

DRAFT proposal for RCW 42.56.240(1) & (2)

FINAL

Submitted by Ramsey Ramerman March 6, 2013

KEY: underline proposed new language
~~strike through~~ removed text for existing statute

- (1) (a) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

(b) The following definitions apply to terms used in subsection (1)(a) of this act:

- (1) Law enforcement agency. Law enforcement agencies means all agencies that qualify as "General authority Washington law enforcement agency" as defined in RCW 10.93.020(1).
- (2) "Investigative agency." An "investigative agency" is an agency or department of an agency that has as one of its primary tasks is to investigate and/or enforce violations of laws, codes or ordinances
- (3) "Compiled by". Records need not be created by an agency to qualify as "compiled by" that agency. Records created by others that are gathered by the agency to be used as specific intelligence information or specific investigative records can be "compiled by" the agency, even if those same records are available from other sources.
- (4) "Specific intelligence information." "Specific intelligence information" is information, even if outside of an investigative file, that an agency has taken specific steps to keep confidential, where disclosure would compromise, undermine or interfere with an investigative technique, method or source, or would create a safety risk for any person., .
- (5) "Specific investigative records." For records to qualify as "specific investigative records," these records must be compiled for the purpose of investigating a specific identifiable actual or potential violation of law, rule, policy, code or ordinance.
- A. Records that relate to internal administrative processes, including but not limited to internal audits, that do no focus on a particular event or suspect are not "specific instigative records."
- B. Records created pursuant to an agency policy or rule for a purpose of auditing or reviewing performance to improve future conduct are presumed not to be "specific investigative records" but this presumption may be rebutted if the agency demonstrates that in a particular instance one of the primary purposes of the investigation is to investigate potential malfeasance.

(6) “Essential to effective law enforcement.”

- A. “Law enforcement.” Law enforcement involves (1) the act of putting the law into effect as mandated by statute, ordinance, code or rule (2) by imposing a sanction for illegal conduct (3) such as imprisonment or fine. A decision regarding whether to revoke a license is not law enforcement when revocation is non-mandatory and may be based on non-legal basis such as immoral or unprofessional acts.
- B. “Essential.” When determining whether nondisclosure is “essential” for effective law enforcement, the following non-exclusive factors should be considered:
- i. Whether disclosure of the information may interfere with other ongoing investigations
 - ii. Whether disclosure will create a substantial likelihood that the source of the record or information will not cooperate in future investigations
 - iii. Whether the agency’s ability to obtain the record or information was conditioned on a promise of confidentiality
 - iv. Whether the information is available from other sources, taking into account the public need for disclosure from the agency rather than this other source, and whether disclosure of the fact that the agency has the particular record could interfere with an investigation
- C. Presumptions regarding interference with effective law enforcement.
- 1. During an active investigation of criminal conduct, the investigative file is categorically exempt because it is presumed that disclosure would interfere with effective law enforcement.
 - 2. When the categorical exemption applies pursuant to subsection (1)(b)(6)(A), the agency has complied with its obligations under RCW 42.56.210 by informing the requestor that the records are exempt under this section because there is an active investigation of suspected criminal conduct, without creating an exemption log or providing specific, detailed information about the records contained in the investigative file.
 - 3. When the categorical exemption applies, the investigative file is not subject to in camera review unless there is a prima facie showing that the agency is asserting the exemption primarily for purposes other than to interfere with effective law enforcement.

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4. An investigation is presumed to no longer be active when

- (a) the case has been referred to the prosecuting authority and that authority has either elected to pursue charges or determined that no charges should be filed; or
- (b) a time limitation, such as a statute of limitations, prevents any sanction from being imposed; or
- (c) an agency has not expended any resources on the investigation for over one year unless the crime is subject to RCW 9A.04.080(1)(a) and the agency has not affirmatively closed the investigation.

5. The presumption that a case is no longer active may be rebutted by the agency by showing the investigation is still, in fact, active. When determining whether the investigation is still in fact active, a court may consider the following non-exclusive factors:

- (a) the nature of the particular crime and investigation;
- (b) the scope of the investigation;
- (c) whether there are multiple crimes that are part of the investigation;
- (d) whether there are multiple suspects that are part of the investigation;
or
- (f) an agency's explanation regarding the risk of disclosing sensitive information.

6. When a law enforcement agency is conducting an investigation of alleged misconduct of a commissioned officer, it is presumed that disclosure during that active investigation will interfere with effective law enforcement just as if it were a criminal investigation.

- (2) Information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if the agency reasonably determines disclosure would endanger any person's life, physical safety, or property. When determining whether such risk is reasonable, the following non-exclusive factors may be considered: (A) the nature of the crime alleged, (B) any threats made by the suspect, (C) any past violent history of the suspect, (D) the relationship between the suspect and the witness or victim. ~~If at any time before a PRA request is made, a complaint is filed~~ the complainant, victim, or witness indicates a desire for disclosure or nondisclosure, such desire shall govern. However, all complaints filed with the commission about any elected official or candidate for public office must be made in writing and signed by the complainant under oath;