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**CONCISE EXPLANATORY STATEMENT**

**WAC ch. 44-14**

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

March 2018

## **Introduction**

This document has been prepared in compliance with RCW 34.05.325, the Concise Explanatory Statement (CES) requirement of the Administrative Procedure Act. Included are: (1) reasons for adopting the amendments to the rules and to repeal one rule; (2) a description of the differences between the proposal and the text of the final rules; and, (3) a summary of comments received on the CR-102 (Proposed Rule Making) and responses to comments.

## **Statutory Authority**

The Public Records Act (PRA) is at chapter 42.56 RCW. The State Legislature directed the Attorney General (Office or AGO) to adopt PRA “advisory model rules.” Specifically, RCW 42.56.570 provides:

- (2) The attorney general, by February 1, 2006, shall adopt by rule advisory model rules for state and local agencies, as defined in RCW 42.56.010, addressing the following subjects:
  - (a) Providing fullest assistance to requestors;
  - (b) Fulfilling large requests in the most efficient manner;
  - (c) Fulfilling requests for electronic records; and
  - (d) Any other issues pertaining to public disclosure as determined by the attorney general.
- (3) The attorney general, in his or her discretion, may from time to time revise the model rule[s].
- (4) Local agencies should consult the advisory model rules when establishing local ordinances for compliance with the requirements and responsibilities of this chapter.
- (5) Until June 30, 2020, the attorney general must establish a consultation program to provide information for developing best practices for local agencies requesting assistance in compliance with this chapter including, but not limited to: Responding to records requests, seeking additional public and private resources for developing and updating technology information services, and mitigating liability and costs of compliance. The attorney general may develop the program in conjunction with the advisory model rule and may collaborate with the chief information officer, the state archivist, and other relevant agencies and organizations in developing and managing the program. The program in this subsection ceases to exist June 30, 2020.

The Office also has the power and duty “to perform any other duties that are, or may from time to time be required of him or her by law.” RCW 43.10.110.

## **How the Model Rules and Proposed 2017 Amendments Were Developed**

**2006-2007.** In 2006-2007, the Office adopted Model Rules. The 2006-2007 Model Rules were the product of participation of a diverse group of those familiar with the PRA, and the Office solicited and received extensive public comment prior to and after filing of the proposed rules, including in statewide public hearings. The Office adopted the rules in chapter 44-14 of the Washington Administrative Code (WAC). The format of the rules includes Model Rule language, comments on the Model Rules, and footnoted citations to authorities such as PRA court decisions and Attorney General Opinions. The Model Rules have not been revised since 2007.

**2017.** In 2017, the Office proposed updates to the Model Rules for certain identified purposes, due to developments in statutory law, case law, and technology. Further details are below.

**Public Notices of Anticipated Rule Making; Invitations for Public Comment Prior to and After Filing of Proposed Rules (RCW 34.05.310(3)(a))**

Beginning in 2014, the Office described publicly that the Model Rules would be the subject of future rule making, filed proposed updates to the Model Rules, and invited public comments, as follows:

- **Rule Making Agendas; Rule Making Docket.** The Office filed “Semi-Annual Rule Making Agendas” with the Code Reviser pursuant to RCW 34.05.314 listing chapter 44-14 WAC as a topic of possible future rule making. The agendas were filed on the following dates: December 22, 2014; July 2, 2014; July 27, 2016; December 20, 2016; and, July 14, 2017. The Rule Making Agendas were published in the *Washington State Register* (WSR 14-14-125, 15-01-154, 16-16-060, 17-01-117, 17-15-071) available on the web site of the Code Reviser, and made available on the Attorney General’s Office Rule Making Web Page as part of its “Rule Making Docket” pursuant to RCW 34.05.315.
- **CR-101.** On November 9, 2016, the Office filed a CR-101 (Preproposal Statement of Inquiry) with the Code Reviser pursuant to RCW 34.05.310, providing notice of possible rule making on chapter 44-14 WAC to update the rules, inviting persons to be added to the stakeholder list, and describing that rule making information for interested persons will be posted on the Office’s website. The CR-101 was published in the *Washington State Register* (WSR 16-23-038), available on the website of the Code Reviser’s website. On or shortly after November 9, 2016, the Attorney General’s Office posted the CR-101 on two locations on the Office’s website: the Rule Making Web Page, and the Model Rules Web Page. The CR-101 was also distributed via email to the Model Rules Stakeholder list (186 persons and organizations) and the Office’s general Rule Making Stakeholder list (404 persons and organizations). The CR-101 provided Office contact information for persons interested in this rule making.
- **CR-102.** On August 23, 2017, the Office filed the CR-102 (Proposed Rule Making) with the Code Reviser pursuant to RCW 34.05.320, providing the proposed amendatory language and inviting public comment by U.S. mail, email, through an online public comment form on the Office’s Rule Making Web Page, and inviting comment at a public hearing scheduled for October 4, 2017. On August 23, 2017, the Office posted the CR-102 on its web site in three locations: the Rule Making Web Page, the Model Rules Web Page, and the News Releases Web Page. The Rule Making Web Page included an online comment form, and other information about how to submit comments on the CR-102 via email, U.S. mail and at the public hearing. This notice was published in the *Washington State Register* (WSR 17-17-157), available on the web site of the Code Reviser. On August 23, 2017, the Office also sent the CR-102 to and invited public comment from the Model Rules Stakeholder list, the office’s Rule Making Stakeholder list, several legislators, and others.

On August 29, 2017, the Office also sent the CR-102 to members of a 2016 PRA Legislative Work Group comprised of legislators, legislative staff, media representatives, requestor representatives, attorneys, state agency staff, local agency staff, and government agency organizations. The work group had been studying possible updates to the PRA, and two bills largely resulting from that work (ESHB 1594 and EHB 1595) were enacted in the 2017 legislative session and incorporated into the proposed Model Rules updates in the CR-102.

- **Media Release Notices.** On August 23, 2017, the Office issued a media release about the proposal, linking the CR-102, and inviting public comment. The Office distributed the media release to 3,119 media outlets. As noted, the Office posted the media release on the Office's website on the News Releases Web Page. In addition, on August 23, 2017, the Office distributed the release via social media, publishing the media release on its Facebook page and sending the release out via Twitter.
  
- **Secondary Public Notices Resulting from Media Release and Stakeholder Notices.** As a result of the Office's outreach via the media release and stakeholder notices, other organizations further distributed the release or information from the release, generating additional public notice of the proposal and opportunities for public comment. For example:
  - On or after August 23, 2017, the Association of Washington Cities (AWC) published an article on its web site regarding the proposed Model Rules updates. The article described that the Office was inviting public comment.
  - On August 24, 2017, the *Daily Sun News* (Sunnyside) published an article about the proposed Model Rules updates. The article described the Office was inviting public comment.
  - On August 25, 2017, the Washington Association of Public Records Officers (WAPRO) published the media release on its web site under "Transparency News." The posting described that the Office was inviting public comment.
  - On August 27, 2017, the *Maple Valley Reporter* published the media release. The article described that the Office was inviting public comment.
  - On August 28, 2017, the *Legal NewsLine* published an article about the proposed Model Rules updates. The article described that the Office was inviting public comment.
  - On August 28, 2017, the *News Tribune* (Tacoma) published an editorial about the proposed Model Rules updates. The editorial described that the Office was inviting public comment. The *News Tribune* also tweeted information about the proposed update to the Model Rules.
  - On August 28, 2017, the Municipal Research and Services Center (MRSC) published an article on its web site regarding the proposed Model Rules updates. The article described that the Office was inviting public comment.
  - On August 29, 2017, the Washington Coalition for Open Government (WCOG) retweeted the Office's media release and the *News Tribune* editorial.
  - On August 30, 2017, the *Seattle Times* published an editorial, describing that persons should provide feedback to the Office on the proposed updates.

- On September 4 or 5, 2017, the *Lewiston Tribune* republished the *News Tribune* editorial.
- On September 4 or 5, 2017, the *Yakima Herald* republished the *Seattle Times* editorial.
- On September 5, 2017, the *Walla Walla Union Bulletin* published an article about the proposed Model Rules updates. The article described that the Office was inviting public comment.
- On September 16, 2017, the *Tri-City Herald* republished the *News Tribune* editorial.
- **Other Notices.** In September 2017, the AGO submitted an article to the Washington Association of Public Records Officers (WAPRO) newsletter, summarizing the proposed amendments to the Model Rules and describing the comment time period and scheduled public hearing. From August 2017 – October 2017, the Office posted comments received on the CR-102, on the Office’s website on the Rule Making Web Page.

**Public Records Act Developments since 2007 Prompting Model Rules Proposed Updates in 2017**

As described, with significant public input in 2006-2007, and following statewide hearings, the Office developed the Model Rules. Since 2007, however, the courts have issued many published decisions concerning the PRA. The Legislature has also amended the PRA, most recently in 2017. In addition, some technological changes impacting public agency records occurred since 2007. To illustrate:

- **Case Law Developments.** In 2015 and in 2016, the Office published an updated online *Open Government Resource Manual*, linking many of those published PRA court decisions, statutes and opinions. The manual served as one resource to identify which parts of the Model Rules needed updating, based on case law developments. By way of example, the State Supreme Court decision of *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), referenced in the manual, addressed public records on personal devices and provided information on searching such devices. That court decision was a significant example of a reason to update the Model Rules in order to address changes in technology use by public agency employees and officials conducting agency business. The proposed rules also provide a reference to the manual. See proposed amendments to WAC 44-14-06002 and amendments to WAC 44-14-08004. There were a number of decisions also impacting exemptions from disclosure, which prompted a review of and proposed amendments to WAC 44-14-06002, suggesting much of the language be repealed given the number of court decisions and the availability of other materials such as the *Open Government Resource Manual*.
- **Statutory Developments.** The State Legislature amended the PRA more than a decade ago to recodify the PRA from chapter 42.17 RCW to chapter 42.56 RCW. Today, requestors, agencies, the courts, the State Legislature and others refer to the RCW 42.56

citations, not to the former RCW 42.17 citations. The Office has provided a “crosswalk” on its website of where the chapter 42.17 RCW citations were recodified into chapter 42.56 RCW. As a result, the former RCW 42.17 citations are no longer necessary in the Model Rules, and the Office proposed to remove them throughout.

In 2014, the State Legislature required PRA training for certain public officials and public records officers, and “Training must be consistent with the attorney general’s model rules for compliance with the public records act.” RCW 42.56.150(3); RCW 42.56.152(3). Currently the Model Rules do not address developments in PRA statutes, case law, and other practices (such as technology use involving personal devices), and as a consequence, the Model Rules as of 2017 did not serve as a fully functional training resource. The proposed amendments also referred to the PRA’s training requirements. *See also* proposed amendments to WAC 44-14-00005.

In 2017, the Legislature enacted two bills amending the PRA, which rendered several parts of the Model Rules out-of-date. Those acts are Chap. 303, 2017 Laws (ESHB 1594) and Chap. 304, 2017 Laws (EHB 1595). These laws became effective on July 23, 2017. In addition to making several other changes in the PRA, ESHB 1594 provided that local agencies should consult the Model Rules in developing their PRA ordinances. RCW 42.56.570(4). In ESHB 1594 the 2017 Legislature also enacted a new local government records consultation program in the Office, which provides that “The Attorney General may develop the program in conjunction with the advisory model rule ...” RCW 42.56.570(5). The Model Rules as of 2017 did not address developments in PRA statutes, case law, and other practices (for example, technological developments such as an increased use of personal devices for agency business). Consequently, the Model Rules did not serve as a contemporary resource for local governments in developing their ordinances, or for the Office in launching the new consultation program.

In addition, in ESHB 1595, the 2017 Legislature addressed costs for electronic copies. As a result, the 2007 rule at WAC 44-14-07003 (Charges for electronic records) is no longer needed and the Office proposed to repeal it.

- **Technology Developments.** Since 2007, in addition to changes in PRA language with respect to electronic records (see examples in bullets above), agencies experienced some changes in technology, such as an increase in use of personal devices for agency business, or use of agency websites for PRA purposes, among others. The proposed amendments addressed those developments.
- **Policy/PRA Processing Approach Developments.** Finally, since 2007 some jurisdictions adopted some innovative policies to better process public records requests that they receive, particularly as agencies are now receiving requests that are more complex. For example, the cities of Kirkland and Pasco enacted procedures for categorizing PRA requests, so the cities can process smaller requests (that the agencies can easily respond to) at the same time they are processing more complex or larger requests. The Office considered those cities’ approaches in its proposal to update the Model Rules.

Therefore, the Office filed the CR-102 Proposed Rule Making form to update the Model Rules on August 23, 2017 for those limited purposes, inviting public comment on the CR-102 by September 29, 2017, via a letter, email, and/or through an online public comment form, and inviting public comment at the October 4, 2017 public hearing.

From August 23, 2017, to October 4, 2017 (the close of the public comment period at the end of the public hearing), 23 persons or entities submitted written comments on the CR-102, and six persons submitted oral comments at the public hearing. The Office reviewed the comments and prepared a table showing substantive comments where suggestions were made and the Office's response to them. *See* Attachment A. The Office has also prepared a supplemental memorandum addressing several of the new topics proposed for rulemaking by several commenters. *See* Attachment B. The written public comments and transcript of oral comments received at the October 4, 2017, hearing were numbered and are provided as Attachment C. The Office also posted the public comments on the CR-102 on its Rule Making Web Page. (See details on comments and public hearing below).

Following the public comment period and the public hearing, the Office decided to proceed with adopting the proposed rules, with some minor insubstantial changes and two substantial changes described herein.

### **Reasons for Adopting the Proposed Rules**

The specific reason to adopt the advisory Model Rules amendments is that the Legislature directed authorized that the Office "may from time to time revise the model rule[s]." RCW 42.56.570(2). Ten years have passed since the Office last updated the rules, and there have been multiple statutory, case law, and technology developments impacting requests for and production of public records.

Since 2007, the Legislature also directed that PRA training "must be consistent with the attorney general's model rules for compliance with the public records act." RCW 42.56.150(3); RCW 42.56.152(3). Additionally, while the Model Rules remain advisory, the Legislature has now directed that local agencies should also consult the Model Rules in developing their PRA ordinances. RCW 42.56.570(4). Moreover, in establishing a new local government records consultation program in the Office, the Legislature further provided that the Office may develop the program in conjunction with the Model Rules. RCW 42.56.570(5).

Pursuant to these legislative directives, the Model Rules, while advisory, should be as current as practical so they serve as a more functional resource for requestors, agencies, the courts, the State Legislature, the Office, and others.

Apart from the Legislature's directives, a more general reason exists for updating these advisory rules. The public and the government need guidance. The PRA, and the many court decisions interpreting the PRA, are an extensive body of law. The Model Rules, including their comments and several citations to statutes and court decisions, help requestors, agencies, the courts, the State Legislature, the Office, and others navigate the PRA.

## **CR-103P (Rule Making Order) – Final Rules as Amended**

Following consideration of comments received on the CR-102 (see further discussion below, and attachments), on March 2, 2018, the Office filed a CR-103P (Rule Making Order) with the adopted amendments to 44 Model Rules in chapter 44-14 WAC, and repealing one Model Rule (WAC 44-14-07003). WSR 18-06-051. The amendments and repeal become effective 31 days after filing (April 2, 2018). The amended Model Rules will be made available on the Office's web site, and distributed to stakeholders, the media, and others. The amended Model Rules will also be available on the web site of the Office of the Code Reviser, in the *Washington State Register*. After the amendments are incorporated by the Code Reviser, the Model Rules with amendments will also be available in the online Washington Administrative Code (WAC) on the Code Reviser's website.

### **Differences Between Proposed and Final Rules**

- **Minor insubstantial changes:** The Office made several minor insubstantial changes in the final rules, to make corrections to citations and formatting, to clarify the intended language of the current Model Rules or proposed amendments, and to provide additional references to statutes and Model Rules. Those are largely editing changes, described in Attachment A. See also the brief explanation in the CR-103P (Rulemaking Order).
- **Substantial changes:** The Office made two substantial changes in the final rules, specifically, to WAC 44-14-040 and WAC 44-14-04003 (to remove references to prioritizing/categorizing requests); and, WAC 44-14-08004 (to remove most of the discussion of judicial review and PRA court proceedings). See also descriptions of the changes in Attachment A, and the brief explanation in the CR-103P.

The principal reason for adopting the changes to remove references to the prioritizing/categorizing requests is based on the public comments received. The commenters either requested the language not proceed, or had concerns if the language did proceed. While the Office recognizes public agencies may process requests in various ways in order to enable them to handle both simple as well as complex requests, it was not determined to be feasible at this time to provide possible standard language in Model Rules addressing such processing. Therefore, the Office is not adopting that proposed language in the final rules.

The principal reason to remove most of the discussion of judicial review is that two commenters described that the Model Rules do not govern court proceedings, and many court cases describe various elements of PRA judicial review. In addition, the AGO's online *Open Government Resource Manual* links to the PRA judicial review statutes at RCW 42.56.550 and RCW 42.56.540, and also links to many of those court decisions. Therefore, like the amendments that will significantly reduce the Model Rules' discussion of exemptions (see amendments to WAC 44-14-06002), the discussion of judicial review in the Model Rules is similarly significantly reduced in the final rules.

## **Summary of Comments and Responses**

- **Written Comments on CR-102**

The Office received 23 written comments on the CR-102.

- **Public Hearing on the CR-102; Oral Comments**

The Office held a public hearing on October 4, 2017, in Olympia, Washington. Six persons provided oral comments about the CR-102 on the following subjects: records organization/management, agency rules, requests, production of records, installments, searches, the proposed prioritization/categorization approach for processing requests, public records on personal devices, third party notice, and other topics. Several commenters at the hearing provided an overview of their more detailed written comments. Organizations represented at the hearing included the Washington Coalition for Open Government (WCOG), Allied Daily Newspapers of Washington (Allied), and the Washington Newspaper Publishers Association. The hearing was held open for public comment for two hours. A written transcript was prepared.

- **Summary of Written and Oral Comments on the CR-102 and Responses**

See Attachment A, a table summarizing written comments and comments made at the public hearing where persons/entities made suggestions on the proposal, and the Office's response to the comments/suggestions. See the "Overall Response to Comments/Suggestions" in Attachment A; and see Attachment B for a more detailed response on several of the comments, declining to engage in new rulemaking on the suggested topics.

- **Copies of Comments on CR-102**

See Attachment C for copies of written comments and the hearing transcript, with page numbers.

### **Attachments:**

Attachment A – Table - Summary of Public Comments/Suggestions and Responses to Comments

Attachment B – Supplemental Memorandum

Attachment C – Written and Oral Comments Received on CR-102 (numbered)