

Public Records Act



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Updated: November 2022

Application of the Public Records Act to Member Offices

Public Records Act – Background:

- Passed by initiative in 1972 with a voter approval of 72%
- The Act was enacted to provide the people with broad rights to access to public records

Public Records Act and Washington State Legislature:

- Associated Press, et al. v. Legislature
- Member offices are "agencies" subject to the general disclosure requirements of the PRA
- The legislative bodies are subject to the PRA's narrower disclosure provisions that are specific to the Chief Clerk and the Secretary of the Senate.

Why Should You Care?

Employment Security's foot-dragging flouts public-records laws

WEDNESDAY, JULY 21, 2021



Two recent cases reveal troubling failures in access to public records.

from The Seattle Times The Seattle Times <https://ift.tt/2UsVBfu>

Public records requests mishandled after
Seattle mayor's texts went missing,
whistleblower investigation finds

May 13, 2021 by CBW Reporter



State and local agencies are strictly liable for violation of the Act – intent does not matter



The liability for violating the Act could be large



The Act authorizes penalties from \$0 to \$100 per violation, per day

One record constitutes one violation - with the Court having discretion on defining what constitutes a record.



Agencies must also pay for all costs and legal fees

Penalty Factors

A court must consider these nonexclusive **factors** as guidance in deciding whether an agency should pay a penalty

Mitigating factors



(factors that can reduce a penalty):

- A lack of clarity in the PRA request.
- The agency's prompt response or legitimate follow-up inquiry for clarification.
- The agency's good faith, honest, timely, & strict compliance with all PRA procedural requirements & exceptions.
- Proper training & supervision of the agency's personnel.
- The reasonableness of any explanation for noncompliance by the agency.
- The helpfulness of the agency to the requester.
- The existence of agency systems to track and retrieve public records.

Aggravating factors



(factors that can increase a penalty):

A delayed response by the agency, especially in circumstances making time of the essence.

Lack of strict compliance by the agency with all the PRA procedural requirements and exceptions.

Lack of proper training & supervision of the agency's personnel.

Unreasonableness of any explanation for noncompliance by the agency.

Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency.

Agency dishonesty.

The public importance of the issue to which the request is related, where the importance was foreseeable to the agency.

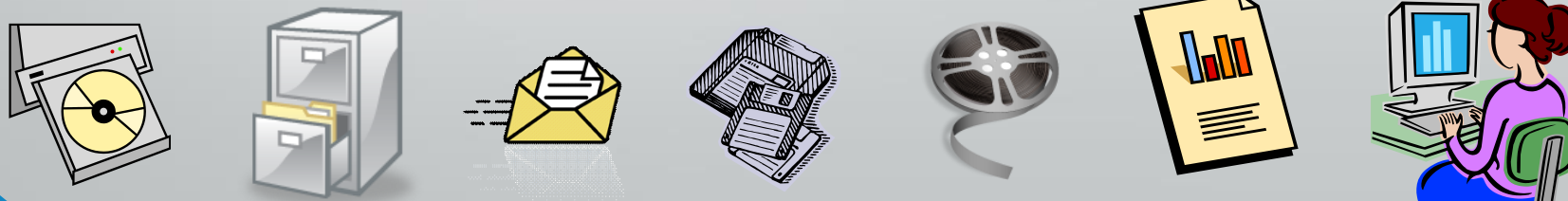
The inadequacy of an agency's search for records.

What is a Public Record?

- “Public record” is broadly defined.
- “**Writing**” includes “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 recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.”

~ RCW 42.56.010

- INCLUDES **METADATA**.



What is a Public Record?

Function/Use

- Under the PRA, chapter [42.56](#) RCW, to constitute a public record, the record must relate to the conduct of government and be either prepared, owned, used, or retained by the agency.
- Whether the record was used by the agency is not always clear.
 - A record is “used” by an agency if the record contains information that the agency either employs for, applies to, or makes instrumental to a governmental end or purpose – see, *Concerned Ratepayers v. PUD No. 1*, 138 Wn.2d 950, 960 (1999)



Practical Implications of POUR

Member Offices

- For Member, Legislative Assistant, Session Aide, Intern
- Documents sent to or from a legislative office or shared with a legislative office is a public record.

Legislative Staff

- For Caucus Staff, OPR/SCS, Administration, Leg agency staff.
- Work is generally not a public record UNLESS it is shared with a member or their office.

Advice: Don't get cute with this. Every document a member uses is a public record. Don't just show it to them and take it back. Best practice: Send them a copy.

The Public Records Process

- The Public Records Act and Court cases are very specific about the process and obligations of “Agencies”.
- Processes and questions from the Public Records Unit are driven by the law and court cases.
- Documenting the details of searches are important. It’s easier to do at the time of the search then years later when a lawsuit is filed.



The flowchart illustrates a five-step process for handling requests. It begins with 'Request Received' (lightest blue), followed by 'Gather Records', 'Review Records', 'Deliver Records', and finally 'Close Request' (darkest blue). Each step is represented by a downward-pointing chevron shape, with a list of tasks to its right. The steps are connected by a vertical line, and the entire process is set against a background with blue and grey diagonal stripes on the left side.

Request Received

- Determine if request is clear and records are identifiable. Clarify if need be.
- Determine who the “record holders” are
- Send records search email or PRA Hold Notice
- 5 day Response (RCW 42.56.520)

Gather Records

- Search Plan: Who, What, Where, When
- Search Requirements
- Document Search – Tracking Log/Declaration
- Private Devices
- Installments

Review Records

- Review Each Document
- Apply Applicable Exemptions: PRA Specific, Other Statutes (State or Federal)
- Send to Member for review

Deliver Records

- Fee Schedule
- Methods of Records Delivery
- Preservation and Retention

Close Request

- Ensure all applicable Members/Staff have responded with their search details
- Document Completion Date
- Identify Retention/Disposition Date
- Prepare Electronic and Hard Copy Files for Storage

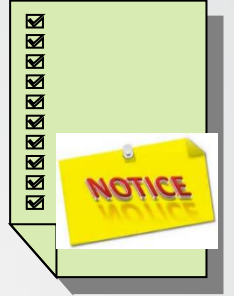
What is a Public Records Request

- **Request does not have to be in writing** - No official format, agency forms are encouraged but not required
- **Must be for identifiable records** – a request for information is not a request for public records
- **The Act does not require the creation of a new record in order to respond to a request.**

What is a Public Records Request

- If asked how to submit request, direct to <http://leg.wa.gov/House/Pages/PublicRecordsRequestInformation.aspx>
- **Try to use your best judgment** – if you think you have received a records request, **contact the Public Records Office immediately.**
- Agencies cannot distinguish between requesters, or require the purpose of a request
- The Public Records Officer is responsible for all communication with the requestor.

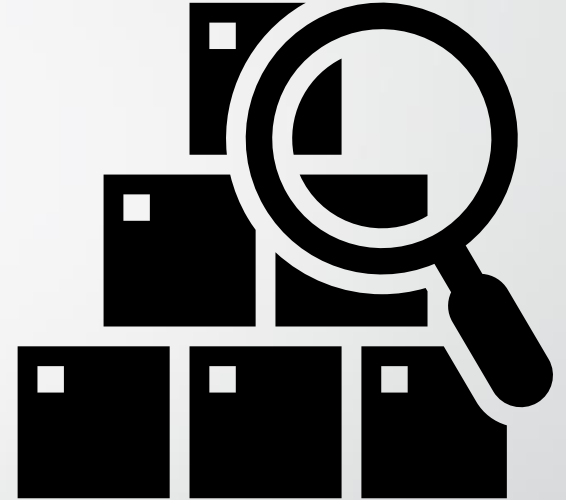
From The Requester's Perspective



- Persons must request **identifiable public records** from public agencies.
 - At minimum, requester must **identify documents with sufficient clarity to allow the agency to locate them.**
 - A request for “information” is not a request for “records” under the PRA.
 - Timeframes/date ranges don’t need to be provided (for example, all emails on fishing rights)
- Requesters can ask to ***inspect*** records, or request ***copies*** of records. Requests can be made via mail, email, in person.
- Agencies can adopt procedures explaining where requests must be submitted and other procedures.
- Generally, no need to identify **purpose** of request, unless required by law (e.g., restriction on providing lists of individuals for a commercial purpose).
- Requestors may make PRA requests in addition to discovery in a lawsuit.

Searches

- An agency must conduct an **adequate search** for **responsive records**.
 - The search should be **reasonably calculated** to uncover responsive records.
 - The search should follow **obvious leads** to possible locations where records are likely to be found.
 - If responsive public records are located in an employee's **personal device, personal account, or personal files**, those must be searched.
- The focal point of the judicial inquiry is the agency's search process, not the outcome of the search.
- The agency bears the burden of proof to show the adequacy of the search.



~ RCW 42.56.520; Neighborhood Alliance of Spokane v. Spokane County; Hobbs v. State; Block v. City of Gold Bar; Nissen v. Pierce County.

Reasonable Estimate

- Each request must be evaluated to determine how long it may take to process.
- 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.

“Mechanics” of Searching/Producing Public Records Controlled by Member/Employee



- The location or time a document was created is not determinative of whether the document is a public record or not.
- Applies to records on privately owned accounts and devices.

“Mechanics” of Searching/Producing Public Records Controlled by Member/Employee



- The public **employee/official** must **search, segregate, and produce** to the Public Records Office those public records that are responsive to a PRA request from the employee's/official's **personal accounts, files, and devices.**
- Employee/official may be required to submit affidavit regarding their search.

Records on Personal Devices – Case Law

- **Nissen v. Pierce County** (Personal Devices)
- **West v. City of Puyallup** (Facebook)
- **West v. Vermillion** (Email on private devices)
- The records, even if they are on a private device, may be subject to disclosure if the person “acts within the scope of his or her employment,” in which case the actions are tantamount to “the actions of the [body] itself.”
- Scope of employment is whether (1) the official's position required the posts, (2) the employer directed the posts, or (3) the posts furthered the employer’s interests.
- Social Media: Courts look at such facts as whether the posts are informational and do not directly address the “conduct” or “performance” of government functions.

Providing just a *general* statement of the search process will likely be insufficient to show what the agency did for a specific request.

- Banks v. City of Tacoma, Unpublished, 6/2/2021
- **Key Facts:** Requester sought records regarding the City's use of cell site simulators, aka "stingray." Through discovery and by comparing records from non-City sources requesters challenged the adequacy of the search. Requesters also challenged the City's redactions and withholding of records.
- **Holding:** The search must be "reasonably calculated to uncover all relevant documents" but is not required to "search every possible place a record may conceivably be stored." Testimony about the PRO's customary process for records searches, including for similar requests was inadequate to show the efforts in this request. The COA negatively comments on the lack of a contemporaneous written log or description of the people and departments contacted about this request, the lack of a contemporaneous list of the places searched or the search terms used.

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 will be redacted, and non-exempt information will be produced. No “silent withholdings”.

Withholding and redacting decisions will be made by the Public Records Office.

Legislative Privilege

Not commonly asked about, but super important

Legislators are not answerable to the judicial branch of government about their deliberative processes.

- Protects the internal deliberative processes of the Legislature by allowing legislators the freedom to discuss and explore policy options.
- Protects the Legislature and legislators in their exercise of their legislative duties from interference by the executive and judicial branches.

Where does it come from?

- Washington Constitution, Article II, Section 17 - The Speech and Debate Clause
- Common Law
- Separation of Powers Doctrine implicit in federal and state Constitutions

Legislative Privilege

Under the PRA, records may be exempt from disclosure if another statute creates a disclosure exception.

- Legislative Privilege (Article II, Section 17) operates as an exception to the PRA's disclosure obligations.
- Productions in response to a public records request that include **internal** legislative discussions of **proposed policies, positions or legislation** if the communications involve **deliberations, recommendations, opinions or advice** may be redacted.

Process:

- The public records office will confer with counsels on whether records are under this exemption.
- Records will be sent to members for final review.
- The Privilege belongs to the member and can be waived. If member does **not** respond, records will be released as redacted.

Privacy Concerns

- RCW 42.56.230(3): “Personal information in files maintained for employees...of any public agency to the extent that disclosure would violate their right to privacy.”
- RCW 42.56.050: right to privacy is invaded or violated if disclosure of information
 - Would it be highly offensive to a reasonable person; AND
 - Is not of legitimate concern to the public.



Privacy Concerns

- Predisik v. Spokane School Dist. No. 81
 - A person has a right to privacy under the PRA only in “matter[s] concerning the private life.”
 - Restatement (Second) of Torts § 652D (1977) - “Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.”



Legal vs. Practical

Now that we understand the legal requirements,
how do we put into practice?

Notes about Search Responsibilities

- **Public Records Office searches:**
 - Emails, Calendar, and Teams chats on legislative account (@leg.wa.gov)
 - Text messages on Legislative-issued cell phone, and RingCentral
 - M drive; One Drive, share point sites; network drives
- **Member's and LA's search all other locations** where records are stored/likely to be located (and PR office cannot search).
 - Desktop/on legislative phones/third party storage
- Members and LAs are in the best position to know **where** to search records. *If you believe public records reside in a certain location – search there.*
- Not all members use the same locations to retain records.



Search of Personal Device and/or Account Declaration

If records responsive to a request reside on an employee's or official's personal device or account, that individual must search those locations and sign a declaration describing the nature and extent of the search.

The declaration must also include a description of personal records that showed up in the search but not produced (due to the personal nature) with sufficient facts to show the records are **not** public records.

Nissen v. Pierce County (Personal Devices)

West v. City of Puyallup (Facebook)

West v. Vermillion (Email on private devices)

Records Search Tracking Log

We are required to document
our searches.

It is up to the Member and LA
to determine locations where
records may be located and
search those locations.

No more printing out forms!!

[Search Forms](#)



Resources

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Questions?