Administrative Code
Part C
Section 1
Public Records Policy

YAKIMA REGIONAL CLEAN AIR AGENCY ADMINISTRATIVE CODE PART C

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SECTION 1 PUBLIC RECORDS ACT POLICY

PUBLIC RECORDS ACT POLICY COMMENTS

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1.1 Introduction

1.1.1 Statutory authority and purpose. *(RCW 42.56 et seq. and WAC 44-14-00001)*
This establishes Yakima Regional Clean Air Agency (Agency) policy for retaining and making available public records to any person who requests a public record. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time (RCW 42.56.570 (2) and (3)). WAC 44-14 was developed to satisfy that directive. This policy is based on the content of WAC 44-14 and the corresponding WAC 44-14 section numbers are indicated in parenthesis after each section heading.

The purpose of this policy is to provide information to records requestors and provide guidance for the Agency about best practices for complying with the Public Records Act, RCW 42.56.570 (PRA). The overall goal of this policy is to establish a culture of compliance at this Agency and a culture of cooperation among requestors by standardizing best practices. This policy provides a uniform approach (or, in some cases, alternate approaches) to processing public records requests

1.1.2 Format of policy. *(WAC 44-14-00002)*
This policy is published with comments. The comments section headings have numbers which correspond to the relevant policy sections.

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

1.1.3 Portions of this policy are nonbinding. *(WAC 44-14-00003)*
Portions of this policy, and the comments accompanying it, are intended for guidance only and do not legally bind the Agency or a requestor. Accordingly, many of the provisions of this policy use the word "should" or "may" to describe what the Agency and requestors are encouraged to do. The use of the words "shall", "will" or "must" are used to describe what the Agency and requestors must do in the vast majority of cases. However, the Agency reserves the right to waive any provision of this policy to better meet requestors' expectations or to prevent excessive interference with other essential functions of the Agency.

1.1.4 Training is critical. *(WAC 44-14-00005)*
The PRA is complicated, and compliance requires training. Training can be the difference between a satisfied requestor and a dissatisfied requestor. The Agency will provide initial and ongoing training to Agency staff on this policy, the PRA and public records compliance. All Agency employees will receive basic training on this policy and public records compliance and records retention. The Public Records Officer (PRO) will receive more intensive training.

1.1.5 Additional resources. *(WAC 44-14-00006)*
Several web sites provide information on the PRA. The Washington State Attorney General's Office web site regarding public records is www.atg.wa.gov/records/deskbook.shtml . The Municipal Research Service Center, an entity serving local governments, provides a public records handbook at www.mrsc.org/Publications/prdpub04.pdf .

1.2 Authority and Purpose *(WAC 44-14-010)*

1.2.1. RCW 42.56.070(1) requires each agency to make nonexempt public records available for inspection and copying in accordance with published rules. The PRA defines "public record" 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 42.56.070(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.

1.2.2 This policy ~~is~~ establishes the procedures the Agency will follow in order to provide full access to public records. This policy provides information to persons wishing to request access to public records of the Agency and establish processes for both requestors and Agency staff that are designed to best assist members of the public in obtaining such access.

1.2.3 The purpose of the PRA and this policy is to provide to the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of this Agency. In carrying out its responsibilities under the PRA, the Agency will be guided by the provisions of this policy and the PRA describing its purposes and interpretation.

1.3 Agency Description--Contact Information—Public Records Officer (PRO) *(WAC 44-14-020)*

1.3.1 The Agency conducts work programs authorized and required by the Washington Clean Air Act (*RCW 70.94*) and the Federal Clean Air Act (*42 U.S.C. 7401 et seq.)* to preserve and enhance the air quality within its jurisdiction. The Agency's office is located at:

329 North First Street
Yakima, WA 98901

1.3.2 Any person wishing to request access to public records of the Agency, or seeking assistance in making such a request, should contact the PRO:

Mary Wurtz, Public Records Officer
Yakima Regional Clean Air Agency
329 North First Street
Phone number: (509) 834-2050 Ext 102
Fax number: (509) 834-2060
Email: maryw@yrcaa.org

Information is also available at the Agency's web site at http://yakimacleanair.com .

1.3.3 The PRO will oversee compliance with the PRA but other Agency staff members may be assigned duties to help process a request. Therefore, this policy when referring to the PRO will include designees. The PRO and the Agency will provide the fullest possible assistance to requestors. At the same time, the PRO and Agency must also ensure that public records are protected from damage or disorganization and that the essential functions of the Agency are not interrupted by fulfilling public records requests.

1.4 Availability of Public Records *(WAC 44-14-030)*

1.4.1 Hours for inspection of records.
Public records are available for inspection and copying during normal business hours of the

Agency, Monday through Friday, 9:00 a.m. to 5:00 p.m., excluding legal holidays. Any inspection of public records must be conducted at the Agency offices.

1.4.2 Records index.

The Agency finds that the requirement to maintain a records index would unduly burden or interfere with Agency operations. The Governing Board of Directors adopted Resolution 2011-01 exempting the Agency from maintaining a records index under the provisions of RCW 42.56.070(4).

1.4.3 Organization of records.

The Agency will maintain its records in a reasonably organized manner. The Agency will take reasonable actions to protect records from damage and disorganization. A requestor shall not take Agency records from the Agency offices without the permission of the PRO. A variety of records is available on the Agency web site at http://yakimacleanair.org/. Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

1.4.4 Making a request for public records.

a. Any person wishing to inspect or copy public records of the Agency shall make the request in writing on the Agency's request form. The form may be submitted by letter, fax, email or in person, addressed to the PRO and must include the following information:

- Name of requestor;
- Address of requestor;
- Other contact information, including telephone number(s) and any e-mail address;
- Identification of the public records adequate for the PRO 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 so and if there is a copying fee make arrangements to pay for copies of the records or make a cash deposit. Pursuant to subsection 1.8 of this policy, standard black and white or color photocopies will be provided at fifteen cents per page.

c. A records request form is available for use at the office of the PRO and on-line at http://yakimacleanair.org/.

d. The PRO may accept, by telephone, letter, fax, email or in person, a request for public records which does not utilize the request form, provided the request contains the above information. If the PRO accepts such a request, he or she will confirm receipt of the information and the substance of the request by completing the records request form and indicating so on the form.

1.5 Processing of Public Records Requests--General *(WAC 44-14-040)*

1.5.1 Providing fullest assistance.

This policy defines how the Agency 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 timeliest possible action on public records requests. The PRO shall process requests in the order which allows

the maximum number of requests to be processed in the most efficient manner.

1.5.2 Acknowledging receipt of request.
Within five business days of receipt of a public records request, the PRO shall acknowledge receipt of the request in writing and do one or more of the following:

a. Make the records available for inspection and copying;

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

c. Provide a reasonable estimate of when records will be available;

d. If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone, fax, regular mail, or email. The PRO may, as a result, revise the estimate of when records will be available; or

e. Deny the request.

1.5.3 Consequences of failure to respond.
If the Agency does not respond in writing within five business days of receipt of the request for disclosure, the requestor should consider contacting the PRO to determine the reason for the failure to respond. If the requestor fails to respond to a clarification request, (as in 1.5.2.d, above) within thirty (30) days, the PRO will notify the requestor of the Agency's intent to immediately close the request as abandoned.

1.5.4 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 PRO 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.

1.5.5 Records exempt from disclosure.
Some records are exempt from disclosure, in whole or in part. If the Agency believes that a record is exempt from disclosure and should be withheld, the PRO will state the specific exemption and provide a brief 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 PRO will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor why portions of the record are being redacted.

1.5.6 Inspection of records.

a. Consistent with other demands, the 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 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 thirty (30) days or make other arrangements, the Agency shall notify the requestor of its intent to close the request and refile the assembled records. Other public records requests may be processed ahead of a subsequent request by the same person for the same or almost identical records, which will be processed in order as a new request.

1.5.7 Providing copies of records.

After inspection or identification of records is complete the requestor shall notify the Agency whether or not copies of the records are desired. If the requestor indicates that copies of the records are desired, the PRO shall copy or arrange for copying of all nonexempt records and make the records available to the requestor. Upon receipt of the records a requestor must verify receipt of the responsive records in the manner specified by the Agency.

1.5.8 Providing records in installments.

When the request is for a large number of records, the PRO may 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 (30) days, the requestor fails to inspect or claim the entire set of records or one or more of the installments, the PRO shall advise the requestor of its intent to stop searching for the remaining records and close the request as provided in subsection 1.5.10.

1.5.9 Completion of inspection.

When the inspection or identification of the requested records is complete and all requested copies are made, the PRO shall notify the requestor that the Agency has completed a diligent search for the requested records and make any located nonexempt records available to the requestor.

1.5.10 Closing requests.

Upon fulfillment of a request for records, the PRO shall notify the requestor in writing, describing the records provided and informing the requestor that the request has been closed.

The PRO shall notify the requestor of the Agency's intent to close a request by a specified date if the requestor:

a. Fails to provide clarifying information as required in subsection 1.5.3;
b. Withdraws the request;
c. Fails to fulfill his or her obligations to inspect the records;
d. Fails to pay the deposit or final payment for the requested copies;
e. Fails to claim the records as required in subsections 1.5.6.b and 1.5.8; or
f. Fails to confirm receipt of records as required in subsection 1.5.7.

If the requestor fails to correct the cause for closure by the date specified, the Agency shall close the request as notified.

1.5.11 Later discovered records.

If, after the Agency has informed the requestor that it has provided all available records, the

Agency becomes aware of additional responsive records existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

1.6 Processing of Public Records Requests--Electronic records *(WAC 44-14-050)*

1.6.1 Requesting electronic records.

The process for requesting electronic public records is the same as for requesting paper public records.

1.6.2 Providing electronic records - format.

When a requestor requests records in an electronic format, the PRO will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the 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 subsection 1.8.2 of this policy.

1.6.3 Providing electronic records – method of delivery.

Records in electronic format may be delivered either by email or by copying the records onto a write-protected disk, delivered in person, by US mail or by parcel post. Generally, small quantities of electronic records will be delivered by email and large quantities will be delivered in person, by US mail or by parcel post. The PRO will decide the most reasonable method of delivery. Requestors will be asked to confirm receipt of records provided by email.

1.7 Exemptions *(WAC 44-14-060)*

1.7.1 The Public Records Act provides that certain records and information contained in records are exempt from public inspection and copying. Requestors should review the Public Records Act for a detailed explanation of the exemptions found in that statute. In addition, certain records and information contained in records are exempt from disclosure if any other statute exempts or prohibits disclosure. Requestors should be aware of exemptions, outside the Public Records Act, such as, but not limited to, the following, which restrict the disclosure of certain records and information contained in records held by the Agency for inspection and copying:

Washington State Statutes

Citation	Records/Information
RCW 2.64.113	Confidentiality - violations
RCW 5.60.060	Privileged communications
RCW 5.60.070	Court-ordered mediation records
RCW 10.97.070	Disclosure of identity of suspect to victim
RCW 18.04.405	Confidentiality of information gained by CPA
RCW 19.215.020	Destruction of personal health and financial information
RCW 19.215.030	Compliance with federal rules
RCW 40.14	Preservation and destruction of public records
RCW 42.23.070(4)	Municipal officer disclosure of confidential information prohibited
RCW 42.41.030(7)	Identity of local government whistleblower
RCW 42.41.045	Non-disclosure of protected information (whistleblower)
RCW 42.56.610	Certain information from dairies and feedlots limited-Rules
RCW 46.52.130(2)	Abstract of driving record
RCW 48.62.101	Local government insurance transactions – access to information

RCW 50.13.060	Access to employment security records by local government agencies
RCW 50.13.100	Disclosure of non-identifiable information or with consent
RCW 51.28.070	Worker's compensation records
RCW 51.36.060	Physician information on injured workers
RCW 70.58.104	Vital records, research confidentiality safeguards
RCW 70.94.205	Confidential business information

Selected Federal Confidentiality Statutes and Rules

5 USC § 552a	Privacy Act records maintained on individuals
20 USC § 1232g	Family Education Rights and Privacy Act
42 USC 405(c)(2)(vii)(l)	Limits on Use and Disclosure of Social Security Numbers.
45 FR 160-164	HIPAA Privacy Rule

1.7.2 The Agency is prohibited by statute from disclosing lists of individuals for commercial purposes.

1.8 Costs of providing copies of public records *(WAC 44-14-070)*

1.8.1 Costs for paper copies.

There is no fee for inspecting public records. A requestor may obtain black and white or color photocopies for fifteen cents per page.

Before beginning to make copies of records, the PRO may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The PRO 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 Agency will not charge sales tax when it makes copies of public records.

1.8.2 Costs for electronic records.

The cost of electronic copies of records placed on any Portable Storage Device such as a flash or thumb drive shall be equal to the actual cost of the purchase of the device. The cost of scanning existing Agency paper or other non-electronic records is ten cents per page. Records uploaded to email or to a cloud based storage device or other means of electronic delivery will have a cost of five cents per four (4) electronic files or attachments. Records transmitted in electronic format, or for use of agency equipment to send records electronically, will have a cost of ten cents per Gigabyte.

1.8.3 Postage or Delivery Charges.

The Agency will charge the actual cost of Postage or any delivery charges and any container or envelope used to mail. When customized access services are not normally used by the agency for other business purposes, the requestor will be charged any actual cost for customized services incurred in completing a request.

1.8.4 Payment.

Payment may be made by cash, check, money order or credit card to the Agency.

1.9 Review of denials of public records *(WAC 44-14-080)*

1.9.1 Petition for internal administrative review of denial of access.

Any person who objects to the initial denial or partial denial of a record request may petition in writing (including email) to the PRO for a review of that decision. The petition shall include a copy of, or reasonably accurate representation of the written statement by the PRO

denying the request.

1.9.2 Consideration of petition for review.
The PRO shall immediately provide the petition and any other relevant information to the Executive Director. The Executive Director 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 to which the Agency and the requestor mutually agree.

1.9.3 Judicial review.
Any person may obtain court review of denials of public records requests pursuant to RCW 42.56.550 at the conclusion of two business days after the initial denial regardless of any internal administrative appeal.

COMMENTS to YRCAA PUBLIC RECORDS ACT POLICY

These comments relate directly to sections of the above policy and sections of WAC 44-14 as indicated. The comments are intended to provide guidance for, broader context of, and deeper understanding of the policy and the PRA. The comments do not bind the Agency or a requestor.

Comments to 1.2 - Authority and Purpose *(WAC 44-14-010)*

Scope of coverage of Public Records Act. *(WAC 44-14-01001)*
The PRA applies to an "agency" (RCW 42.56.070(1)) which includes all local agencies. 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.

Court files and judges' files are not subject to the PRA.[1] Access to these records is governed by court rules and common law. This policy, therefore, does not address access to court records.

An entity which is not an agency can still be subject to the PRA 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). However, the PRA defines the county as a whole as an agency subject to the PRA. An agency should coordinate responses to records requests across departmental lines. An agency's PRO must oversee the agency's compliance with PRA.

Notes: [1]*Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).
[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); Op. Att'y Gen. 5 (1991).

Requirement that agencies adopt reasonable regulations for public records requests. *(WAC 44-14-01002)*
The PRA 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 42.56.100) Therefore, an agency must adopt reasonable regulations providing for the fullest assistance to requestors and the most timely possible action on requests. It is the intent of this policy to comply with that requirement.

At the same time, an agency's regulations (policy) must protect public records from damage or disorganization and prevent excessive interference with other essential agency functions. Another provision of the PRA states that providing public records should not unreasonably disrupt the operations of the agency (RCW 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.

Construction and application of the PRA**.** *(WAC 44-14-01003)*
The PRA 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 42.56.030) The PRA 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." The PRA further provides: "Courts shall take into account the policy of (the PRA) 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 42.56.550(3))

Because the purpose of the PRA is to allow people to be informed about governmental decisions while at the same time being mindful of the right of individuals to privacy, it shall not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.

The PRA emphasizes three separate times that it must be liberally construed to affect its purpose, which is the disclosure of nonexempt public records (RCW 42.56.030[1]). The PRA 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 reasonable. (RCW 42.56.550 (1) and (2)) The PRA also encourages disclosure by awarding a requestor reasonable attorney's fees, costs, 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 42.56.550(4))

An additional incentive for disclosure is RCW 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 PRA.

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 PRA as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

Comments to 1.3 - Agency description--Contact information--PRO

Agency must publish its procedures. *(WAC 44-14-02001)*

An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. (RCW 42.56.040(1))[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 42.56.040(2))

Note: [1]*See, e.g.*, WAC 44-06-030 (attorney general office's organizational and public records methods statement).

Public Records Officers (PRO). *(WAC 44-14-02002)*

An agency must appoint a PRO whose responsibility is to serve as a point of contact for members of the public seeking public records. (RCW 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 local agency must publish the PRO'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 42.56.580(3))

The PRO is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the PRO. If the request is made to the PRO, but should actually be fulfilled by others in the agency, the PRO 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 PRO.

Comments to 1.4 - Availability of public records *(WAC 44-14-030)*

Public record defined *(WAC 44-14-03001)*

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]

(1) Writing.

A public record can be any writing regardless of physical form or characteristics. (RCW42.56.010 (4)). Writing is defined very broadly as: "…handwriting, typewriting, printing, photostatting, 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. An email is a writing.

(2) Relating to the conduct of government.

To be a public record, a record must relate to the conduct of government or the performance of any governmental or proprietary function. (RCW 42.56.010(3)) 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. 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) Prepared, owned, used, or retained.
A public record is a record prepared, owned, used, or retained by an agency. (RCW 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] 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] 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 record to a third party for the sole purpose of avoiding disclosure.[5]

Sometimes agency employees work on agency business from home computers. These home computer records (including email) were used by the agency and relate to the conduct of government so they are public records. (RCW 42.56.010(3)) However, the PRA 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. Yet, because the home computer documents relating to agency business are public records, they are subject to disclosure (unless otherwise 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.

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 42.56.010(3).
[2]*Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000).
[3]*Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).
[4]*Id.*
[5]*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]*See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

Times for inspection and copying of records *(WAC 44-14-03002)*
An agency must make records available for inspection and copying during the customary office hours of the agency. (RCW 42.56.090) If the agency is very small and does not have customary office hours of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

Index of records *(WAC 44-14-03003)*
State and local agencies are required by RCW 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 42.56.070(6)) An agency should post its index on its web site.

The index requirements of the PRA were enacted in 1972 when agencies had far fewer records 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.

Organization of records *(WAC 44-14-03004)*
An agency must protect public records from damage or disorganization. (RCW 42.56.100) An agency owns public records (subject to the public's right, as defined in the PRA, 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. 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 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...and 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) 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. Agencies are encouraged to do so. For those without access to the internet, an agency could provide a computer terminal at its office.

Retention of records *(WAC 44-14-03005)*
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.

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 e-mails could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all e-mails after a short period may prevent an agency from complying with its retention duties and could complicate performance of its duties under the PRA. An agency should have a retention policy in which employees save retainable documents and delete non-retainable ones. An agency is strongly encouraged to train employees on retention schedules.

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 42.56.100) 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 42.56.110)

Note: [1]An agency can be found to violate the PRA and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record. *See Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

Form of requests *(WAC 44-14-03006)*
There is no statutorily required format for a valid public records request.[1] A request can be sent in by mail. (RCW 42.56.100) A request can also be made by email, fax, or orally. A request should be made to the agency's PRO. An agency may prescribe means of requests in its rules. (RCW 42.56.040 and 42.56.070(1)) An agency is encouraged to make its public records request form available 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 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 PRO 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. An agency request form 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 should recite that inspection of records is free and provide the per-page charge for standard photocopies.

An agency request form 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 e-mail 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.

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.

An agency cannot require the requestor to disclose the purpose of the request with two exceptions. (RCW 42.56.080) First, 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.[2] 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 42.56.070(9))

Second, 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. In such cases, an agency is authorized to ask the requestor if he or she fits this criterion.

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

Notes: [1]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.").
[2]Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.
[3]RCW 42.56.060 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 1

Comments to 1.5 - Processing of public records requests - General *(WAC 44-14-040)*

Introduction *(WAC 44-14-04001)*
Both requestors and agencies have responsibilities under the PRA. The public records process can function properly only when both parties meet their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to request identifiable records, inspect the assembled records or pay for the copies, and be respectful to Agency staff.[2]

Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The PRA recognizes that agency public records procedures should prevent excessive interference with the other essential functions of the agency. (RCW 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 PRO 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 42.56.550(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 PRA. 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.

Notes: [1]RCW 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 PRA or other statute).
[2]*See* RCW 42.56.080 ("identifiable record" requirement); RCW 42.56.120 (claim or review requirement); RCW 42.56.100 (agency may prevent excessive interference with other essential agency functions).

Obligations of requestors *(WAC 44-14-04002)*

(1) Reasonable notice that request is for public records.

A requestor must give an agency reasonable notice that the request is being made pursuant to the PRA. Requestors are encouraged to cite or name the PRA but are not required to do so.[1] A request using the terms public records, public disclosure, FOIA, or Freedom of Information Act (the terms commonly used for federal records requests) should provide an agency with reasonable notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt 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 42.56.080 and 42.56.550(1)) An identifiable record is one that agency staff can reasonably locate.[2] The act does not allow a requestor to search through agency files for records which cannot be reasonably identified or described to the agency.[3] 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]

An identifiable record is not a request for information in general.[5] 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. An agency is not required to 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.

(3) Overbroad requests.
An agency cannot deny a request for identifiable public records based solely on the basis that the request is overbroad. (RCW 42.56.080) 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).
[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).
[4]*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*.
[7]*See Limstrom*, 136 Wn.2d at 604, n.3 (PRA 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 (PRA "does not require agencies to research or explain public records, but only to make those records accessible to the public.").

Responsibilities of agencies in processing requests *(WAC 44-14-04003)*
(1) Similar treatment and purpose of the request.
The PRA 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 for a commercial use or would violate another statute prohibiting disclosure). (RCW 42.56.080)[1] The PRA also requires an agency to take the most timely possible action on requests and make records promptly available. (RCW 42.56.100 and 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 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]

An agency cannot require a requestor to state the purpose of the request (with limited exceptions). (RCW 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) Provide fullest assistance and most timely possible action.
The PRA requires agencies to adopt and enforce reasonable rules to provide for the fullest assistance to a requestor. (RCW 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 PRA's requirement that fulfilling requests should

not be an excessive interference with the agency's other essential functions. (RCW 42.56.100) The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The PRA also requires agencies to adopt and enforce rules to provide for the most timely possible action on requests. (RCW 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) Communicate with requestor.

Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require pre-delivery 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 the request is modified orally, the PRO 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) 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 a 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 respond;
(c) Seek a clarification of the request; or
(d) Deny the request. (RCW 42.56.520) An agency's failure to provide an initial response is arguably a violation of the PRA.[2]

(5) No duty to create records.

An agency is not obligated to create a new record to satisfy a records request.[4] 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. If the agency is considering creating a new record instead of disclosing the underlying records, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records. Making an electronic copy of an electronic record is not creating a new record; instead, it is similar to copying a paper copy. Similarly, eliminating a field of an electronic record can be a method of redaction; it is similar to redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying.

(6) 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 42.56.520) Fully responding can mean processing the request (assembling records, redacting, preparing a withholding index, or notifying third parties who might seek nondisclosure) or determining if the records are exempt from disclosure.
An estimate must be reasonable. The PRA provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. (RCW 42.56.550(2)) See 44-14-08004 (5)(b). The burden of proof is on the agency to prove its estimate is reasonable. (RCW 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. Some very large requests can legitimately take months or longer to fully provide. 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 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.

In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requestor the basis for the estimate in the initial response. 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. 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) Seek clarification of a request or additional time.
An agency may seek a clarification of an "unclear" request. (RCW 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 unclear request, the agency need not respond to it further. (RCW 42.56.520) If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. (RCW 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) 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 42.56.100)[5] Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(9) Searching for records.

An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own.[6] A reasonable agency search usually begins with the PRO 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 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. It is better to be over inclusive rather than under inclusive when deciding which staff 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 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.

Agency policies should require staff to promptly respond to inquiries about responsive records from the PRO. After records which are deemed 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.

(10) 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.

(11) 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 42.56.540) 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 PRA 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 42.56.540) 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 42.56.540) Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the PRA. (RCW 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 42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the PRA.

The practice of many agencies is to give ten days' notice. Many agencies expressly indicate the deadline date to avoid any confusion. 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 the notice period in the "reasonable estimate" 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) 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.
Notes: [1]*See also* Op. Att'y Gen. 2 (1998).
[2]*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 42.56.520, it violates the PRA and the individual requesting the public record is entitled to a statutory penalty.").
[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 requests.
[4]*Smith*, 100 Wn. App. at 14.
[5]An exception is some state-agency employee personnel records. RCW 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 research'").
[7]The agency holding the record can also file a RCW 42.56.540 injunctive action to establish that it is not required to release the record or portion of it.

Responsibilities of agency in providing records *(WAC 44-14-04004)*
(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 pre-meeting 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 42.56.080) 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 web site. 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.

(3) Providing records in installments.

The PRA 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 42.56.080) The purpose of this 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.

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 42.56.100)

(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 within the reasonable estimate.

(a) When the agency does not have the record.

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, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[4]

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) Claiming exemptions.

(i) 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 42.56.210(1)) There are a few exceptions.[5] Withholding an entire record where only a portion of it is exempt violates the PRA.[6] 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. (RCW 42.56.240(2)) If a requestor requested a police report in a case in which charges have been filed, 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 42.56.210(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. 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. For electronic records such as data bases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. 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) 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 42.56.210(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 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] The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

(5) 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] 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 re-file 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. The notification can be oral to provide the most timely possible response.

(6) 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. 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.

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

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).
[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]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). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.
[6]*Seattle Fire Fighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).
[7]*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").
[8]For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

Inspection of records *(WAC 44-14-04005)*
(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 42.56.120) 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 42.56.120) If the request is abandoned, the agency is no longer bound by the records retention requirements of the PRA prohibiting the scheduled destruction of a requested record. (RCW 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, 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 upon (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 42.56.090) 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 42.56.100) Similarly, copying records at agency facilities cannot unreasonably disrupt the operations of the agency. (RCW 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 destroyed or disorganized. (RCW 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. However, inspection times cannot be broken down into unreasonable 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).

Closing request and documenting compliance *(WAC 44-14-04006)*

(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 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. 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 42.56.080) 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 42.56.100)

(3) Retain copy of records provided.

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 period of time consistent with the agency's retention schedules for records related to disclosure of documents.

Later-discovered records *(WAC 44-14-04001)*

An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.

Comments to 1.6 - Processing of public records requests--Electronic records *(WAC 44-14-*

050)

Access to electronic records *(WAC 44-14-05001)*
The Public Records Act does not distinguish between 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 PRA by RCW 42.56.010) 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 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.

Technical feasibility is the touchstone 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 44-14-05004. The Agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See 44-14-050(3). What is technically feasible in one situation 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 this Policy may not apply every time. If the 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 44-14-05003. It is usually a purely technical question whether the Agency can provide electronic records in a particular format in a specific case.

Reasonably locatable and reasonably translatable electronic records *(WAC 44-14-05002)*
(1) Reasonably locatable electronic records.
The PRA obligates the Agency to provide nonexempt "identifiable…records." (RCW 42.56.080) An identifiable record is essentially one that Agency staff can reasonably locate. See 44-14-04002(2). Therefore, a general summary of the identifiable record standard as it relates to electronically locating public records is that the PRA requires the Agency to provide a nonexempt reasonably locatable record. This does not mean that the Agency can decide if a request is reasonable and only fulfill those requests. Rather, reasonably locatable is a concept, grounded in the PRA, 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 email search feature has limitations, such as not searching attachments, but is 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 employee for a particular date is reasonably locatable because it can be found utilizing a common organizing feature of the Agency's email program, 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, the 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 data base to determine which businesses are publicly traded corporations.

(2) Reasonably translatable electronic records.

The PRA requires the 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, the 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. Similarly, the 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. The Agency must take reasonable steps to translate the Agency's original into a useable copy for the requestor. The reasonably translatable concept typically operates in three kinds of situations:

(a) The Agency has only a paper record;
(b) The Agency has an electronic record in a generally commercially available format (such as a Windows® product); or
(c) The 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) The Agency has paper-only records.

When the 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 cost for scanning. See 44-14-07003. 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) The Agency has electronic records in a generally commercially available format.

When the 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 the Agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. The 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) The Agency has electronic records in an electronic format other than the format requested.

When the 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, 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 the Agency has a data base 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 data base 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 the 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) The 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, the Agency should keep, when feasible, an electronic copy of the electronic records it provides to a requestor to show the exact records it provided. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

Parties should confer on technical issues *(WAC 44-14-05003)*

Technical 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 44-14-04003(2)) Furthermore, if a requestor files an enforcement action under the PRA 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.

Relationship of Public Records Act to court rules on discovery of electronically stored information *(WAC 44-14-05005)*
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 PRA 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.

Comments to 1.7 – Exemptions *(WAC 44-14-060)*

The Agency must publish a list of applicable exemptions *(WAC 44-14-06001)*
The Agency must publish and maintain a list of the other statute exemptions from disclosure (exemptions found outside the Public Records Act) that it believes potentially exempt records it holds from disclosure. (RCW 42.56.070(2)) The list is for informational purposes only and the Agency's failure to list an exemption shall not affect the efficacy of any exemption. (RCW 42.56.070(2)) A list of possible other statute exemptions is posted on the web site of the Municipal Research Service Center at www.mrsc.org/Publications/prdpub04.pdf (scroll to Appendix C).

Summary of exemptions *(WAC 44-14-06002)*
(1) General.
The PRA 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 this policy. Instead, these comments to the policy 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 this policy merely provide guidance on a few of the most common issues.

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

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

The Agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. (RCW 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, the 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 employee files is exempt to the extent that disclosure would violate the employee's right to privacy. (RCW 42.56.210 (1)(b)) Privacy is then one of the elements, in addition to the others in RCW 42.56.210 (1)(b), that the Agency or a third party resisting disclosure must prove.

Privacy is defined in RCW 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, the Agency cannot claim RCW 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 42.56.210 (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 42.56.210 (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, the Agency must show that the records contain pre-decisional

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 42.56.080) See 44-14-04002(3).

(6) Commercial use exemption.
The PRA does not allow the Agency to provide access to lists of individuals requested for commercial purposes. (RCW 42.56.070(9)) The 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 authority 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, the 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 the 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. The Agency is allowed additional time under the PRA to determine if an exemption might apply. (RCW 42.56.520)

When the 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 42.56.540. 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 42.56.540.

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 42.56.050 ("privacy" linked to rights of privacy "specified in (the PRA) 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 42.56.070(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 42.56.080 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 2

Comments to 1.8 - Costs of providing copies of public records *(WAC 44-14-070)*

General rules for charging for copies *(WAC 44-14-07001)*
(1) No fees for costs of inspection.
The Agency will not charge a fee for locating public records or for preparing the records for inspection or copying. (RCW 42.56.120)[1] The Agency will not 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 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 an agency attempts to charge more than the fifteen cents per page maximum for photocopies, 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 42.56.070(7)) An agency may include the costs directly incident to providing the copies such as paper, copying equipment, and staff time to make the copies. (RCW 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 42.56.070 (7)(a) and (b) and 42.56.120)

If an agency charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. (RCW 42.56.070(7) and 42.56.120)[3] A price list with no analysis is insufficient. An agency's calculations and reasoning need not be elaborate 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.

If an agency opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs. (RCW 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 42.56.120) 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) 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 42.56.120)) 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) Use of outside vendor.
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. 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. An agency cannot charge the default fifteen cents per page rate when its actual cost at a copying vendor is less. The default rate is only for agency-produced copies. (RCW 42.56.120)

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

(7) Costs of mailing.
If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container. (RCW 42.56.070 (7)(a))

Notes: [1]*See also* Op. Att'y Gen. 6 (1991).
[2]The cost of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other non-copying functions. *See* RCW 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 charges).

Charges for electronic records *(WAC 44-14-07003)*
Providing copies of electronic records usually costs the agency and requestor less than making paper copies. Agencies are strongly encouraged to provide copies of electronic records in an electronic format. See RCW 43.105.250, encouraging state and local agencies to make public records widely available electronically to the public. As with charges for paper copies, actual cost is the primary factor for charging for electronic records. In many cases, the actual cost of providing an existing electronic record is de minimis. For example, a requestor requests an agency to e-mail an existing Excel® spreadsheet.

The agency should not charge for the de minimis cost of electronically copying and e-mailing the existing spreadsheet. The agency cannot attempt to charge a per-page amount for a paper copy when it has an electronic copy that can be easily provided at nearly no cost. However, if the agency has a paper-only copy of a record and the requestor requests an Adobe Acrobat PDF® copy, the agency incurs an actual cost in scanning the record. Therefore, an agency can establish a scanning fee for records it scans. Agencies are encouraged to compare their scanning and other copying charges to the rates of outside vendors. See 44-14-07001.

Other statutes govern copying of particular records *(WAC 44-14-07004)*
The PRA generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. (RCW 42.56.130)

Waiver of copying charges *(WAC 44-14-07005)*
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.

Requiring partial payment *(WAC 44-14-07006)*
(1) Copying deposit.
An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request before beginning to copy the records. (RCW 42.56.120)[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 cents per page so the cost would be three hundred dollars. The agency obtains a ten percent deposit of thirty 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 dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining two hundred sixty dollars 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. (RCW 42.56.120) The agency may agree to provide an installment without first receiving payment for that installment.

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

Comments to 1.9 - Review of denials of public records *(WAC 44-14-080)*

Agency internal procedure for review of denials of requests *(WAC 44-14-08001)*
The PRA requires an agency to establish mechanisms for the most prompt possible review of decisions denying records requests. (RCW 42.56.520) An agency internal review of a denial need not be elaborate. It could be reviewed by the PRO's supervisor, or other person designated by the agency. The PRA 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.

Alternative dispute resolution *(WAC 44-14-08002)*
Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. No mechanisms for formal alternative dispute resolution currently exist in the PRA but parties are encouraged to resolve their disputes without litigation.

Judicial review *(WAC 44-14-08003)*
(1) Seeking judicial review.
The PRA 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 42.56.520)[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 42.56.520 allows judicial review two business days after the initial denial.

The PRA provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the PRA. (RCW 42.56.550 (1) and (2)) 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 42.56.550 (1) and (3))

(2) Statute of limitations.

The statute of limitations for an action under the PRA is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. (RCW 42.56.550(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 PRA. (RCW 42.56.550 (1) and (2))[4] The case must be filed in the superior court in the county in which the record is maintained. (RCW 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 42.56.550(5)) The show-cause procedure is designed so that a non-attorney 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 PRA. (RCW 42.56.550 (1) and (2))

(5) Types of cases subject to judicial review**.**

The PRA 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 42.56.550(1)) This is the most common kind of case.

(b) Reasonable estimate.

The second form of judicial review is when a requestor challenges an agency's reasonable estimate of the time to provide a full response. (RCW 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 42.56.540) 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] The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.[8]

(6) In camera review by court.

The PRA authorizes a court to review withheld records or portions of records in camera. (RCW 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]

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 PRA requires an agency to pay a prevailing requestor's reasonable attorneys' fees, costs, and a daily penalty. (RCW 42.56.550(4)) Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the PRA. An agency or a third party resisting disclosure cannot.[10] 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] In an injunctive action under RCW 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]

The purpose of the PRA'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] However, a court is only authorized to award reasonable attorneys' fees. (RCW 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]

The award of costs under the PRA is for all of a requestor's non-attorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.[15]

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]

Notes:

[1]*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW 42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

[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 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]*PAWS II*, 125 Wn.2d at 257-58.
[9]*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).
[10]RCW 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]*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]*Confederated Tribes*, 135 Wn.2d at 757.
[13]*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 PRA by making it financially feasible for private citizens to enforce the public's right to access to public records.").
[14]*Id*. at 118.
[15]*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]*Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).