WCOG proposes changing the text to clarify that the rules must be followed.

Third, the AGO has proposed adding the phrase "with any retention requirements" to the requirement that public records be provided to the agency. This language erroneously equates the scope of "public records" under the PRA with only those records that are subject to retention requirements in Chap. 40.14 RCW. That language should be deleted.

Fourth, the AGO language overlooks the fact that public records might be located in personal ***accounts*** as well as devices.

Fifth, the existing rule suggests that emails in a personal email account should be "blind" carbon copied to an agency email account. There is no reason for an email to be 'bcc'd to an agency email account. The only effect of "blind" copying the agency email account would be to withhold the official email address, which should be used, from the recipient. Emails received in

a personal email account should be ***forwarded*** to an agency email account before any response is made, and the sender should be told to use the agency email address in the future. In the unusual situation where an agency employee needs to send an email from a personal account (because they don't have access to their agency email account) that email should be copied ("CC") to an agency email account.

d. Agency-issued devices. The AGO proposal at 11 would add a sentence to WAC 44-14-03001(3) stating that agency's could provide its employees and officials with agency-issued-devices that the agency retains the right to access. WCOG agrees that agency officials and employees that regularly need a smart phone or similar device to perform their work should be provided with the necessary device by the agency. The agency retains the ability to access all data on the device and/or associated accounts, and should instruct employees in writing that they have no expectation of privacy in the agency-owned device. No agency employee or official should be expected to use a personal device for work.

Existing WAC 44-14-03001(3) addresses requests for records located in personal devices and accounts. The AGO proposal at 10-11 makes revisions to this text as follows:

> If the agency receives a request for records that are located solely on employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the ((~~employee~~)) individual to ((~~forward~~)) search for and provide any responsive documents ((~~back~~)) to the agency, and the agency should process the request as it would if the records were on the agency's computers((~~.~~)) or in agency-owned devices or accounts. The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.9
>
> 9 *Nissen*, 183 Wn.2d at 886-887.

Again, this rule text relates to the organization of public records, and does not belong in WAC 44-14-03001 (which defines "public record"). This text should be moved here to WAC 44-14-03004.

The rule text requires some revision. The suggestion that an agency employee should "search for and provide" responsive documents only after an agency receives a PRA request is inconsistent with the requirement that agencies retain control over their records and that those records be kept organized. WCOG proposes revised text to clarify that (i) records on personal devices and accounts should be regularly moved to agency computers for organization and retention, and that (ii) when an agency receives a request for records that might be may be located on agency employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the individual to search their computer, device and/or account to confirm that all public records have been transmitted to the agency. After that, the agency should process the request as it would if the records were on the agency's computers or devices or in agency-owned devices or accounts.

e. Affidavits may be required. The AGO proposal at 11 would add an additional sentence to WAC 44-14-03001 about requiring employees or officials to sign an affidavit:

> The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.9

AGO proposal at 11. Again, this rule text does not belong in WAC 44-14-03001 (which defines "public record"). This text should be moved here to WAC 44-14-03004..

f. WCOG's proposed WAC 44-14-03004(1). WCOG proposes the following new WAC 44-14-03004 and subsection 03004(1):

> **WAC 44-14-03004 Organization of records.** ((~~An agency must "protect...~~[all existing text deleted]~~... at its office.~~)) Each agency is required to adopt and enforce reasonable rules and regulations 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. RCW 42.56.100.
>
> Each agency is different. Each agency needs to adopt specific rules to address the particular type and organization of the records of the agency. The following sections provide model rules for some of the most commonly requested types of public records. This list is not exhaustive, and each agency shall adopt additional specific rules appropriate for its particular records and organization.
>
> **(1) Use of personal computers, devices and accounts prohibited - exceptions.** Agencies should instruct employees and officials that all public records, regardless of where they were created, should promptly and consistently be transferred to agency computers for retention and organization. Agencies should instruct employees and officials to keep agency-related documents on home computers, personal devices, or in personal accounts in separate folders temporarily, until the documents are transferred to the agency.
>
> The use of personal email accounts for public business should be prohibited, with only narrow exceptions permitted. Agencies should instruct employees and officials that all email public records must be kept in agency-controlled email accounts. Where an employee or public official receives a public record email in a personal email account that email shall be forwarded to an official agency email account, with a copy to the sender, before responding to the email. The sender should be instructed

to use the agency email address in the future. In the unusual situation where an agency employee needs to send an email from a personal account (because they don't have access to their agency email account) that email should be copied ("CC") to an agency email account.

Where agency employees or officials need a smart phone, laptop or other electronic device or account to perform their work the agency shall provide such employees and officials with an agency-issued device or account that the agency maintains and for which the agency retains a right to access. Agencies should instruct their employees and officials that they have no expectation of privacy in such devices, and that such devices should not be used for personal communications.

Agencies should have policies describing permitted uses, if any, of home computers, personal devices or personal accounts for agency business. The policies should also describe the obligations of employees and officials for retaining, searching for and producing the agency's public records.

If the agency receives a request for records that may be located on agency employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the individual to search their computer, device and/or account to confirm that all public records have been transmitted to the agency. After that, the agency should process the request as it would if the records were on the agency's computers or devices or in agency-owned devices or accounts. The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.9

((~~9~~)) 1. *Nissen*, 183 Wn.2d at 886-887.

g. Text messages. Recently a WCOG board member found agency lobbyists using text messages to conduct an extensive discussion of proposed legislation. The Association of Washington Cities (AWC) failed to retrieve these text messages in electronic format, admitting that the text messages had not been retained. AWC provided some text messages as a series of "PNG" images of an iPhone placed on a flatbed scanner, losing much of the metadata, including names and phone numbers, in the process. This incident clearly demonstrates why agencies should not use text messaging for public business.

Agencies should adopt rules prohibiting the use of text messaging (SMS, MMS) unless the text messages are (i) created and received on agency-owned accounts and (ii) the agency has a procedure for retrieving, organizing and archiving text messages. Agencies that do not have the technical ability to retrieve, organize and archive text messages, including all metadata—and the ability to produce those text messages in response to a PRA request—should simply prohibit the

use of text messages altogether. Now that virtually all smart phones can be used to send and receive email there is no good reason for any public official to use text messages to discuss important public business. Agencies should require the use of email instead of text messages.

WCOG proposes the following new subsection (2) to WAC 44-14-03004:

> **(2) Text messages.** The use of text messaging (SMS, MMS) for agency business is prohibited unless and until the agency has (i) implemented procedures, and obtained the necessary software and/or equipment, to retain all agency-related text messages in a manner that can be organized, searched and retrieved, and (ii) has trained agency personnel in such procedures. All employees are encouraged to use email instead of text messaging for agency business.

h. Social media. An agency should not allow the use of social media (Twitter, Snapchat, Facebook, LinkedIn, etc) unless and until the agency adopts rules for the use of such technologies and establishes procedures for organizing and archiving the agency's social media data. Some types of social media may not be appropriate for government business. Where agencies choose to use social media as a means of communicating with agency personnel or the public all social media accounts should be owned by the agency and controlled by authorized personnel.

WCOG proposes the following new subsection (3) to WAC 44-14-03004:

> **(3) Social media.** Social media is an important tool for communicating with the public, but must be done in a manner that is consistent with the Act. Social media posts by the agency or its employees in connection with agency business are, and must be treated as, public records. Unless and until an agency has adopted a written policy for the use of social media, and the agency has adopted a procedure for organizing and archiving the agency's social media records, the use of social media for agency business is prohibited. Only social media accounts controlled by the agency may be used for public business. Social media policies adopted under this rule must specify, at a minimum, (i) the purpose of an agency's social media accounts, (ii) the person(s) authorized to use such accounts, and (iii) procedures for organizing and archiving the agency's social media data.

i. File names and file structures for electronic records. A lack of organized electronic files and/or a lack of standards for names for electronic documents makes it more difficult and time consuming for agencies to respond to requests for records. RCW 42.56.100 recognizes that achieving the goals of fullest assistance and most timely action on PRA requests requires agencies to adopt and enforce rules keep their records organized. For electronic records, those rules must specifically address file names and file structures for electronic records. An agency that needs to conduct a keyword search for records that should have been properly organized in logical subject matter files is in violation of RCW 42.56.100.

The PRA was enacted at a time when records were stored as paper in organized filing cabinets. While many public records are now in electronic form, the need for and principles of record organization remain the same. Records should be stored in a logical filing system, based on subject matter and appropriately organized based on the type of record, date, etc. Electronic records should (i) have consistent, meaningful file names and (ii) be maintained in appropriately organized computer data folders. Public records officers must ensure that agencies have clear rules for naming and storing electronic files, and that those rules are consistently followed.

All electronic records should be kept on network servers controlled by the agency where the records can be located and used by other agency personnel, backed up, and protected from malware. Electronic records should never be kept on local "C" drives or portable media under the control of agency employees.

WCOG proposes the following new subsection (4) to WAC 44-14-03004:

> **(4) File names and file systems for electronic records.** Each agency must adopt and enforce rules for file names and file systems for the organization of electronic records. Such rules must address, at a minimum, the following issues:
>
> (a) Each agency shall create and use a logical filing system for all electronic records.
>
> (b) Each agency shall establish rules to provide consistent, meaningful file names for all electronic records.
>
> (c) Each agency shall require that electronic records be organized and stored on servers that are controlled by the agency, backed up, and protected from viruses, malware or unauthorized access. Each agency shall prohibit the use of local hard drive or storage devices that are not controlled by the agency.

j. Email. Many public officials and employees allow massive amounts of unorganized email messages to accumulate in their Inbox or Sent Items folders rather than actually filing emails into an organized filing system. **WCOG has seen numerous examples of public officials with tens of thousands of items in their Inbox or Sent Items folders.**

Agencies frequently rely on key word searches to retrieve responsive emails from huge piles of disorganized emails. But such searches are often ineffective and time-consuming because agencies have no rules requiring the use of particular key words, file names or matter numbers in the subject lines of email messages, and because duplicates of messages accumulate in Inbox or Sent Items folders of other agency employees. Some agencies have taken months or even years to locate and produce emails relating to a single subject or case.

The model rules must be revised to clarify that agencies are required to keep email records organized. WCOG proposes the following new subsection (5) to WAC 44-14-03004:

(5) Email. Each agency must adopt and enforce rules for the organization of email messages, addressing. Such rules must address, at a minimum, the following issues:

(a) A user's Inbox and Sent Items folder are temporary locations for incoming and sent email, and ***not*** a permanent filing system. Allowing emails to accumulate in a user's Inbox or Sent items folder that must be searched in order to respond to a PRA request does not comply with RCW 42.56.100. Each agency must have appropriate software, procedures and training to enable emails to be regularly organized and easily retrieved. Each agency must adopt and enforce a rule requiring all agency personnel to move email messages from their Inbox and Sent Items folders to specific organized files on a regular basis to ensure that all public records are properly organized.

(b) Emails should be organized by subject or matter, just like other agency records. Each agency will determine the specific process to be used by the agency, such as (i) using folders within the agency's email program, (ii) using additional document organization software, or (iii) extracting email messages as separate files, or converting them to PDF files, to be stored along with other electronic records on the same subject matter. Emails should be organized and stored in the same manner as other agency records on the same subject.

(c). Each agency must adopt and enforce rules that specify how files received as email attachments will be organized.

(d) Each agency must adopt and enforce rules specifying the information—such as a project name, matter name, case number or file number—that must be included in the subject line of every email. Public records officers must ensure that lists of approved email subject lines or matter or file numbers are updated and available to all email users, and that email users are in fact following the agency's email rules.

(e) Each agency must adopt and enforce rules specifying (i) who is responsible for filing email messages, and (ii) where emails are sent to numerous recipients or received by numerous recipients, who is responsible for such email records.

Agencies need rules specifying how an agency will organize and archive the word processing files (Word, Word Perfect, etc) from which many public text documents are created. Agencies should adopt rules that treat word processing files as drafts and require final versions of public text documents to be published as PDF files (unless some other format is needed). Agencies should adopt specific rules for naming and preserving the original word processing files for important public documents. Agencies should adopt specific rules to ensure that whenever significant changes are made to important public documents that the word processing files are

preserved and that file names or locations are changed to prevent previous versions from being overwritten.

Agencies should adopt rules and train their employees that when a word processing files is received as an attachment to an email message the attached file should be given a proper file name and moved to the appropriate location in the agency's filing system before working with the file.

WCOG proposes the following new subsection (6) to WAC 44-14-03004:

> **(6) Word processing files.** Each agency must adopt and enforce rules for the organization of word processing files. Such rules must address, at a minimum, the following issues:
>
> (a) Each agency must adopt rules that treat word processing files as drafts and require final versions of public text documents to be published as PDF files (unless some other format is needed).
>
> (b) Each agencies must adopt specific rules for naming and preserving the original word processing files for important public documents.
>
> (c) Each agency must adopt specific rules to ensure that whenever significant changes are made to important public documents that the word processing files are preserved, and that file names or file locations are changed to prevent previous versions of files from being overwritten.
>
> (d) Each agency must adopt rules establishing procedures by which a word processing file received as an attachment to an email message is given a proper file name and moved to the appropriate location in the agency's document filing system before working with the file.

When drafts of important public documents are sent from one agency or public official to another for the purpose of making changes to the document, each successive draft of the document may be an important public record that must be preserved in electronic format. Each agency must adopt and enforce rules to make sure that different versions of important public documents are retained in an organized filing system, and that file names and/or locations are changed to prevent previous versions from being overwritten or destroyed.

WCOG proposes the following new subsection (7) to WAC 44-14-03004:

> **(7) Drafts shared with other agencies or officials.** Each agency must adopt and enforce rules to protect successive drafts of important public documents from different agencies from disorganization or destruction. Such rules must, at a minimum, ensure that all different versions of important public documents are retained in an organized filing system and that file names and/or locations are changed to prevent previous versions from being overwritten or destroyed.

Reviewing and redacting public records increases the time and cost of responding to a PRA request. Agencies that routinely handle exempt information and records should design their official forms and record-keeping processes to minimize the need for records to be manually reviewed and redacted. Agencies should adopt rules to avoid including unnecessary exempt information in public records. Where such information is collected on a regular basis, an agency should adopt standard forms that clearly identify and segregate exempt information so that it can be quickly redacted without legal review.

For example, an application for a building permit is a public record and not exempt. If the agency collects exempt credit card information (see RCW 42.56.230(5)) for building permit fees then that information should be on a separate payment form. In the alternative, the agency should design its standard application form to clearly indicate that the credit card information will be redacted before a copy of the permit is produced in response to a PRA request.

WCOG proposes the following new subsection (8) to WAC 44-14-03004:

> **(8) Exempt information in commonly-used forms.** Each agency that uses standard forms in its government processes should review and revise its forms on a regular basis to limit the time and cost of redaction. Forms should be revised to (i) eliminate any unnecessary exempt information, and (ii) identify and segregate any necessary exempt information that should be redacted in response to a PRA request.

Some agencies have done a poor job of documenting how and where an agency actually searched for records in response to a PRA request. Other agencies have allowed attorneys to become too closely involved in the process of searching for and collecting records such that the resulting factual records of an agency's search are mingled with privileged communication. Agencies need to adopt and enforce rules to keep records of PRA compliance separate from related privileged communications.

WCOG proposes the following new subsection (9) to WAC 44-14-03004:

> **(9) Records of PRA compliance.** In the event of a dispute over whether an agency has conducted a reasonable search calculated to uncover all responsive documents the burden of proof is on the agency to prove that a reasonable search was conducted. Public records officers and other agency personnel engaged in searching for responsive records must retain written records of where, when and how the agency searched for records, including without limitation, the key words used, the custodians whose records were searched, whether any privately owned devices or accounts were searched, and the electronic and physical locations that were searched. Such records are not exempt, even if they are prepared by an attorney, and must be organized and retained along with all other documentation relating to a request for records.
>
> Public records officers and other agency personnel engaged in searching for responsive records may request legal advice from an

> agency's attorney. However, requests for legal advice and responses thereto must be identified as such and kept separate from records that contain nonexempt information about an agency's search for records.

Attorney invoices are not exempt. Attorney invoices are important public records that document important agency decisions and actions, and how agency money is spent. RCW 42.56.904 recognizes that only narrow redactions are permissible:

> It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure.

Despite this clear statement from the legislature, now 10 years old, many outside attorneys do a poor job of providing detailed invoices, any many invoices are excessively redacted.

WCOG proposes the following new subsection (10) to WAC 44-14-03004:

> **(10) Attorney invoices.** Attorney invoices are important public records. RCW 42.56.903. Any redactions to attorney invoices causes delay and interferes with complete transparency. All outside legal counsel shall be instructed in writing as part of their retainer agreement with the agency, and each agency shall adopt and enforce a rule, that (i) attorney invoices shall include detailed information about the specific attorney work performed and shall not contain any exempt information except in specific unusual circumstances explained in writing (see below), and (ii) attorney invoices shall indicate the specific persons who were present at any meeting with legal counsel. In the unusual situation where an invoice must contain privileged information the billing attorney shall make a notation on the invoice explaining what information is privileged and why.

Most of the contents of an attorney's file belongs to the client. See RPC 1.16(d). Where a private attorney's client is a public agency most of the file belongs to the agency and constitutes public records. Nonetheless WCOG has encountered attorneys for public agencies who erroneously assert that their litigation files are not public records. Each agency must adopt rules to clarify that all litigation files belong to the agency, and are therefore public records, and that such records must be kept organized.

WCOG proposes the following new subsection (11) to WAC 44-14-03004:

> **(11) Records of external legal counsel.** Records relating to the legal work of external legal counsel are the public records of the represented agency. Each agency that employs outside legal counsel must specify, both by rule and in the attorney's retainer agreement, that (i) during the course of representation the litigation files of outside counsel are public records whether or not those records are actually in the possession of the agency itself, and (ii) at the conclusion of representation

> the entire file must be provided to the agency in an organized fashion. When records relating to litigation or agency legal advice are requested the search must include responsive records that might be in the possession of an agency's external legal counsel. A private attorney or law firm may act as the sole custodian of some or all of an agency's legal files during the course of a representation but such files must be provided to the agency (i) when requested under the PRA and/or (ii) at the conclusion of representation so that the records can be properly archived. Each agency that employs outside legal counsel shall specify, both by rule and in the attorney's retainer agreement, (i) how the agency's legal files will be organized and delivered to the agency, and (ii) that the attorney shall not receive additional compensation for searching or organizing legal files in response to a PRA request.

There are numerous multi-agency organizations. Examples include Washington Association of Prosecuting Attorneys (WAPA), Washington State Association of Municipal Attorneys (WSAMA), Washington Association of Public Records Officers (WAPRO), the Association of Washington Cities (AWC), and the Washington State Association of Counties (WSAC). These agencies generate large amounts of records of email discussions among their members, which are agencies under the PRA. Some of these organizations maintain separate websites and/or offices.

Members of such organizations frequently engage in advocacy, lobbying and training on important matters of public policy, and serve as a forum for agency representatives and attorneys to discuss important matters of public policy. Whether or not the organization is itself an "agency" under the PRA, each member agency whose officers or employees participate in a multi-agency organization is obligated to comply with RCW 42.56.100. Records of organization meetings, conferences and email discussions among member agencies are important public records that must be retained in native electronic format, organized for prompt production in response to PRA requests, and protected from destruction.

Some of these organizations are also agencies under RCW 42.56.010(1). Others are not themselves agencies. Each multi-agency organization must determine whether or not the organization is itself an "agency" under the PRA. That determination dictates how the records of the organization should be kept.

Multi-agency organizations such as WAPA and WSAMA generate huge amounts of email records. Most of these records are non-exempt discussions of important matters of public policy or law. In many cases these email records have dozens or even hundreds of recipients. Yet these agencies have largely failed to organize and archive these important public records.

For example, the Washington Association of Public Records Officers consists entirely of PRA officers who are agency employees subject to the PRA. WAPRO members work on WAPRO activities on agency time and using agency resources, computers and email accounts. That is perfectly legal, assuming the WAPRO members are acting in the public interest and under the supervision of elected officials. All records of a PRA officer's WAPRO activities are the "public records" of the agency that employees the PRA officer.

Nonetheless, in response to a 2016 PRA request for copies of the WAPRO newsletter "Transparency News," the president of WAPRO (Snohomish County PRA Officer Whitney Stevens) asserted that WAPRO was responsible for archiving WAPRO records even though (according to Stevens) WAPRO was not an "agency" subject to the PRA. Email dated August 30, 2016. Agencies are not permitted to place public records outside the reach of the PRA. *See Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695, 71-8-719, 354 P.3d 249 (2015). But that is exactly what WAPRO was attempting to do.

For another example, in 2014-2015 the Washington Association of Prosecuting Attorneys (WAPA), which is an agency under the PRA, filed amicus briefs in support of *Pierce County in Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). Various prosecuting attorneys participated in WAPA's amicus process by email, and WAPA received numerous emails from the Pierce County's attorneys seeking amicus support. Those emails were important, non-exempt public records that should have been organized and preserved by WAPA under RCW 42.56.100. But in response to a PRA request for WAPA's amicus records WAPA staff attorney Pam Loginsky admitted that less than six months after the *Nissen* opinion was issued WAPA had already destroyed the email records from the *Nissen* case. Retrieval of WAPA's scattered email records required making PRA requests to every other prosecuting attorney in the state.

Every agency is subject to the requirement in RCW 42.56.100 that an agency must adopt and enforce reasonable rules to protect public records from disorganization in order to provide fullest assistance and the most timely possible action on PRA requests.

WCOG proposes the following new subsection (12) to WAC 44-14-03004:

> **(12) Multi-agency organizations.** (a) "Multi-agency organization" means any organization that represents a particular type of government official or local government entity and/or whose members include representatives of a particular type of government official or local government entity. Examples include Washington Association of Prosecuting Attorneys (WAPA), Washington State Association of Municipal Attorneys (WSAMA), Washington Association of Public Records Officers (WAPRO), the Association of Washington Cities (AWC), and the Washington State Association of Counties (WSAC).
>
> (b) No agency shall participate in any multi-agency organization unless and until that organization (1) has made a determination as to whether it is an "agency" under the PRA (such determinations may be subject to legal challenge), and (2) prominently discloses on its website, and states in its bylaws, the determination of whether an organization is an "agency" subject to the PRA.
>
> (c) Where a multi-agency organization is itself an "agency" subject to the PRA, the organization is responsible for all of its own public records. No agency shall participate in any multi-agency organization unless and until that organization (i) appoints a public records officer pursuant to RCW 42.56.580, and (ii) adopts and enforces reasonable rules to protect

the organization's records from disorganization and destruction pursuant to RCW 42.56.100. A member agency may not rely on the organization to comply with the PRA with respect to any public records unless the member agency's PRA officer has determined that the organization has adopted reasonable rules pursuant to RCW 42.56.100 and that those rules are actually being enforced.

(d) Whether or not a multi-agency organization is itself an "agency" under the PRA each member agency remains responsible for all of its own public records, including all organization records in its possession. Each agency officer or employee who is a member of a board or committee of a multi-agency organization shall ensure the board or committee's compliance with RCW 42.56.100 by either accepting responsibility for PRA compliance for all of the board or committee's records or confirming in writing that another agency and its public records officer is responsible for such records. All public records must be organized and retained by an "agency" under the PRA. A member agency may not rely on a non-agency organization to comply with the PRA even if the organization offers or agrees to provide access to public records as if it were an agency. Each member agency must adopt and enforce reasonable rules for the organization of all organization records in its possession. A member agency may not rely on another agency to comply with the PRA with respect to any public records unless the member agency's PRA officer has determined that other agency has adopted reasonable rules for organization records pursuant to RCW 42.56.100 and that those rules are being enforced.

(e) No agency shall participate in any non-agency organization unless and until the organization ensures that an agency governed by the PRA has agreed in writing to be responsible for the organization's compliance with the PRA, to provide a PRA officer for the organization, and to adopt rules for the organization as if it were a single agency under RCW 42.56.100. That agency and public records officer must adopt and enforce reasonable rules to ensure that all of the records of an organization, board, or committee are retained in electronic format in organized files or folders as if the organization were an "agency" under the PRA. All records of the organization must be kept under the control of the appointed agency and its public records officer unless and until a new agency and/or public records officer is appointed and actually takes control over the records in compliance with RCW 42.56.100 and record retention statutes.

(f) Records of multi-agency organization meetings, conferences and email discussions among member agencies are important and time-sensitive. Such records must be kept organized in a single location under the control of a single agency. Each organization shall adopt and enforce specific rules for email discussion groups that specify (i) the content of an

email subject line, and (ii) a PRA officer or designee that must be copied on every email to enable the appointed agency to collect and organize email records.

The definition of "public record" excludes records under the personal control of individual members of the legislature. RCW 42.56.010(3); RCW 40.14.080. Because these records cannot be obtained from the legislature under the PRA it is essential that public records sent to or received from legislators be properly organized by the agency sending or receiving such records.

WCOG proposes the following new subsection (14) to WAC 44-14-03004:

> **(13) Correspondence with legislators.** Each agency must adopt and enforce rules for the retention and central organization of any and all records sent to or received from individual members of the legislature and/or their staff.

Agencies routinely refuse to honor PRA requests for records that do not yet exist, even if the record is clearly identified and will exist soon because an agency is required to produce the record. Forcing requesters to repeatedly ask for the same record or risk obtaining the record too late is not consistent with the goals of transparency.

WCOG proposes the following new subsection (15) to WAC 44-14-03004:

> **(14) Identifiable future records.** Legislative and administrative proceedings frequently require agencies to issue official decisions, recommendations and reports. In many cases such records are time-sensitive because parties and concerned citizens have only short period of time in which to take action in response. Any pending decision, order, ordinance, resolution, recommendation or other official record that an agency is required by law to produce in any particular legislative or administrative matter is an identifiable public record for purposes of RCW 42.56.080 whether or not the record exists at the time it is requested. Agencies shall honor requests for such records by requiring the officer or body that will issue a decision, order, ordinance, resolution, recommendation or other official record to keep a list of persons who have requested the record, and to provide the record to those persons as soon as it is available.

WAC 44-14-03005 Retention of records

The AGO proposal makes minor revisions to this rule. With the exception of the proposed changes to footnote 1, WCOG concurs in these revisions, which are included in WCOG's proposed revised rule (below).

WCOG suggests revising this rule to clarify that the record retention provisions of Chap. 40.14 RCW are different from the requirements of RCW 42.56.100, and that compliance with record retention laws does ***not*** necessarily also comply with RCW 42.56.100. The AGO proposal

would add a sentence to footnote 1 that the PRA and Chap. 40.14 RCW "are two different laws." WCOG believes this important point should be made in the body of the rule, not in the footnote.

WCOG notes that the record retention provisions of Chap. 40.14 RCW predate the PRA by many years. Since at least 1957 this chapter has required each agency to designate a "records officer." RCW 40.14.040; Laws of 1957, ch. 246, § 4. The relationship between the "records officer" and the "public records officer" required by RCW 42.56.580(1) is unclear. WCOG believes the "records officer" and "public records officer" should be the same person.

The AGO proposal would revise footnote 1 as follows:

> 1. An agency can be found to violate the Public Records Act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record after a request is made. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989). However, it is not a violation of the Public Records Act if a record is destroyed prior to an agency's receipt of a public records request for that record. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 218 P.3d 196 (2009); *West v. Dep't of Nat. Res.*, 163 Wn. App. 238, 258 P.3d 78 (2011). The Public Records Act (chapter 42.56 RCW) and the records retention statutes (chapter 40.14 RCW) are two different laws.

These revisions misstate the holdings of the *BIAW* and *West* cases.

BIAW v. McCarthy, 152 Wn. App. 720, 218 P.3d 196 (2009) held that there was no agency action to review where the record had already been destroyed. The court rejected the requestor's argument that a violation of Chap. 40.14 RCW should also be a violation of the PRA. 152 Wn. App. at 742. The *BIAW* court noted that the parties had agreed that destruction of records in compliance with Chap. 40.14 RCW was not a violation of the PRA, and that the requestor had not provided a basis for its argument that unlawful destruction of records should be a violation of the PRA. The court declined to consider the arguments of amici curiae that the PRA trumps Chap. 40.14 RCW.

In *West v. Dep't of Nat. Res.*, 163 Wn. App. 238, 258 P.3d 78 (2011) the agency inadvertently destroyed the records at issue before a PRA request was made. The court followed its ruling in *BIAW*, holding that there was no agency action to review. 163 Wn. App. at 245.

At most, the *BIAW* and *West* cases stand for the proposition that there is no remedy under the PRA where an agency destroys records ***in compliance with retention laws*** before the records are requested. The AGO proposal does not make that point clear.

Furthermore, the suggestion in *BIAW* and *West* that there is "no agency action to review" where a requested record does not exist (because it has been destroyed) is dicta. Neither case considered the possibility that other PRA remedies, including equitable remedies, might be available in an appropriate case. *See Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 446-47, 327 P.3d 600 (2013).

Finally, the purpose of the model rules is to help agencies comply with the PRA. There is no reason for the model rules to tell an agency what might happen in litigation if the agency does not comply with the PRA, particularly where the case law is evolving and there are significant unanswered questions about the relationship between records retention laws and the PRA. The

AGO proposal to add two sentences and two citations to footnote 1 should be rejected. (WCOG concurs other minor proposed revisions to the footnote).

WCOG proposes revising the existing rule as follows:

WAC 44-14-03005 Retention of records. The Public Records Act (chapter 42.56 RCW) and the records retention statutes (chapter 40.14 RCW) are two different laws. The record retention statutes were enacted by the legislature and have been in effect for many decades. The PRA was enacted in 1972 by popular initiative. Compliance with records retention laws does ***not*** necessarily comply with the PRA, particularly RCW 42.56.100, which requires agencies to adopt and enforce rules to prevent the ***disorganization*** and destruction of public records, and which forbids the scheduled destruction of records that have been requested under the PRA.

Both statutes require the appointment of an officer to comply with the statute. RCW 40.14.040 requires each agency to designate a "records officer." RCW 42.56.580(1) requires each agency to appoint a "public records officer." Although these offices are created by different statutes, an agency should appoint the same person to perform the functions of both offices.

Except as required by RCW 42.56.100, [a]n agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.1 Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at ((~~www.secstate.wa.gov/archives/gs.aspx~~)) www.sos.gov/archives/ (select "Records Management").

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling emails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all emails after a short period of time (such as thirty days). While many of the emails ((~~like other public records~~)) could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all emails or other public records after a short period no matter what their content may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records

Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules. Public records officers must receive training on retention of electronic records. RCW 42.56.152(5).

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW ((~~42.17.290/~~)) 42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. RCW 42.56.100. An exception exists for certain portions of a state employee's personnel file. RCW ((~~42.17.295/~~)) 42.56.110.

1. An agency can be found to violate the Public Records Act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record after a request is made. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

WAC 44-14-03006 Form of requests

This is a lengthy proposed rule, without numbered subsections. For ease of reference, WCOG will separately address the introductory paragraph and then each bold-faced (unnumbered) sub-section for which it has comments and proposed revisions.

WCOG has no comment to the following sub-sections:

- "Agency public internet web site records – No request required";
- "In-person requests";
- "Prioritization of records requested"; and
- "Indemnification."

1. Form of requests. The AGO proposal revises the first paragraph as follows:

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request.((~~1~~)) RCW 42.56.080(2). Agencies may recommend that requestors submit requests using an agency-provided form or web page. However, a person seeking records must make a "specific request" for "identifiable records" which provides "fair notice" and "sufficient clarity" that it is a records request.1 An agency may prescribe the means of requests in its rules. RCW 42.56.040; RCW

42.56.070(1); RCW 42.56.100; RCW 34.05.220 (1)(b) (state agencies). An agency can adopt reasonable procedures requiring requests to be submitted only to designated persons (such as the public records officer), or a specific agency address (such as a dedicated agency email address for receiving requests, or a mailing/street address of the office where the public records officer is located).

1. RCW 42.56.080 (1) and (2); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA [PRA] request.")((.)); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (an agency's duty under the act is triggered when it receives a "specific request" for records and when the requestor states "the request with sufficient clarity to give the agency fair notice that it had received a request for public records").

2. ((~~Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.~~))Parmelee v. Clarke, 148 Wn. App. 748, 201 P.3d 1022 (2008) (upholding agency's procedures requiring public records requests to be made to a designated person).

WCOG Comments:

a. No required form, even if agency provides one. The proposed rule begins by noting, correctly, that there is no statutorily required form for PRA requests. The second and third sentences, however, could be read to suggest that if the agency has a recommended form or web page, requestors are required to use it. WCOG suggests minor revisions to the language to make clear that an otherwise valid request cannot be denied just because it is not on the agency's recommended form or web page.

b. Agencies cannot "prescribe" the form of request. A rule stating agencies "may prescribe the means of requests" is at best ambiguous, and does not fairly reflect the purpose or spirit of the PRA's rulemaking provisions – which exist to require agency rules that assist the public in making requests, and to reduce the likelihood of agency PRA violations. To the extent the rule suggests an agency can require a particular form of request, it is contrary to RCW 42.56.100 ("Nothing in this section shall relieve agencies … from honoring requests received by mail for copies of identifiable public records."). To avoid confusion, WCOG recommends revising the rule to more accurately reflect the rulemaking provisions of RCW 42.56.040, .070 and .100, which requires agencies to "publish" (not "prescribe") rules for the public's "guidance."

c. Agencies rules cannot mandate PRA request be made to a particular person. The fifth sentence of the proposal ("An agency can adopt reasonable procedures requiring requests to be submitted only to designated persons …") misstates the law and should be deleted. An agency is obligated to respond to any request for public records so long as it has "fair notice" of the request. "There is no single, comprehensive definition of 'fair notice' for PRA purposes. *Germeau v. Mason County*, 166 Wn. App. 789, 805, 271 P.3d 932, 941 (2012). The proposed rule relies entirely on *Parmelee v. Clarke* (see footnote 2). But that decision was subsequently rejected in *Germeau*, which correctly characterizes the earlier case as holding only that the PRA did not permit inmate Allan Parmelee "to submit a valid PRA request to any agency office he chose," and that DOC did not have "fair notice" of the particular request at issue. *Germeau*, 166 Wn. App. at 806 n.17. While agencies may identify preferred individuals and locations to which PRA requests should be submitted, failure to comply with these preferences does not relieve

them of their statutory obligation to respond to requests for specific, identifiable records when they have fair notice of the request.

WCOG proposes the following new introductory paragraph to WAC 44-14-03006 (changes are shown in comparison to language in the current model rule):

> **WAC 44-14-03006 Form of requests**. There is no statutorily required format for a valid public records request.((~~1~~)) RCW 42.56.080(2). Agencies may recommend, but may not require, that requestors submit requests using an agency-provided form or web page. Agencies must respond to any "specific request" for "identifiable records" which provides "fair notice" and "sufficient clarity" that it is a records request.1 An agency may publish rules, for the guidance of the public, describing the established places at which, the employees from whom, and the methods whereby, records may most readily be requested. RCW 42.56.040; RCW 42.56.070(1); RCW 42.56.100; RCW 34.05.220 (1)(b) (state agencies).
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> 1. RCW 42.56.080 (1) and (2); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA [PRA] request.")((~~.~~)); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (an agency's duty under the act is triggered when it receives a "specific request" for records and when the requestor states "the request with sufficient clarity to give the agency fair notice that it had received a request for public records").

2. Mail, email and fax requests. The AGO proposal revises this paragraph as follows:

> **Mail, email and fax requests.** A request can be sent ((~~in~~)) to the appropriate person or address by U.S. mail. RCW ((~~42.17.290/~~)) 42.56.100. A request can also be made by email, fax (if an agency still uses fax), or orally((~~. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies)~~)) (but should then be confirmed in writing; see further comment herein).

a. Agencies rules cannot mandate PRA requests be made to a particular person. As noted above, agencies are required to respond to any request about which it has fair notice, regardless of whether the request is made to the public records officer or some other individual the agency designates as "appropriate." The reference to "appropriate person" should be deleted.

b. The rules should recognize that electronic requests are the norm, and that fax is an outdated technology. The rules should reflect that requests made by email (or, alternatively, through an online portal) are typical. Conversely, the use of fax should be discouraged, and no agency should be allowed to require requests be made by fax.

c. Proposed rule. WCOG proposes the following new WAC 44-14-03006 (Mail, email and fax requests):

Mail, email and fax requests. A request can be sent by U.S. mail. RCW ((~~42.17.290/~~)) 42.56.100. ((~~A request can also be made by email, fax, or orally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies).~~)) Agencies also must accept requests orally; by email or, alternatively, via website portal (if available); or by fax (if an agency still uses fax). Oral requests should be confirmed in writing; see further comment herein. Fax requests may be offered as a convenience to requestors who still use fax machines, but agencies shall not require that requests be made by fax.

3. Public records requests using the agency's form or web page. The AGO proposal moves and revises text from the first and third paragraphs of the existing rule, and adds new language, to create a new section. (The intervening second paragraph of the existing rule has been moved to the proposed new "Oral request" section noted below, and is not shown here.) The proposed new section reads as follows:

Public records requests using the agency's form or web page. An agency should have a public records request form. An agency is encouraged to make its public records request form available at its office, and on its web site. ((~~An agency should have a public records request form.~~)) Some agencies also have online public records request forms or portals on a page on their web sites, set up to specifically receive public records requests. Agencies may recommend that requestors submit requests using an agency-provided form or web page. RCW 42.56.080(2). In this comment, requestors are strongly encouraged to use the agency's public records request form or online form or portal to make records requests, and then provide it to the designated agency person or address. Following this step begins the important communication process under the act between the requestor and the agency.2 This step also helps both the requestor and the agency, because it better enables the agency to more promptly identify the inquiry as a public records request, timely confirm its receipt with the requestor, promptly seek clarification from the requestor if needed, and otherwise begin processing the agency's response to the request under the act.

An agency request form or online form or portal should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form or online portal should recite that inspection of records is free and provide ((~~the per page charge for standard photocopies~~)) information about copying fees.

An agency request form or online form or portal should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor

that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or email should be provided. Requestors should provide an email address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

2. *See Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3) ("Communication is usually the key to a smooth public records process for both requestors and agencies.").

a. Comment. While WCOG agrees that communication between agencies should be encouraged, the proposed rule should not suggest that the PRA requires any particular form or level of communication. *Hobbs* (cited in the footnote) is *dicta* on this point, and the PRA itself does not describe any "communication process under the act between the requestor and the agency." Additionally, portions of the rule are stylistically awkward.

b. WCOG proposed rule. WCOG proposes the following new WAC 44-14-03006 (Public records requests using the agency's form or web page):

Public records requests using the agency's form or web page. An agency should have a public records request form. An agency is encouraged to make its public records request form available at its office, and on its web site. ((~~An agency should have a public records request form.~~)) Some agencies also have online public records request forms or portals on a page on their web sites, set up to specifically receive public records requests. Agencies may recommend that requestors submit requests using an agency-provided form or web page. RCW 42.56.080(2). Requestors are strongly encouraged (but not required) to use the agency's public records request form or online form or portal to make records requests, and then to provide it to the designated agency person or address. Agencies are encouraged to communicate with requestors, including by promptly seeking clarification from the requestor if needed. A request for clarification is particularly appropriate if the agency is uncertain as to whether the requestor is seeking records, or merely seeking information; unless and until the agency receives such clarification, the agency should treat the inquiry as a request for records.

An agency request form or online form or portal should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form or online portal should recite that inspection of records is free and provide ((~~the per page charge for standard photocopies~~)) information about copying fees.

An agency request form or online form or portal should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or email should be provided. Requestors should provide an email address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

4. Bot requests. The AGO proposal adds a new paragraph as follows:

> **Bot requests.** An agency may deny a "bot" request, which is one of multiple requests from a requestor to the agency within a twenty-four-hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential agency functions. RCW 42.56.080(3). A "bot" request means a records request that an agency reasonably believes was automatically generated by a computer program or script.

a. The rule should conform to the statute. The proposed rule reflects the language of RCW 42.56.080(3), with one small but potentially confusing exception. The statute states that in some cases an agency "may deny a 'bot' request **that** is one of multiple requests from a requestor to the agency within a twenty-four-hour period." The rule changes the "that" to a "which," in a way that could be read to remove a limitation in the statute on the type of bot requests to which the exemption applies, and to suggest the language that follows is the definition of "bot." (In fact, "bot" is defined in the last sentence of both the rule and statutory section.") WCOG suggests conforming the rule to the statute to avoid any confusion.

b. WCOG proposed rule. WCOG proposes the following new WAC 44-14-03006 (Bot requests):

> **Bot requests.** An agency may deny a "bot" request that is one of multiple requests from a requestor to the agency within a twenty-four-hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential agency functions. RCW 42.56.080(3). A "bot" request means a records request that an agency reasonably believes was automatically generated by a computer program or script.

5. Oral requests. The AGO proposal includes a new section on oral PRA requests, based in part on the second paragraph of the existing rule, and adding new language (second paragraph of the proposal) that is not found in the existing rule. The proposal reads as follows:

Oral requests. A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger or complex ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in this comment and in WAC 44-14-04002(1), a requestor must provide the agency with ((~~reasonable~~)) fair notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required ((~~reasonable~~)) notice or satisfy the agency's Public Records Act procedures. Therefore, requestors are strongly encouraged to make written requests, directed to the designated agency person or address.

If an agency receives an oral request, the agency staff person ((~~receiving it)) authorized to receive the request such as the public records officer,~~ should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorialized ((~~s~~)) the request. If the staff person is not the proper recipient, he or she should inform the person of how to contact the public records officer to receive information on submitting records requests. The public records officer serves "as a point of contact for members of the public in requesting disclosure of public records and oversees the agency's compliance with the public records disclosure requirements." RCW 42.56.580.

a. Agencies are obligated to respond to oral requests, even if they are not made to the public records officer. The second paragraph of the proposed rule misstates the law by suggesting that an oral requests can be sent back to the requestor without further agency action if it is not made to an "authorized" staff person. Agencies are obligated to respond to any request for records so long as the agency has fair notice. *Germeau v. Mason County*, 166 Wn. App. 789, 805, 271 P.3d 932, 941 (2012). The burden in this scenario is on the agency, not the requestor: to avoid subjecting the agency to a potential PRA violation, the employee in this situation should forward the request to the public records officer.

b. WCOG proposed rule. WCOG proposes the following new WAC 44-14-03006 (Oral requests):

Oral requests. A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger or complex ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in this comment and in WAC 44-14-04002(1), a

requestor must provide the agency with ((~~reasonable~~)) fair notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required ((~~reasonable~~)) notice or satisfy the agency's Public Records Act procedures. Therefore, requestors are strongly encouraged to make written requests, directed to the designated agency person or address.

If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request. If the staff person is not the agency's public records officer, he or she should inform the public records officer that the request has been submitted. The public records officer serves "as a point of contact for members of the public in requesting disclosure of public records and oversees the agency's compliance with the public records disclosure requirements." RCW 42.56.580.

6. Purpose of requests. The AGO proposal revises the existing paragraphs as follows:

Purpose of request. An agency cannot require the requestor to disclose the purpose of the request ((~~with two~~)), apart from exceptions permitted by law. RCW ((~~42.17.270/~~)) 42.56.080. ((~~First,~~)) For example, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose and require the requestor to provide information about the purpose of the use of the list. 5 An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW ((~~42.17.260(9)/~~)) 42.56.070(9).

((~~Second~~)) And, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to ((~~a claimant for benefits or his or her representative~~)) identified persons. In such cases, an agency is authorized to ask the requestor if he or she fits ((~~this criterion~~)) the statutory criteria for disclosure of the record.

5. ~~Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.~~ *SEIU Healthcare 775W v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016).

a. The rule should conform to the statute. RCW 42.56.080(2) specifies the limited circumstances in which a requestor may be required to identify the purpose for the request; the rule should identify these purposes. (Additionally, the statutory cite at the end of the first paragraph is incorrect.)

b. An agency cannot inquire into the purpose of a request for a list of names, unless there is a specific indication that the list might be used for commercial purposes. The proposed rule cites *SEIU Healthcare 775W v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016) for the

proposition that agencies can "require the requestor to provide information about the purpose of the use" whenever the request is for a list of names. *SEIU*, however, is not so broad, and the mere fact a request seeks a list of names does not give the agency *carte blanche* to require evidence of the requestor's purpose. In most cases, the commercial-purpose exception (RCW 42.56.070(8)) requires only that the agency ask the requestor to certify that a requested list of names will not be used for a commercial purpose. The duty to investigate further arises only if the agency "has **some indication** that the list might be used for commercial purposes," based on "the identity of the requester, the nature of the records requested, and any other information available to the agency." *Id.*, 193 Wn. App. at 405 (emphasis added).

c. WCOG proposed rule. WCOG proposes the following new WAC 44-14-03006 (Purpose or requests):

> **Purpose of request.** An agency cannot require the requestor to disclose the purpose of the request, ((~~with two exceptions~~)) except to establish whether inspection and copying would violate RCW 42.56.070(8) or 42.56.240(14), or other statute which exempts or prohibits disclosure of specific information or records to certain persons. RCW ((~~42.17.270/~~)) 42.56.080. ((~~First~~)) For example, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose; and, if (and only if) circumstances suggest the list might be used for a commercial purpose, the agency may require the requestor to state the purpose of the use of the list.5 An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW ~~42.17.260/~~42.56.070(((~~8)) 9~~).
>
> ((~~Second~~)) And, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to ((~~a claimant for benefits or his or her representative~~)) identified persons. In such cases, an agency is authorized to ask the requestor if he or she fits the ((~~criterion~~)) statutory criteria for disclosure of the record.
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> 5. Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4; *SEIU Healthcare 775W v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016).

PROCESSING OF PUBLIC RECORDS REQUESTS—GENERAL WAC 44-14-040 et seq.

[See separate comment letter for WCOG's comments on WAC 44-14-040 through 44-14-04005]

WAC 44-14-04006 Closing request and documenting compliance.

The AGO proposal makes various minor revisions to WAC 44-14-04006. WCOG concurs in those revisions, except that the WCOG believes the language encouraging agencies to make

electronic copies should be strengthened. With few exceptions agencies should make and retain an electronic copy of everything provided to the requester.

PDF scanning and redaction software is now cheap and ubiquitous. The use of such software saves time and money for both the agency and requester. Such software should be used by every agency regardless of size. There is no reason for an agency to not retain a copy of both the original PDF and the redacted records provided to the requestor.

WCOG proposes revising the section as follows:

> **WAC 44-14-04006 Closing request and documenting compliance.** (1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an entirely unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests, or where the last communication with the requestor established that the request would be closed on a date certain. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.
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> **(2) Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW ((~~42.17.270/~~)) 42.56.080. In those cases where the agency has not made an electronic copy of the records provided to the requestor, after a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW ((~~42.17.290/~~)) 42.56.100.
>
> (3) **Retain copy of records provided.** Except in unusual circumstances an agency should create and retain an electronic copy of the records provided to the requestor. Even where a requester asks for paper copies, the agency should make a PDF copy of the requested records and then print the paper copies from the PDF file. Agencies should use electronic PDF redaction software rather than redacting paper records by hand. Where a PDF file has been electronically redacted the

agency should also retain a copy of the unredacted PDF file. ((~~In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided.~~)) A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for ((~~a~~)) the period of time consistent with the agency's retention schedules for records related to disclosure of documents.

WAC 44-14-04007 Later discovered records.

No comments.

PROCESSING OF PUBLIC RECORDS REQUESTS—ELECTRONIC RECORDS WAC 44-14-050 et seq.

WCOG has the following comments and proposed changes to WAC 44-14-050.

a. Scanning is just copying. The AGO proposal correctly notes that "Scanning paper copies to make electronic copies is a method of copying paper records and does not create a new public record." *AGO Proposal* at 26 (WAC 44-14-04003(6)). This statutory clarification of a common misunderstanding of technology is long overdue. RCW 45.56.120(1); Laws of 2017, ch. 304, § 3. A modern copier is not a magic box that makes paper copies. What unsophisticated courts and agencies sometimes refer to as "copying" paper records is actually a process that first creates an electronic image of a paper document and then prints a copy of the image onto paper (if paper copies are desired). Almost all digital copiers manufactured since 2002 create images of the document being copied and store those images on a hard drive.[2] A "copier" is just an out-of-date document scanner that always makes a paper copy from the document image. Agencies cannot refuse to use scanning technology based on the erroneous notion that there is a legal or factual distinction between "scanning" and "copying" a paper record.

The PRA requires all agencies to adopt procedures that provide for the fullest assistance to requestors and the most timely possible action on requests for public records. **In 2017, fullest assistance and most timely possible action mean, at an absolute minimum, scanning paper documents to create electronic copies.** An agency that does not have the ability to scan paper records to PDF files ***cannot*** comply with its duty under RCW 42.56.100 to provide the " fullest assistance to inquirers and the most timely possible action on requests for information."

All paper records should be scanned to PDF first. Scanning creates an electronic copy of the requested records that can be redacted, stored or shared with the requestor. If a requestor wants paper copies the agency can retain the electronic original and print a set of copies for the

[2] See https://www.copierguide.com/help-advice/copy-vs-scan/ (last visited 9/1/17); https://www.cbsnews.com/news/digital-photocopiers-loaded-with-secrets/ (last visited 9/1/17).