

Legal Requirements of the Public Records Act

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Overview

- ✓ Purpose & history of the Public Records Act
- ✓ What is a “public record” and an electronic record?
- ✓ General agency obligations under the Public Records Act (PRA)
- ✓ How to respond to a records request
- ✓ What are exemptions and how do they apply?
- ✓ Agency liability
- ✓ Tips and Resources



History of the Public Records Act RCW 42.56

- Passed in 1972 as part of Public Disclosure Initiative I-276 with a voter approval of 72%
- The Act requires a broad mandate in favor of disclosure of ALL public records; courts will liberally interpret the Act to promote disclosure
- Redaction of information must be applied narrowly

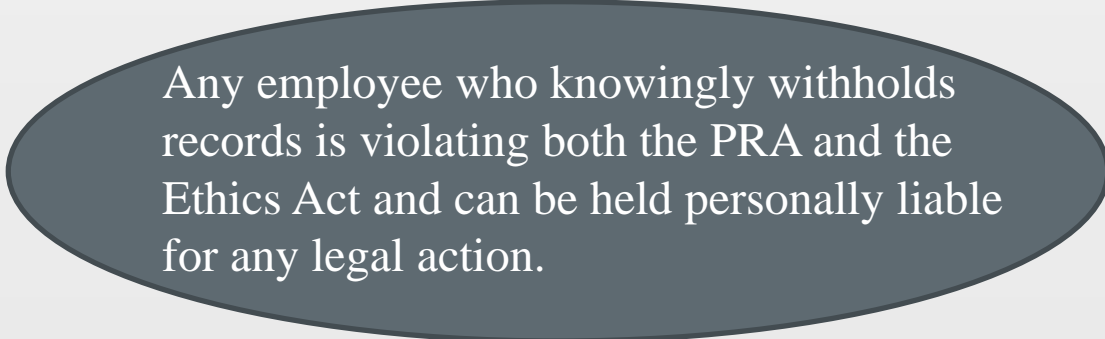


Why Should You Care?

- State agencies are strictly liable for violation of the Act—intent does not matter
- The liability for violating the Act potentially could be very big
- Agency must also pay for all costs and legal fees
- Massive Negative Publicity: even valid withholdings can create negative press
- RCW 42.52.050(4)



\$750,000
fine to UW



Any employee who knowingly withholds records is violating both the PRA and the Ethics Act and can be held personally liable for any legal action.



Why Should You Care?

NOTE: RCW provides that no public agency or employee will be held liable for any loss or damage based upon the release of a public record if the employee acted in good faith in attempting to comply with a request

**There is incentive to
reply, not withhold**



What is a Public Record?

“Public record”...any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.





What is a Public Records Request?

- **Request does not have to be in writing** - no official format, agency forms encouraged but not required
- **Must be for identifiable public records** (not a request for general information)
- **The act does not require the creation of a new record**
- **Use common sense if you think you have received a records request – Call the Public Records Office!**
- **Agencies may not distinguish between requestors, or require the purpose of a request** - WSU may not have the real name, may not have the real reason, but still has to produce records; don't guess at what a requestor may or may not want





Agency Response Obligations

- Provide fullest assistance to requester
- Provide most timely possible action
- Contact public records officer
- “Need to know why” is generally not required
- “Need to know who” is generally not required
- “Will take too long” or “we don’t have the resources” won’t work



How WSU Will Initially Respond?

- Within five (5) business days WSU will:
- Provide the record(s), or
- Provide an Internet address and link to the agency's website to the specific records requested, or
- Acknowledge receipt of request and provide reasonable estimate of response time, or
- Deny the request and explain why, or
- Seek clarification

RCW 42.56.520



**This means you must work
with the Public Records
Office in a timely manner!**



What is a Reasonable Estimate?

- ◎ Time to fully respond to request includes:
 - Assembly and review of records
 - Notification to Third Parties
 - AG's Model Rules: notice should be provided early, only if arguably exempt, and specify a date for disclosure
WAC 44-14-04003(11)



What is a Reasonable Estimate?

- **Each request must be evaluated:** the agency's responsibility will vary depending on the complexity and number of requests, agency resources, and other agency essential functions
- **Routine extensions with little or no action show that previous estimates probably were not “reasonable”**
- **Agencies should explain the need to revise an estimate**
WAC 44-14-04003(6)



When Can Records Be Withheld?

- **When a statute exempts the information**
Exemptions exist in the PRA and other laws
- **Exemptions must be narrowly construed**
- **Exempt information should be redacted and non-exempt information should be produced**
- **Withholding and redacting decisions will be made by the Records Office and the AGO**
- **No exemption for non-responsive material included with responsive material**



What records are exempt?

- **Personal information in files maintained for clients of public institutions (RCW 42.56.230(1))**
- **Personal information in files maintained for employees, if private (RCW 42.56.230(2))**
- **Preliminary drafts or recommendations in which opinions are expressed or policies formulated**
- **Attorney advice or work product**
- **Other exemptions in law (FERPA, Trade Secrets Act, HIPAA & health care information, etc.)**



Is There A “Privacy” Exemption?

- No general privacy exemption; see AGO 1988 No. 12
- Privacy must be incorporated into an element of a specific exemption (for example, personal information in files maintained for employees, if private; RCW 42.56.230(2))
- Privacy is invaded if disclosure is 1) Highly offensive to a reasonable person; AND 2) not of legitimate concern to the public (RCW 42.56.050)
- Tiberino v. Spokane County
- Dawson v. Daly, performance evaluations, with no misconduct, are private; employee salary, rank, benefits data, and discussions involving misconduct are not private



Court Protection of Records

Examination may be enjoined if:

- Upon motion and affidavit by an agency or a person who is named in the record or to whom the record specifically pertains, the superior court finds that examination:
 - ✓ would clearly not be in the public interest and would substantially and irreparably damage any person; or
 - ✓ would substantially and irreparably damage vital governmental functions



Court Protection of Records

A requestor must be joined in injunction proceeding in which a third party seeks to prevent release of records to requestor

(Burt v. Dep't of Corrections (WA Supreme Court, 2010))



How To Fulfill A Request For Electronic Records

- **Agencies should develop, store, manage, and make public records widely available electronically (RCW 43.105.250)**
- **Agencies are encouraged to make commonly requested records available on its website – and in response to request for records, agencies may provide an Internet address and link on the website to the records (unless requestor notifies agency that s/he cannot access the Internet) (RCW 42.56.520)**

How To Fulfill A Request For Electronic Records

Agencies are not required to produce records electronically, but agencies should produce records electronically if it is “technologically feasible” (Mechling v. City of Monroe, 152 Wn. App. 830 (2009); WAC 44-14-05001)





What Fees May be Charged?

- Agencies may not charge inspection or search fees
- WSU charges 15 cents per page for providing photocopies or scanning paper records (only those that were not originally electronic)
- Agencies cannot charge a per-page amount for a paper copy when it has an electronic copy that can be easily provided at nearly no cost (WAC 44-14-07003)
- This will be coordinated by the Public Records Office



Agency Liability

- The agency has the burden of proving that all requested documents were produced, and that its redactions and withholdings are proper; payment of court costs and attorney fees (RCW 42.56.550)
- Payment of mandatory penalties:
 - **\$5 to \$100 per page, per day, for each day the record inspection/production was delayed or denied** (could very significant if court dates are involved)



Agency Liability

- **Yousoufian v. King County**
- **Factors which “may” determine penalty range include:**
 - **Clarity of request and an agency follow-up**
 - **Training and supervision of personnel**
 - **Agency systems to track and retrieve records**
 - **Strict compliance with PRA procedural requirements**
 - **Reasonableness of explanation**



Records Retention

- **RCW 40.14 -- Preservation and destruction of public records**
 - *“Regardless of physical form or characteristics, and including such copies thereof, that have been made or received by any agency of the state of Washington in connection with the transaction of public business.”*
 - *WSU Records Retention (see BPPM 90.01.15 All University Records Retention Schedule)*
 - *Individual departments will have schedules that must be reviewed and updated every two years*





What do you keep?

- **Content matters:** apply the same decisions to retaining electronic information as you would to the traditional paper format
- **Policies, significant decisions, commitments, or important meetings**





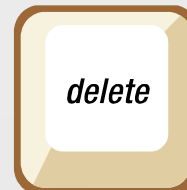
What do you keep?

- Messages that facilitate or document actions affecting the conduct of business
- Requests or provides substantive information
- If content protects rights—legal, fiscal, property, other
- If you use your personal cell phone for work, messages necessary to be retained should be saved on your work computer or other storage device and deleted from your phone



What don't you keep?

- Records with little or no retention value:
 - “FYI” or information *requiring no action*
 - Social, meeting or announcement type of notices,
 - Personal messages and “chit-chat”
 - Spam and junk mail
 - Announcements, WSU media, etc.
 - Get rid of it as soon as you can; if kept, and documents are requested, it can all become part of a public records request - don't leave it in your deleted folder.





Clutter—get rid of it

- Develop policies on primary & secondary copies; have conversations on who needs to keep what
- Use email less often; pick up the phone, go meet
- Create filters, shared folders/spaces, etc.
- CC less people, only critical sharing is necessary
- Get rid of redundant, outdated, and trivial material





In and out of the office

Use Caution: the line between work and personal time has blended or is gone completely

- Telecommuting, GO-To Meeting, etc.
- Smart phones, tablets, personal computers, cloud
- Social Media; protect the wsu.edu good name!





Be Prepared

- ❖ Always remain aware of the fact that we are each creating Public Records in the daily course of doing our jobs.
- ❖ Legally dispose of records in accordance with the records retention schedule, including email.



Destroying Records

A record scheduled for destruction may not be destroyed if a legal action (litigation hold notice) or Public Records Request involving that record is pending.



Summary

- **Do not delay--forward any Public Records Requests to the Public Records Office immediately.**
- **When the Public Records Office requests records, promptly search for all records that are responsive and provide copies, following the instructions provided.**
- **Do not withhold or redact records because you think the information is exempt. Leave that determination to the Public Records Office and Attorney General's Office.**
- **Dispose of records in conformance with the retention schedule.**
- **Manage your e-mail account.**



RESOURCES

- **WSU Public Records Office**

3033 IT Bldg., 335-3928, wsu.pubrecords@wsu.edu

- **WSU Attorney General's Office**

332 French Admin Bldg., 335-2636, wsu.atg@wsu.edu

- **Secretary of State (retention of records)**

- www.sos.wa.gov/archives/RecordsRetentionSchedules.aspx

