

**WASHINGTON STATE OFFICE OF
PUBLIC DEFENSE**

**PRA: Getting the Stuff the Prosecutor Did Not
Give You – and May Not Know About**

**ROBERT D. BUTLER
Law Offices of Robert D. Butler, PLLC**

WENATCHEE, WA. OCTOBER 24, 2014.

The Public Records Act is a fun and powerful tool when used properly. It can also be a difficult statute to explain to an affected client for what I believe is the unintended consequences. In this session I hope to explain the process of **“how to PRA,” “what to expect,”** and **“why PRA”**. Then, what are some areas to watch out for with your clients. By way of brief background, RCW 42.56 is the re-codified version of RCW 42.17. This transition occurred in 2006. The relevant WAC is Chapter 44-14

1. “HOW TO PRA”

RCW 42.56 makes the “how to” exceedingly easy. Simply ask. Magic words are not required. RCW 52.56.580 requires all agencies to designate a public records officer.

42.56.580 Public records officers.

(1) Each state and local agency shall appoint and publicly identify a public records officer whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of this chapter. A state or local agency's public records officer may appoint an employee or official of another agency as its public records officer.

(2) For state agencies, the name and contact information of the agency's public records officer to whom members of the public may direct requests for disclosure of public records and who will oversee the agency's compliance with the public records disclosure requirements of this chapter shall be published in the state register at the time of designation and maintained thereafter on the code reviser web site for the duration of the designation.

(3) For local agencies, the name and contact information of the agency's public records officer to whom members of the public may direct requests for disclosure of public records and who will oversee the agency's compliance within the public records disclosure requirements of this chapter shall be made in a way reasonably calculated to provide notice to the public, including posting at the local agency's place of business, posting on its internet site, or including in its publications.

Identify a public entity that may have information that could be useful or simply interesting to you and ask. Go to the website for the agency and you should be able to locate the public records agent's contact information. As a practical matter, the request should be in writing (email is fine) so you can have a paper trail, which may be useful for tracking purposes. On some matters, I will call the person who I believe has the records and ask what documents

exist, and how to ask for them to make their job easier, this is the exception however (it does score points with the frequently overworked civil servant that I frequent with requests).

Practice Tip: Be expansive to learn what universe of documents exist, before narrowing your requests.

Example: All arrest reports for DUI's made in the past 6 months.

Example: All training or educational courses attended by Officer Smarty related to investigation of sex crimes in the past 6 years.

Example: All office policies related to charging decisions.

Practice Tip: If you are requesting information on a specific name, make sure your request includes potential derivatives.

Example: Request for all email related to Mr. George Yeannakis. Including; to, from, cc, bcc, or subject line, body of email with George , Yeannakis, George Y, or whatever nickname you know George may be known by in the agency. This allows, or requires the response to be inclusive of what you are looking for.

2. "WHAT TO EXPECT"

So you have now submitted a request, what next. RCW 42.56.520 identifies a prompt response is required.

Responses to requests for public records shall be made promptly by agencies, ... **Within five business days of receiving a public record request, an agency,...** **must respond by either (1)** providing the record; **(2)** providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer; **(3)** acknowledging that the agency,... has received the request and providing a reasonable estimate of the time the agency,.... ; or **(4)** denying the public record request. Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request. In acknowledging receipt of a public record request that is unclear, an agency,.... may ask the requestor to clarify what information the requestor is seeking. If the

requestor fails to clarify the request, the agency..... need not respond to it.
Denials of requests must be accompanied by a written statement of the specific reasons. Most common is a redaction log.

Notes:

Finding -- 2010 c 69: "*The internet provides for instant access to public records at a significantly reduced cost to the agency and the public. Agencies are encouraged to make commonly requested records available on agency web sites. When an agency has made records available on its web site, members of the public with computer access should be encouraged to preserve taxpayer resources by accessing those records online.*" [2010 c 69 § 1.]

The typical response is an acknowledgement of the request and an approximate response date. Frequently, what appears to be the new defensive trick is to call and ask for clarification or limitation. If you do not respond, they will toll the response time until you respond.

Practice Tip: If you get a clarification request, respond promptly to keep the pressure on the agency to get you the responsive documents. It is important to consider the clarification request against what it is you ultimately want in return. Engage in conversation with the records person. If they are attempting to thwart your "universe" fishing trip, hold firm. If your request is, on reflection ambiguous, then clarify.

Practice Tip: have someone else read your PRA and see if they can tell you what you are going to get in response.

Another variation of response you may receive is "the request will be available in 8 weeks" or some other obnoxious delay. There are lots of published cases that have imposed fees on agencies for delay. Litigating public record violations is beyond the scope of this presentation, but be aware there is a body of case law that has established enforcement of this statute and its predecessor. If you get a "delay" response and do not believe it is reasonable, follow up to create your paper trail. Nancy Krier at the AG office is the current designated contact to assist you as a first step. I have attached as exhibit 1 a recent exchange I had with her on a case. The response after the AG is contacted is usually quite quick. In this case 8 weeks was trimmed to less than 2 weeks.

The final response option is denial in whole or part. There is an enforcement mechanism in the statute that requires an explanation. You can then seek review informally, up to and including litigating in Superior Court.

3. "WHY PRA"

The "why" is as varied as the requests. As an underlying purpose, as citizens we demand transparency of our elected officials and governmental agencies and this is a vehicle to at least in part secure that transparency. On a practical level for purposes of this presentation, it is both fun and often very effective when you find the "good stuff." The sky is the limit on requests to be pursued. Examples of recent successful PRA's include:

- All DUI arrest reports written by WSP Trooper X between date x and date y. From that disclosure we received 47 reports and established a chart showing no matter what the person blew, they were obviously intoxicated. Important for this case was his pattern pretext. Out of 47 reports for the relevant time period, 11 were initiated for license plate obstruction (dirty plate, trailer hitch, light out).
- All police reports referencing our client's name or "tag" from 2007 to present. The fun of this request is knowing that on November 6, 2011 Officer Kevin Bean talked to a fellow, not our client, who freely admitted to being the tagger "Beluga." This was not provided in discovery but the prosecutor was wailing about all his holdback charges. We ended up receiving 380 pages of additional discovery that the prosecutor had not received or reviewed.
- All Tort Claims related to the Sheriff Office (whatever agency). This will give you a good picture of which officers are causing problems by hurting people which can lead to follow up inquiries into training and discipline related to the officer (attached as exhibit 2 is the recent PRA to Spokane Police which provided a spreadsheet initially, and Spokane County which provided over 250 pages in response).
- All "Brady" letters issued. This has become an ongoing passion as different agencies handle the process differently. Which lead me to PRA all training material related to "Brady," which is attached as exhibit 3. WAPA updated their material as did WASPC in 2013.
- All training received by officer W. related to sex crimes, including interviewing technique and investigation protocols. This led to realizing the arresting officer was as untrained as he appeared in his report writing. Our client's rape allegation was his first sex case investigation. He was a school cop, formerly a construction worker, who had no experience which resulted in poor quality work and ultimately a dismissal because the officer was not going to hold up on the stand and be able to defend any of his decisions or actions. The interview, knowing this about him, educated the prosecutor and the case was dumped (he had also really traumatized and pissed off the complaining witness by his awful approach to the case)

- All training material and policy related to report writing will lead to a clear picture of what is required and allows for aggressive cross on technicalities when the case warrants.
- Phone records for the agency showing calls made or lack of calls made to distant witnesses.
- Emails exchanged by prosecutor and witnesses in your case, including lay witnesses as well as experts.
- All records related to prosecutor ex parte contact with the court to determine “Brady” material disclosure. I learned no records are made in my jurisdiction.
- All policies related to retention of anonymous tips related to crimes being investigated. Backstory, my client was identified by an anonymous tip. In the cop interview, I learned the department was being inundated with tips. When I asked if any tip identified the person as someone other than my client, she could not answer. When I asked if there is a policy related to retention of tips, she did not know. Following the interview what had previously been “nothing but a felony” quickly became a gross misdemeanor, no jail offer from the prosecutor. He clearly recognized I would have a field day if we went to trial. The ability of defense to review all the tips that come in on a case is relevant and potentially exculpatory. That is not a function that each officer should decide on his or her own.

The fun, getting the prosecutor worried that you have more than they do so they bring a motion to compel. In this case, I gleefully dropped off 14” of paper I had accumulated on the prosecutor’s arresting officer and department. This included transcripts from interviews, trials, and civil depositions. Cop interviews are much more fun and productive when they know you know their dirt. Even if not admissible, being worried about opening a door that will allow me to get into some area, keeps them in line. **The benefit is securing great outcomes for clients.**

Worrisome aspects

There has been a recent push by a certain citizen to obtain sex offender names. The ACLU has joined the battle on this. It is important to educate clients if or when they get such a notice, respond and attempt to protect their rights of privacy as minimal as they may be. If a response is not lodged, the agency is compelled to disclose. Responding that your client does not want the information to be made public at least buys time to decide further.

The other worrisome aspect is accessibility to Sexual Deviancy Evaluations submitted in support of SOSSA recommendations. Members of WDA & WACDL have been actively engaged in this issue by way of amici and legislation. If it goes to the court, and a motion to seal is not successful, the risk remains.

While there is always plenty to worry about in this work, a final pointer would be your email to the prosecutor becomes a public record which a client filing a bar complaint about our performance could access. Not only the documents provided, but the snark you may have injected about your client, the judge or someone else.

Conclusion

PRA is a great tool to gain information the prosecutor does not give you and may not know about. This can give you the upper hand in negotiations. It can also give you at least something to cross examine about in the case where your motion to change facts and law is denied. Finally, it can satisfy your curiosity as to how things work or should work in your jurisdiction.

RESOURCES:

Washington State Attorney General website www.atg.wa.gov

Attorney General of Washington “Advanced Public Records Training Materials” (August 2014) Attached and can be found with other relevant information at:

<http://www.wacounties.org/waco/Aug2014OpenGovTrainings/>

Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws (Greg Overstreet)

WAC 44-14-01003

Bob Butler

From: Krier, Nancy (ATG) <NancyK1@ATG.WA.GOV>
Sent: Wednesday, January 29, 2014 4:46 PM
To: Bob Butler
Subject: RE: PRA question

Dear Mr. Butler,

Following our conversation today regarding your email below, I spoke with Erin Herschlip, Records Manager at the City of Bellingham. She explained that your particular request (for which you provided me a copy -- request # 13B41996) is a very large request, involving a large incident (riot) where many reports need to be reviewed, and the records also contain information concerning juveniles (which need to be reviewed for possible redactions) and active suspects. She also explained that she has been processing other public records requests that pre-date yours and her office is also processing another request of yours. She described that they do not have sufficient staff to process requests as fast as may be preferred, and they need to treat all requesters the same. She also explained that another factor that impacted the estimate of time for processing your particular request was the fact your request was sent during the holiday season, when there are even fewer staff available.

I explained it may be useful when possible for the city to provide more detail on those factors that go into an estimate of time to respond to a public records request, beyond the explanation in her January 9, 2014 letter to you. While I didn't suggest more detail would be needed in a response to every request, I noted that it is often a good practice to explain and document a bit more why more time is needed to process a particular request, especially if it is larger or more complicated request, or if staffing levels are low or low for a period of time, or if there are other factors relevant to processing a particular request.

She said she is willing to follow up with you via email and give you more information on the basis for the estimate of time.

I hope this information assists you. Thank you for your inquiry.

Sincerely,

Nancy Krier
Assistant Attorney General for Open Government

From: Bob Butler [<mailto:bob@rdbutlerlaw.com>]
Sent: Tuesday, January 21, 2014 1:55 PM
To: Krier, Nancy (ATG)
Cc: Samantha Kahabka
Subject: PRA question

Nancy,

As the listed AAG on the website, I am contacting you regarding what I regard as excessive delay in the City of Bellingham in responding to our request. I am attaching their response which is sadly becoming nearly boilerplate to requests for documents which are readily available and disseminated to others in less than a week.

Short of us filing suit, is there anything your office can do to assist in bringing this response into compliance.

Thanks in advance for your assistance.

Bob
Law Offices of Robert Butler PLLC
103 E Holly # 512
Bellingham, WA 98225

Ph. 360-734-3448
Fax 360-734-7975

Web: www.rdbutlerlaw.com
Email: bob@rdbutlerlaw.com

[Follow on Facebook](#)
[Profile on AVVO](#)

This is a private and confidential communication for the sole viewing and use of the intended recipient. It is intended to constitute an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 USC 2510. Any review or distribution to other recipients is not intended and does not constitute a loss of the confidential or privileged nature of the communication. Any review or distribution by other recipients is strictly prohibited. If you are not the intended recipient of the communication please contact the sender by return electronic mail and delete and destroy all copies of this communication. Thanks!

Bellingham

POLICE

Washington State Accredited Agency

Kelli Linville, Mayor
Clifford R. Cook, Chief of Police

505 Grand Avenue, Bellingham, Washington 98225
Telephone: (360) 778-8800
Fax : (360) 778-8601 Administration Fax: (360) 778-8701 Records

Date: 01/09/2014

Requestor: Robert Butler/E. Chestnut & Jersey 10/12/2013 13B41996

Dear Sir or Madam:

RE: Acknowledgement of PDR

I am writing to inform you that the City has received your request and to provide a reasonable estimate of the time the City will need to respond to your request as required by RCW 42.56.520(3).

The City needs additional time to locate and assemble the records requested and to determine whether any of the requested records are exempt in whole or in part.

For these reasons, I estimate that the City will need approximately 8 weeks in order to respond to your request. Depending on the size of your request, the City may also exercise its right to provide the responsive records in installments as they become available or to request a deposit.

See RCW 42.56.080 and RCW 42.56.120.

Sincerely,

Erin Herschlip
Records Manager

Records Specialist

M/Records/forms/5DayAcknowledgment

Irene Henry

From: City of Spokane <webmaster@spokanecity.org>
Sent: Friday, September 05, 2014 3:58 PM
To: Irene Henry
Subject: Your public records request

You have submitted the following public records request.

We will respond within five business days of your request. We will acknowledge confirmation of receipt of your request, as well as provide a time estimate for completion. If clarification is needed or questions arise concerning your request, you will be notified accordingly. If records are immediately available, they will be provided at the time of our acknowledgement. If you have any questions regarding the status of your request, contact (509) 625-6350.

Public Records Request: Irene Henry (9/5/2014)

Requestor's name

Irene Henry

Requestor's email address

irene@rdbutlerlaw.com

Requestor's phone number

360-734-3448

Requestor's address

103 E. Holly Street, Suite 512
Bellingham, WA 98225

Request

Pursuant to RCW 42.56, please provide a copy of all Tort Claims from January 1, 2013 to present, related to Spokane Police Department. Please don't hesitate to contact me with questions. Best regards, Irene M. Henry Office Manager / Legal Assistant

1/11/2013	CITY CLERK	MARK LOE GARBAGE VEHICLE REMOVED GAS METER FROM 2316 N LINCOLN WHILE PICKING UP GARBAGE SPD CASE 120413631	LGL 2013-0001	LOE
1/14/2013	CITY CLERK	DANNICA HANSON COLLISION WITH SPOKANE POLICE CAR MUTUAL OF ENUMCLAW	LGL 2013-0001	MUTUAL OF ENUMCLAW INSURANCE
1/22/2013	CITY CLERK	TARA REYNOLDS PERSONAL INJURY DURING AUTO ACCIDENT INVOLVING SPD	LGL 2013-0001	REYNOLDS
2/12/2013	CITY CLERK	BRITA PARSNESS SEEKING RESTITUTION FOR DOOR DAMAGED BY SPD	LGL 2013-0001	BARSNESS
4/11/2013	CITY CLERK	MADLINE NOLAN PERSONAL INJURY POLICE VEHICLE	LGL 2013-0001	NOLAN
5/21/2013	CITY CLERK	JENNIFER ORSI PERSONAL PROPERTY LOSS IN SPD CUSTODY	LGL 2013-0001	ORSI
6/7/2013	CITY CLERK	KIM WRIGHT VEHICLE DAMAGE BY POLICE OFFICER JOEL FERTAKIS	LGL 2013-0001	KIM WRIGHT
7/10/2013	CITY CLERK	TRICIA CORBIN PERSONAL PROPERTY DAMAGE SPD	LGL 2013-0001	CORBIN
7/29/2013	CITY CLERK	ROBERT LADD POLICE CASE 12 0028706 CRAFTSMAN TABLE SAW SOLD AT AUCTION AND NOT RETURNED TO CLAIMANT	LGL 2013-0001	LADD
8/30/2013	CITY ATTORNEY	JAMES ORCUTT POLICE OFFICER BREAK THROUGH DOORS TO APPREHEND SUSPECT DOOR FRAME HARDWARE DAMAGE	LGL 2013-0001	ORCUTT
9/4/2013	CITY CLERK	LACEY KERR POLICE REPORT NUMBER E120321	LGL 2013-0001	KERR
9/12/2013	CITY CLERK	SAMMY MERCER MOTOR VEHICLE ACCIDENT CORNER OF NEVADA UNKNOWN CROSS STREET RESULT OF SPOKANE POLICE PUSHING CLAIMANT'S VEHICLE	LGL 2013-0001	MERCER

10/15/2013	CITY CLERK	MARLA WORDEN LOSS OF VEHICLE AND DAMAGE TO HEAD NECK AND BACK DUE TO COLLISION WITH POLICE VEHICLE	LGL 2013-0001	WORDEN
11/18/2013	CITY CLERK	BETTY BULLERT VEHICLE DAMAGE CITY POLICE CAR	LGL 2013-0001	BULLERT
1/9/2014	CITY CLERK	SPOKANE COUNTY RISK MANAGEMENT DAMAGE TO SECURITY GATE BY POLICE OFFICER	LGL 2014-0001	SPOKANE COUNTY RISK MANAGEMENT
1/13/2014	CITY CLERK	DAVID DEAN WHISENHUNT DAMAGE TO VEHICLE BY POLICE CAR 15TH AVE AND ASH OFFICER C CONRATH SPD	LGL 2014-0001	WHISENHUNT
1/13/2014	CITY CLERK	DAVID DEAN WHISENHUNT DAMAGE TO VEHICLE BY POLICE CAR 15TH AVE AND ASH OFFICER C CONRATH SPD	LGL 2014-0001	WHISENHUNT
1/30/2014	CITY CLERK	WEI YAN SPOFFORD PROPERTY LLC PROPERTY DAMAGE DOOR KICKED IN BY POLICE	LGL 2014-0001	YAN
2/3/2014	CITY CLERK	JAMES STOUTD III PERSONAL INJURY WHILE IN SPD VEHICLE	LGL 2014-0001	STOUTD III
2/14/2014	CITY CLERK	DEBORAHA FOSTER VEHICLE DAMAGE POLICE OFFICER	LGL 2014-0001	FOSTER
2/26/2014	CITY CLERK	PATRICK JONES DAMAGE TO VEHICLE BY POLICE VEHICLE	LGL 2014-0001	JONES
2/28/2014	CITY CLERK	LEROY BERRA POLICE DEPARTMENT ASSAULT EAST ENTRANCE STA PLAZA WALL STREET	LGL 2014-0001	BERRA
2/28/2014	CITY CLERK	JESSICA K TANCREDI DAMAGE SONS CELL PHONE OFFICER R TILLEY #369 ROLLED OVER PHONE POLICE VEHICLE	LGL 2014-0001	TANCREDI
3/4/2014	CITY CLERK	VYACHESLAY PRACH PROPERTY DAMAGE SPD	LGL 2014-0001	PRACH
3/5/2014	CITY CLERK	MICHAEL RAMSEY REIMBURSEMENT FOR PURCHASE STOLEN PHONE POLICE AUCTION	LGL 2014-0001	RAMSEY

3/5/2014	CITY CLERK	ADDITIONAL DOCUMENTATION JESSICA K TANCREDI DAMAGE SONS CELL PHONE OFFICER R TILLEY #369 ROLLED OVER PHONE POLICE VEHICLE	LGL 2014-0001	TANCREDI
3/7/2014	CITY CLERK	SPOKANE COUNTY RISK MANAGEMENT SHERIFFS VEHICLE DAMAGED BY CITY SPD VEHICLE	LGL 2014-0001	SPOKANE COUNTY RISK MANAGEMENT
3/13/2014	CITY CLERK	DARRYL MCLEOD PERSONAL INJURY AND VEHICLE DAMAGE SPOKANE POLICE CAR	LGL 2014-0001	MCLEOD
3/27/2014	CITY CLERK	RICHARD SPENGLER WRONGFUL ARREST BY SPOKANE POLICE DEPARTMENT	LGL 2014-0001	SPENGLER
4/8/2014	CITY CLERK	YVONNE FISHER DAMAGE TO FENCE BY SPOKANE POLICE OFFICER DRIVING VEHICLE AND SLIDING ON ICE	LGL 2014-0001	FISHER
5/6/2014	CITY CLERK	TRAVIS MUSENGO INCIDENTS WITH SPOKANE POLICE OFFICER SEAN WHEELER AND OTHERS	LGL 2014-0001	MUSENGO
5/22/2014	CITY CLERK	MAY YANG VEHICLE DAMAGE CITY POLICE VEHICLE	LGL 2014-0001	YANG
5/23/2014	CITY CLERK	COLTON MCMAHON PERSONAL INJURY VEHICLE DAMAGE CITY POLICE VEHICLE	LGL 2014-0001	MCMAHON
6/5/2014	CITY CLERK	NORMA BAUCH PROPERTY DAMAGE FENCE POLICE CHASE	LGL 2014-0001	BAUCH
6/19/2014	CITY CLERK	KADY KLEY PROPERTY LOSS BY SPD PROPERTY DEPARTMENT	LGL 2014-0001	KADY KLEY
6/23/2014	CITY CLERK	MARTY HANN VEHICLE DAMAGE CITY POLICE VEHICLE	LGL 2014-0001	HANN
7/2/2014	CITY CLERK	V DAVID BROWN EAGLE PROPERTY DAMAGE FENCE DURING POLICE PURSUIT	LGL 2014-0001	BROWN EAGLE

7/11/2014	CITY CLERK	JAMIE MCLEOD LOSS OF CONSORTIUM CLAIM FOR INJURIES SUFFERED BY HUSBAND DARRYL MCLEOD WHEN REARENDED BY SPD VEHICLE AXTELL BRIGGS & FREEBOURN PLLC	LGL 2014-0001	AXTELL BRIGGS & FREEBOURN PLLC
8/1/2014	CITY CLERK	LORA WAGNER VEHICLE DAMAGE POLICE	LGL 2014-0001	WAGNER
8/18/2014	CITY CLERK	RANDY GOLDITHC FOR LEROY MCALL DAMAGE TO PERSONAL VEHICLE BY SPOKANE CITY POLICE VEHICLE	LGL 2014-0001	MCCALL
8/25/2014	CITY CLERK	DANNY EDWARDS VEHICLE DAMAGE CITY POLICE RANGE	LGL 2014-0001	EDWARDS
9/4/2014	CITY CLERK	DEBRA MCCALL VEHICLE DAMAGE CITY POLICE VEHICLE	LGL 2014-0001	MCCALL

September 8, 2014

**PUBLIC DISCLOSURE REQUEST
PURSUANT TO RCW 42.56**

SENT VIA FAX & US POSTAL MAIL

James P. Emacio
Public Records Officer
1116 W. Broadway Avenue
Spokane, WA 99260
Fax: (509) 477-3672

Dear James:

Pursuant to RCW 42.56, please provide a copy of all Tort Claims from January 1, 2013 to present, related to Spokane County.

Please accept this as authorization of copy cost payment for up to \$35.00. If copying costs exceed \$35.00, please call for further authorization.

If I can be of any assistance or answer any questions, please do not hesitate to call our office.

Best regards,



Irene M. Henry
Office Manager/Legal Assistant

ADOPTED – JUNE 19, 2013

MODEL POLICY

DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR RECURRING
INVESTIGATIVE OR PROFESSIONAL WITNESSES

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
2013

1

EXHIBIT 7 IS A MERGE OF WAPA AND
WASPC POLICY WASPC STARTS AT p.8

Exhibit 3, Page 1 of 12

This written policy is designed to achieve compliance with these requirements, and to foster county-wide uniformity in the way potential impeachment of recurring government witness issues are resolved. ***All County deputy prosecuting attorneys are required to know and follow this protocol and all relevant law concerning potential impeachment of recurring government witness disclosure obligations.***

I. BACKGROUND

In representing the State of Washington, Prosecuting Attorneys function as ministers of justice. To administer justice Prosecuting Attorneys accept responsibilities for the integrity of the criminal justice system and responsibilities that run directly to a charged defendant.

One specific responsibility is an affirmative duty to disclose potentially exculpatory information to a charged defendant. There are several sources for disclosure requirements of potentially exculpatory information.

A constitutional Due Process requirement for disclosure is set out in Brady v. Maryland, 373 U.S. 83 (1983). This requirement has been explained and modified by several subsequent cases. This Due Process requirement applies to all information in the hands of governmental agencies. Prosecutors have “a duty to learn of any [exculpatory] information known to the others acting on the government’s behalf in the case, including the police.” Kyles v. Whitely, 514 U.S. 419 (1995). Impeachment evidence is especially likely to be ‘material’ under disclosure requirements. Silva v. Brown 416 F.3d 980 (9th Cir.2005). Failure to comply with these requirements can lead to reversal of a criminal conviction.

Independent of the constitutional due process requirement, there are court and practice rules that apply. Prosecutors are required by Criminal Rule 4.7(a)(3) to “disclose any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged.” This obligation is “limited to material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” Criminal Rule 4.7(a)(4). Once information is provided to the Prosecutor’s Office by law enforcement agencies, that material becomes subject to disclosure under Criminal Rule 4.7(a)(3).

A closely concurrent duty to disclose such information is also placed upon prosecutors by Rule of Professional Conduct 3.8(d).

The requirements of Due Process and those of Criminal Rule 4.7 and Rule of Professional Conduct 3.8 apply to evidence that could be used to impeach witnesses. The scope of the requirements addressing potential impeachment evidence is different. Due Process will focus upon evidence that raises issues of credibility or competency, and imposes an affirmative duty on prosecuting attorneys to learn of impeachment evidence for recurring witnesses for the prosecution/investigation team i.e. investigators and forensic scientists. The court and practice rules requirements are limited to information possessed by the prosecuting attorney, but categorically include any prior convictions of a recurring witness for the prosecution/investigation team.

A law enforcement officer's or forensic expert's privacy interest does not prevent disclosure of disciplinary records, as such records are considered to be of legitimate concern to the public. *See, e.g. Dawson v. Daly*, 120 Wn.2d 782, 795-96, 845 P.2d 995 (1993); *Cowles Pub'g Co. v. State Patrol*, 44 Wn. App. 882, 724 P.2d 379 (1986), *rev'd on other grounds*, 109 Wn.2d 712, 748 P.2d 597 (1988).

Thus, Prosecuting Attorney disclosure requirements cumulatively include both an affirmative duty to seek out certain impeachment information and a duty to disclose information that may not impact the witnesses credibility.

II. GUIDELINES

1. As required by law, this office requests law enforcement agencies to inform it of information that could be considered exculpatory to criminal defendants. For purposes of disclosure, this office must determine whether the information is potentially exculpatory and how and when to make that information available at pending and future trials. *It is a constitutional obligation that rests singularly with the prosecutor and cannot be delegated to any other agency.*

2. As required by CrR 4.7 and RPC 3.8, this office will disclose to defense attorneys information that tends to negate the defendant's guilt. These requirements extend to any prior convictions as well as any information that a reasonable person, knowing all relevant circumstances, could view as impairing the credibility of an officer that will or could be called to testify in a particular criminal proceeding.

3. The potential impeachment disclosure (PID) standard depends on what a reasonable person could believe. It does not necessarily reflect the belief of this office or a law enforcement agency. Consequently, disclosure may be required in cases where this office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion. If this office concludes that an officer is subject to PID that does not reflect a conclusion that the officer committed misconduct or that the officer is not credible as a witness.

4. The PID standard requires consideration of all relevant circumstances. Because this office is not an investigatory agency, it lacks the ability to ascertain those circumstances. Consequently, this office relies on law enforcement agencies to conduct investigations into allegations of officer misconduct, and to advise this office of the results of those investigations.

III. PROCESS

1. The Prosecuting Attorney is the main contact point for all information relating to PID determinations.

2. Any law enforcement agency that receives information concerning alleged misconduct relating to truthfulness, bias, or other behavior that could be exculpatory to criminal defendants, and involves an officer engaged in criminal cases, is requested to investigate or arrange for the investigation of those allegations. Any law enforcement agency that employs individuals who routinely perform expert witness services are additionally asked to investigate confirmed performance errors committed by those individuals, where those errors could compromise an expert witness's opinions.

3. At the initiation and upon completion of the investigation, the agency is requested to notify the Prosecuting Attorneys Office of the relevant allegation and determination. This should be done whether or not the agency determined that the allegations were well founded.

4. If this office obtains information about alleged misconduct by a law enforcement officer or agency expert witness that has not been fully investigated, it will ask the officer's agency to conduct an investigation. This may occur where, for example, an officer or expert witness employee has resigned from his/her agency in lieu of termination.

5. When a Prosecuting Attorney is advised that an investigation is pending concerning a recurring government witness, the witness may be added to a "pending review" list to be monitored regularly for sustained findings of misconduct related to dishonesty or falsehood. On pending cases involving the recurring government witness, the Prosecuting Attorney shall notify defense counsel of the existence of the open investigation and direct further inquiry to the investigating agency. *Law enforcement shall immediately advise the Prosecuting Attorney if at any point in the investigation, an allegation of misconduct relating to dishonesty or falsehood is confirmed or acknowledged.*

6. The Prosecuting Attorney's Office will notify the agency and the officer/employee whether or not the information satisfies the PID Standard.

7. If the allegations are sustained and they involve misconduct related to dishonesty or falsehood, the investigating agency shall notify the Prosecuting Attorney. An allegation is sustained when it is factually supported, even if discipline is not imposed. The witness may then be added to the "Potential Impeachment Disclosure List" or other process for future disclosure. If the allegations are determined to be unfounded, the witness will be removed from the "pending review" status. If appropriate, this office will seek protective orders covering such information.

8. If it is uncertain whether or not the information meets the PID standard, the information will be submitted to the court for an *in camera* inspection in a case in which the officer or expert witness is a listed witness.

9. The Prosecuting Attorney's Office will maintain a record of the information that he or she reviewed in making the determination, which could include a copy of the law enforcement agency's final IA determination, if any.

10. These guidelines are intended for the guidance of the Prosecuting Attorney's Office and law enforcement agencies. It may be modified or abrogated by the Prosecuting Attorney at any time. Exceptions may also be authorized by the Prosecutor or his designee. These guidelines do not confer legal rights on any individual or entity.

IV. Deputy Prosecuting Attorney Responsibilities

1. If a DPA or any staff member becomes aware of PID material regarding a recurring government witness, the deputy or staff member shall inform the elected prosecuting attorney or their designee.
2. If the elected prosecuting attorney or their designee believes that the information could constitute PID material, he or she will direct the DPA to prepare a memorandum summarizing the material. The memo should focus only on facts and avoid conclusions or speculation.

V. If your office maintains a PID List

A secure electronic database may be maintained with copies of all PID material. Hard copies of the PID material will be kept in a single secure location. Access to the PID materials will be monitored.

When a subpoena is issued, a DPA should receive notice that a recurring government witness is associated with PID material. The DPA will also be permitted to view the PID list to determine if any witness has PID material.

Witnesses on the PID list will be classified as having either potential impeachment evidence (PID material), or criminal convictions that do not encompass a crime of dishonesty or false statement.

VI. When A Deputy Prosecuting Attorney Discovers That A Potential Trial Witness Is On The PID List, or subject to PID disclosure.

When a DPA becomes aware that a subpoenaed witness is on the PID list, or subject to PID disclosure, the DPA should request more detail about the nature of the PID material. If the DPA determine that the potential PID material is not discoverable, due to the specific facts of the case and the witness's anticipated testimony, the DPA shall notify the elected prosecuting attorney or their designee.

In all other instances, the DPA should discuss with the elected prosecuting attorney or their designee whether the material should be disclosed directly to the defense attorney, or if it should be submitted to the court for an *in camera* review. The DPA should also discuss with the elected prosecuting attorney or their designee the need for a protective order. The DPA shall notify the elected prosecuting attorney or their designee if a judge in their case makes a ruling regarding the admissibility of the PID material.

VII. When Potential PID Material Is Discovered During Trial

The DPA should talk to the elected prosecuting attorney or their designee to determine an appropriate action.

WASHINGTON ASSOCIATION OF SHERIFFS & POLICE CHIEFS

3060 Willamette Drive NE Lacey, WA 98516 ~ Phone: (360) 486-2380 ~ Fax: (360) 486-2381 ~ Website: www.waspc.org

Serving the Law Enforcement Community and the Citizens of Washington

MODEL POLICY FOR LAW ENFORCEMENT AGENCIES REGARDING POTENTIAL IMPEACHMENT DISCLOSURE



Revised Policy Approved November 20, 2013

Original Policy Approved November 19, 2009

I. PURPOSE

This Policy addresses potential impeachment disclosure information that may be in the possession of law enforcement agencies. It sets forth law enforcement duties and procedures regarding disclosure of information about law enforcement employee/officer witnesses pursuant to the *Brady* rule. It is intended to meet prosecutorial obligations and preserve the constitutional due process rights of defendants, while permitting efficient and effective law enforcement investigation and prosecution of criminal cases. This policy is intended to function in conjunction with established *Brady* policies/procedures applicable to prosecutors. Law enforcement agencies should be familiar with the *Brady* policies of the prosecuting attorneys in their jurisdiction.

II. BACKGROUND

THE *BRADY* RULE

The prosecution must disclose to the defense evidence that is favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). This duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). The rule encompasses material exculpatory evidence including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different," i.e. prejudice to the defendant must have occurred as a result. *Kyles v. Whitley* 514 U.S. 419, 433-434 (1995). Suppression by the prosecution of material exculpatory evidence violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution. Thus, violations can occur whether the State willfully or inadvertently suppressed the evidence. *Strickler v. Greene*, 527 U.S. 263, 280-281 (1999). In order to ensure compliance with these rules, the United States Supreme Court has urged the "careful prosecutor" to err on the side of disclosure. *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

III. DEFINITIONS—POTENTIAL IMPEACHMENT EVIDENCE

Recurring Government Witness

Recurring government witness are those law enforcement employees/officers for whom it is reasonable to believe will or may be called to testify more than once or on a regular basis.

Exculpatory Evidence

Evidence is exculpatory if it is evidence that is favorable to the defendant, is material to the guilt, innocence, or punishment of the defendant, and impeachment evidence that may impact the credibility of a government witness, including a police officer. Exculpatory evidence must be disclosed.

Materiality

Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. A “reasonable probability” is established when the failure to disclose the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Such evidence must have a specific, plausible connection to the case, and must demonstrate more than minor inaccuracies. Evidence is material if it is facially apparent as exculpatory.

Impeachment Evidence

Evidence that might be used to impeach a witness is exculpatory evidence and must be disclosed to the defense by the prosecutor. Impeachment evidence is evidence that demonstrates that a witness is biased or prejudiced against a party, has some other motive to fabricate testimony, has a poor reputation for truthfulness or has past specific incidents that are probative of the witness’ truthfulness or untruthfulness. Prior inconsistent statements are impeachment evidence. Impeachment evidence that is merely cumulative (i.e. duplicative to evidence already provided or presented) or impeaches on a collateral issue need not be disclosed.

Admissibility of impeachment evidence is determined on a case by case basis by the courts. Therefore even evidence that is likely to be inadmissible can still be considered potential impeachment evidence information, and thus be required to be submitted to the prosecutor.

IV. LAW ENFORCEMENT AGENCY DUTIES

Generally

Law enforcement officers must collect and document exculpatory and impeachment information discovered pursuant to administrative and criminal investigations and provide the same to the prosecution. Law enforcement agencies with information that could impeach any non-law enforcement witness must provide that information to the prosecution as well.

Training

All employees must be properly trained on the department’s obligation to disclose potential impeachment information.

For the purposes of this model policy, employee means anyone employed by the agency who may be called to testify under oath. However, the existence of the policy and a copy should be made known and available to all employees.

Employer–Employee Agreements regarding Law Enforcement Conduct

Law enforcement agencies shall investigate all complaints regarding their officers in accordance with their established policies. If an agreement, settlement or other understanding is reached

between an agency and an employee regarding a complaint, investigation or response, the agency should consider the impact of the subject matter of the complaint, investigation or response on the employee's ability to serve as a witness in any criminal proceeding for any jurisdiction.

V. LAW ENFORCEMENT AGENCY RESPONSE TO POTENTIAL IMPEACHMENT INFORMATION REQUEST—CATEGORIES OF EVIDENCE AND PROCEDURES

Agencies must review all their internal investigation files to determine if any possible potential impeachment information exists on any of their employees who may be called as witnesses by the prosecution. If such information exists, they must submit the information to the prosecutor. The prosecution is under a continuing duty to disclose potential impeachment information and therefore agencies must also notify the prosecutor any time they become aware of new potential impeachment information.

If an agency receives a request from a prosecutor for possible potential impeachment information on an employee/officer the law enforcement agency shall comply with the request as soon as practicable and according to the policies and procedures below:

Substantiated/Sustained Findings of Misconduct Related to Dishonesty

Law enforcement shall disclose to the prosecution as potential impeachment material information regarding any final determination by the Chief Law Enforcement Executive of a substantiated or sustained finding related to an employee's/officer's dishonesty or untruthfulness, regardless of whether or not discipline was given. Agencies should follow their current policies regarding document retention for substantiated/sustained/founded findings and disciplinary processes.

Criminal Convictions

Law enforcement shall disclose to the prosecution as potential impeachment material information regarding criminal convictions of an employee/officer related to dishonesty or untruthfulness, if known.¹

Unsubstantiated Finding

There is no requirement that law enforcement provide prosecutors with information concerning unsubstantiated findings about an employee.²

¹ It should be noted that although it is not required by *Brady* per se, Washington CrR 4.7 (1)(iv) provides that the prosecutor shall provide the defendant with "any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." Therefore it is best practice to provide the prosecutor with all known criminal conviction information of any agency recurring government witness in addition to that specifically reflecting on an employee's dishonesty or untruthfulness.

² This model policy addresses agency practice regarding potential impeachment information and is intended to provide guidance for law enforcement in assisting prosecutors in complying with the requirements of *Brady*. It is not intended to address all situations regarding agency disclosure or nondisclosure of information regarding employees or officers which may raise questions of civil liability or other legal consequences. For example, failure to disclose relevant information may expose an employee or agency to 42 USC 1983 section IV civil rights violation claims. As discussed in the model policy, agencies should consult with legal counsel as necessary.

In-Lieu-of Actions/Agreements

Actions/agreements such as resignation, demotion, retirement or separation from service of an employee/officer in lieu of disciplinary action do not control whether information is potential impeachment information. Each law enforcement executive should consult with the appropriate legal counsel in making a determination if information not related to substantiated findings is potential impeachment information or in cases where he or she is uncertain regarding what action to take.

Current or Ongoing Investigations

Pending criminal or administrative investigations are considered preliminary in nature, and the prosecution should be notified of their existence. Law enforcement has an obligation to communicate confirmed or acknowledged *Brady* information which occurs during the course of a criminal or administrative investigation. U.S. V. Olsen, 704F.3d1172 (2013). Each chief law enforcement executive should consult with the appropriate legal counsel in making a determination if information not related to substantiated findings is potential impeachment information or in cases where he or she is uncertain regarding what action to take.

Expert Witnesses

Law enforcement information regarding agency employee expert witnesses may be considered potential impeachment evidence. Any final agency determination of a substantiated or sustained finding related to an expert witness's unsatisfactory employment performance that compromises the expert's conclusions or ability to serve as an expert witness, regardless of whether or not discipline was given, must be turned over to the prosecution.

Other Potential Impeachment or Relevant Information

Each law enforcement executive should consult with appropriate legal counsel in making a determination if evidence not related to substantiated or sustained findings of dishonesty or untruthfulness is potential impeachment information. This may include evidence related to current or ongoing investigations, disciplinary actions, in-lieu-of actions, and employment agreements or when he or she is uncertain regarding what action to take. It is also best practice to consult with legal counsel in cases regarding potential disclosure of other evidence that may be relevant in a case (such as excessive use of force findings in current cases with allegations of excessive use of force, findings of bias etc.),

What is Not Potential Impeachment Information

Allegations that are not substantiated, are not credible, without merit, false or have been determined to be unfounded are not potential impeachment information.

Notification to Subject Employee/Officer

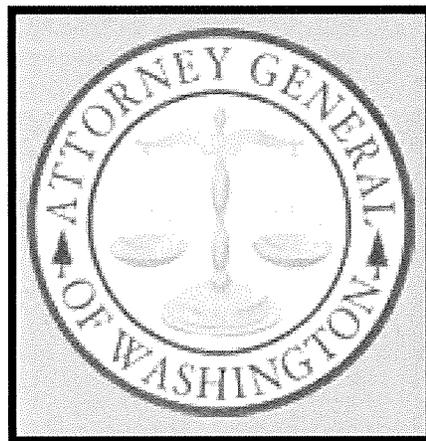
If potential impeachment information is found in law enforcement agency files, the agency shall notify the employee/officer who is the subject of the potential impeachment information, consistent with agency policy. The employee/officer notification shall include the opportunity to review the information that has been presented to the prosecutor. The notification shall comply with all policies and procedures, collective bargaining agreements and other regulations applicable to the agency and employee/officer. If the possible potential impeachment information identifies any other individual who may have privacy rights to the information, the agency shall

notify that person, consistent with agency policy, of the agency's provision of the information to the prosecutor and/or court.

Record Keeping

If the information is provided to the prosecutor and determined to be potential impeachment information, the law enforcement agency should note in the employee/officer file that such information was subject to disclosure. In cases where a court determines that information must be disclosed to the prosecution and defense, the agency should note in the file that the information was subject to disclosure and maintain a copy of the court order with the information in the file. If the court determines that the information should not be disclosed to the prosecution and defense, the agency should note in the file that the information was not subject to disclosure and include a copy of the court's finding in the file.

Advanced Public Records Act Training Materials



Prepared for:

Washington Association of County Officials

August 2014

Presenter:

Nancy Krier

Assistant Attorney General for Open Government

Washington State Attorney General's Office

1125 Washington Street SE

PO Box 40100

Olympia, WA 98504-0100

Ph: (360) 586-7842

Email: nancyk1@atg.wa.gov

Outline

- I. Introduction – Open Government Principles**
 - II. Roles of Attorney General’s Office & Public Records Act (PRA)**
 - III. Risk Management Tips – Examples of Procedural Steps You Would Not Know By Reading the PRA in July 2014**
 - IV. Public Records Legislative Update from 2014 Session**
 - V. New Open Government Training Requirements (ESB 5964) Effective July 1, 2014 (Q & A) [Note: Now codified at RCW 42.56.150, RCW 42.56.152, RCW 42.56.155, RCW 42.30.205]**
-



I. Introduction – Open Government Principles

"A popular Government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance...."

~ *James Madison*

"...a nation that is afraid to let its people judge the truth and falsehood in an open market is afraid of its people."

~ *John F. Kennedy*

"It has been said time and again in our history by political and other observers that an informed and active electorate is an essential ingredient, if not the *sine qua non* in regard to a socially effective and desirable continuation of our democratic form of representative government."

~ *Washington State Supreme Court*

"The people of this state do not yield their sovereignty to the agencies that serve them."

~ *RCW 42.56, RCW 42.30*

"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."

~ *RCW 42.56, RCW 42.30*

"The people insist on remaining informed so that they may maintain control over the instruments that they have created."

~ *RCW 42.56, RCW 42.30*

The "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*



II. Roles of the Attorney General’s Office (AGO) & PRA

A. **Public Records Act – RCW 42.56**

RCW 42.56.570 - Explanatory pamphlet

(1) The **attorney general's office** shall publish, and update when appropriate, a pamphlet, written in plain language, explaining this chapter.

(2) The **attorney general**, by February 1, 2006, shall adopt by rule an advisory model rule for state and local agencies, as defined in RCW 42.56.010, addressing the following subjects:

- (a) Providing fullest assistance to requestors;
- (b) Fulfilling large requests in the most efficient manner;
- (c) Fulfilling requests for electronic records; and
- (d) Any other issues pertaining to public disclosure as determined by the **attorney general**.

(3) The **attorney general**, in his or her discretion, may from time to time revise the model rule.



RCW 42.56.155 Assistance by attorney general – The **attorney general’s office** may provide information, technical assistance, and training on the provisions of this chapter [RCW 42.56].



RCW 42.56.530 Review of state agency denial

Whenever a state agency concludes that a public record is exempt from disclosure and denies a person opportunity to inspect or copy a public record for that reason, the person may request the **attorney general** to review the matter. The **attorney general** shall provide the person with his or her written opinion on whether the record is exempt.

Nothing in this section shall be deemed to establish an attorney-client relationship between the **attorney general** and a person making a request under this section.

RCW 42.56.140 Public records exemptions accountability committee (Sunshine Committee)

(1)(a) The public records exemptions accountability committee is created to review exemptions from public disclosure, with thirteen members as provided in this subsection.

... (ii) The **attorney general** shall appoint two members, one of whom represents the **attorney general** and one of whom represents a statewide media association.

(5) The **office of the attorney general** and the office of financial management shall provide staff support to the committee.

...
(7)... (d) For each public disclosure exemption, the committee shall provide a recommendation as to whether the exemption should be continued without modification, modified, scheduled for sunset review at a future date, or terminated. By November 15th of each year, the committee shall transmit its recommendations to the governor, the **attorney general**, and the appropriate committees of the house of representatives and the senate.



B. Assistant Attorney General for Open Government

The Attorney General has appointed an Assistant Attorney General for Open Government who can assist citizens and agencies with Public Records Act and Open Public Meetings Act compliance. Here are some common examples of what the office does:

- A citizen emails a question to the office to ask whether an agency's response (or lack of a response) violates the Public Records Act. If the office has enough information in the email (a copy of the request and the agency's response), it might provide a short analysis of the law and apply it to the facts presented by the citizen.
- A state or local agency calls the office to ask if its approach to providing public records is correct or not. The office might agree with the agency or suggest an alternate approach.
- A citizen or agency asks the office if an agency meeting must be open to the public. The office would analyze the issue and provide an informal opinion by phone, email, or sometimes by letter.
- A citizen or the media contacts the office about a complaint involving the Public Records Act or the Open Public Meetings Act. The office may contact the agency to see if the office can give guidance to resolve the problem.

In this role, the Assistant Attorney General for Open Government also coordinates the Attorney General's legislative and policy efforts on the Public Records Act and Open Public Meetings Act. The office drafts legislation and works with the Legislature to pass it. The office also drafts the Attorney General's model rules for public records and works on updating them. Finally, the office speaks to citizen and agency groups about open government laws and writes resource materials such as the Attorney General's Open Government Internet Manual and online training materials, and provides other training assistance.

[http://](http://www.atg.wa.gov/OpenGovernment.aspx)

C. AGO Open Government Website

<http://www.atg.wa.gov/OpenGovernment.aspx>

1. Web page includes information and links to:

- Open Government Training Materials
- Public Records and Open Public Meetings – Overviews
- Open Government Internet Manual (*currently being updated*)
- Model Rules
- Open Government Ombud Function
- Sunshine Committee



2. AGO Open Government Training Page

(*new as of January 2014*)

<http://www.atg.wa.gov/OpenGovernmentTraining.aspx>

Web page includes:

- Links to training materials on Public Records Act (RCW 42.56), Open Public Meetings Act (RCW 42.30), records retention (RCW 40.14), including Power Point presentations and videos
- Links to websites with other training resources
- Sample training documentation forms



III. Risk Management Tips – Examples of PRA Procedures You Would Not Know By Reading the PRA in July 2014

The Public Records Act is codified in RCW 42.56. The PRA includes many procedural steps that an agency must follow, and some procedures courts are to follow in PRA litigation.

However, simply reading the PRA does not describe all the PRA procedures. RCW 42.56 also does not codify many of the PRA procedures required through court decisions.¹ And, there are laws outside the PRA that govern certain records.

Therefore, as a risk management tool, it is important that a public agency --- including its public records officer and legal counsel --- stay on top of legislative developments and court decisions that identify all PRA steps. It is also important an agency consider if there are statutes outside of the PRA that may require certain procedures with respect to its particular records (example, health care records).

The enclosed chart provides examples of records procedures that are not found in RCW 42.56 as of July 2014, but are described in some court decisions or statutes outside the PRA. **This chart is illustrative only and is not a comprehensive list, nor does it constitute legal advice.**

And, several unpublished decisions are referenced in the chart. They cannot be cited as authority and are not binding upon an agency that was not a party in those cases; however, they are noted here to give further examples of PRA procedures identified by some courts in some cases. In addition, some of the unpublished decisions may have been published after these materials were prepared. Some of the referenced decisions (published and unpublished) may have appealed further after these materials were prepared. Finally, court decisions issued after these materials were prepared, or statutes enacted after July 2014, may modify the summaries in the attached chart.

The chart focuses mainly on PRA procedures; many other court decisions analyze other legal issues concerning the PRA (applicability of particular exemptions, etc.).



¹ The AGO PRA Model Rules describe many of those additional steps created by the courts through at least 2007, and other recommended procedures. The AGO will begin a process in 2014 to review and possibly update the Model Rules. Contact Nancy Krier if you are interested in receiving information on this project.

Procedure	Source
AGENCY RECORDS PROCEDURES – CURRENT STATUTES OUTSIDE PRA	
<p>OTHER LAWS GOVERNING AGENCY RECORDS. <i>Other laws may govern certain records or information. See, e.g., RCW 42.56.510; RCW 42.56.070(1).</i></p> <p>EXAMPLES. Health care records.</p> <p>Records retention procedures.</p> <p>Employee access to his/her own personnel file.</p> <p>Student education records.</p> <p>Juvenile dependency records.</p>	<p><i>Progressive Animal Welfare Soc’y v. Univ. of Wash.</i>, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)</p> <p>RCW 70.02; federal Health Insurance Portability and Accountability Act (HIPAA)</p> <p>RCW 40.14</p> <p>RCW 49.12.240 - .260</p> <p>RCW 28A.605.030; Family Educational and Privacy Rights Act of 1974 (FERPA) at 20 U.S.C. 1232 <i>et seq.</i></p> <p>RCW 13.50; <i>Deer v. Department of Social and Health Services</i>, 122 Wn. App. 84 (2004); <i>Wright v. State</i>, 176 Wn. App. 585 (2013)</p>
AGENCY PRA PROCEDURES – ADDED BY COURTS	
<p>REQUESTS. <i>PRA is silent on <u>how</u> a request must be made to an agency, or <u>what</u> it must contain (except that it must be for “identifiable” records – RCW 42.56.080). An agency may prescribe means of requests in its rules. RCW 42.56.040, RCW 42.56.100. PRA does not define some terms that may be used in a request, such as “metadata.”</i></p> <p>However, courts have provided more information about requests.</p>	

<ul style="list-style-type: none"> • There is no official format for a PRA request. However, procedures describing PRA requests must be public and reasonable. 	<p><i>Hangartner v. City of Seattle</i>, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.") However, the courts have also upheld reasonable PRA procedures provided by an agency, including those related to request procedures. <i>See, e.g., Parmelee v. Clarke</i>, 147 Wn. App. 1035 (2008). But see <i>Zink v. City of Mesa</i>, 140 Wn. App. 328 (2007) (procedures must strictly comply with PRA).</p> <p><i>See also Resident Action Council v. Seattle Housing Authority</i>, __ P.3d __ (2014), 2013 WL 7024095 ("The PRA requires each relevant agency to facilitate the full disclosure of public records to interested parties. An agency must publish its methods of disclosure and the rules that will govern its disclosure of public records. RCW 42.56.040(1). A requester cannot be required to comply with any such rules not published unless the requester receives actual and timely notice. RCW 42.56.040(2). More generally, an agency's applicable rules and regulations must be reasonable and must provide full public access, protect public records from damage or disorganization, and prevent excessive interference with other essential functions of the agency. RCW 42.56.100. The agency's rules and regulations also must 'provide for the fullest assistance to inquirers and the most timely possible action on requests for information.'")</p>
<ul style="list-style-type: none"> • A request must give "fair notice" that it is a PRA request. 	<p><i>Wood v. Lowe</i>, 102 Wn. App. 7, 994 P.2d 857 (2000); <i>Germeau v. Mason County</i>, 166 Wn. App. 789, 271 P.2d 932 (2012).</p>
<ul style="list-style-type: none"> • A request for "information" is not a PRA request for identifiable records. 	<p><i>Bonamy v. City of Seattle</i>, 92 Wn. App. 403, 960 P.2d 447 (1998); <i>Beal v. City of Seattle</i>, 150 Wn. App. 865, 209 P.3d 872 (2009); <i>Hangartner v. City of Seattle</i>, 151 Wn.2d 439, 90 P.3d 26 (2004) (must be a request for "identifiable" records); <i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014) (requester is not required to use the exact name of the record but requests must be for identifiable records or class of records).</p>
<ul style="list-style-type: none"> • A "complex and broad" request may require an agency to provide records in installments, and use additional time to locate and assemble records, notify third parties, and determine if information is exempt. 	<p><i>West v. Department of Licensing</i>, Div. I Court of Appeals No. 7-643-3-1 (June 9, 2014) (unpublished) (Note: motion to publish and motion for reconsideration filed).</p>
<ul style="list-style-type: none"> • There is no constitutional right to access records. 	<p><i>City of Seattle v. Egan</i>, 179 Wn. App.333, 317 P.3d 568 (2014) (Note: petition for review filed).</p>
<ul style="list-style-type: none"> • If specifically asked for (in the PRA request) 	<p><i>O'Neill v. City of Shoreline</i>, 170 Wn.2d 138, 240 P.3d 1149 (2010) (court defines "metadata" as "data about</p>

<p>non-exempt “metadata” must be produced.</p>	<p>data” or hidden information about electronic documents contained in software programs.)</p>
<p>REQUESTERS. <i>RCW 42.56.080 & the intent section following RCW 42.56.050 say agencies shall not distinguish among requesters absent statutory authority. Statutory examples include (1) inmate/SVP requesters subject to injunction obtained under RCW 42.56.565 or RCW 71.09.120(3), (2) media requesters for records identified in RCW 42.56.250(8) – photographs and dates of birth of criminal justice agency employees, (3) requesters seeking lists of individuals for commercial purposes unless authorized under RCW 42.56.070(9), or (4) other requesters seeking information or records that can only be provided to specific requesters per statute.</i></p> <p>However, the courts have also looked at specific requests or requesters on occasion, with respect to agency’s response.</p>	
<ul style="list-style-type: none"> • In assessing penalties, the Supreme Court has said courts are to consider some factors relevant to a particular request or to a particular requester. This suggests agencies should consider certain facts about a request or requester when determining how to process a particular request. 	<p><i>Yousoufian v. Office of Ron Sims</i>, 168 Wn.2d 444 (2010). “Aggravating” penalty factors include:</p> <ul style="list-style-type: none"> • A delayed response by the agency “especially in circumstances making time of the essence”; • When considering the “public importance of the issue” to which the request is related, where importance was “foreseeable” to the agency; and, • “Any actual personal economic loss to the requestor” resulting from the agency’s misconduct, where the loss was “foreseeable” to the agency.
<ul style="list-style-type: none"> • PRA does not provide a right of a requester to indiscriminately search through an agency’s 	<p><i>Limstrom v. Ladenburg (Limstrom II)</i>, 136 Wn.2d 595, 963 P.2d 896 (1998) (PRA does not provide “a right of citizens to indiscriminately sift through an agency’s files in search of records or information which cannot</p>

files.	be reasonably identified or described by the agency.”)
<ul style="list-style-type: none"> • A requester’s attorney can make the request on behalf of the client. 	<i>Kleven v. City of Des Moines</i> , 111 Wn. App. 284, 289–93, 44 P.3d 887, 889–91 (2002).
<ul style="list-style-type: none"> • A requester’s union representative can make the request on behalf of a union member. 	<i>Germeau v. Mason County</i> , 166 Wn. App. 789, 271 P.3d 932 (2012).
<p>FIVE BUSINESS DAY RESPONSE.</p> <p><i>Except for using 5 “business” day response, PRA does not give further details about counting days.</i></p> <p>However, courts and other statutes provide guidance.</p>	
<ul style="list-style-type: none"> • When counting the five-day response time for a PRA request, don’t count the day of receipt. 	RCW 1.12.040; <i>Limstrom v. Ladenburg</i> , 98 Wn. App. 612, 989 P.2d 1257 (1999) (see how court counted days)
<ul style="list-style-type: none"> • Remember that emailed PRA requests can go into an agency employee’s junk mail folders or spam folders; or to an email address of an employee who is out of the office for several days. That fact does not necessarily stop the 5-day clock. So, agencies may want to have rules or procedures identifying which email address must be used for PRA requests. 	<i>See, e.g.</i> , Mason County Superior Court case, <i>Carey v. Mason County</i> . (Unpublished, no appeals). One of the several issues in the case was that the public records requests allegedly went into an employee’s spam mail box, were subsequently blocked, and thus not responded to by the agency. Penalties awarded.
<p>RESPONSES – OTHER PROCEDURES.</p> <p><i>The PRA does not provide many other details about response formats or procedures, except to provide that responses can include an estimate of time for further response, request for clarification, internet address/link to records on the agency’s website, and that denials must be in writing with a</i></p>	

<p><i>brief explanation. See, e.g., RCW 42.56.210; RCW 42.56.520; RCW 42.56.070(1).</i></p> <p>However, the courts have explained other procedures.</p>	
<ul style="list-style-type: none"> • In an injunction hearing, a court could order an agency to publish its PRA procedures. 	<p><i>See Resident Action Council v. Seattle Housing Authority</i>, __ P.3d __ (2014), 2013 WL 7024095.</p>
<ul style="list-style-type: none"> • Agencies are not required by PRA to give an explanation for estimates of time for further response at the time of the explanation. 	<p><i>Ockerman v. King County Department of Developmental and Environmental Services</i>, 102 Wn. App. 212, 214, 6 P.3d 1214, 1215 (2000) (RCW 42.56.520 “does not require an agency to provide a written explanation of its reasonable estimate of time when it does not provide the records within five days of the request.”)</p> <p>[However, recall that agencies carry the burden of proof to establish an estimate of time is reasonable if challenged under RCW 42.56.550, so a suggested practice could include providing some information on the estimate, particularly if the time estimate is significant. See comments at WAC 44-14-04003(6).]</p>
<ul style="list-style-type: none"> • A “complex and broad” request may require an agency to provide records in installments, and use additional time to locate and assemble records, notify third parties, and determine if information is exempt. 	<p><i>West v. Department of Licensing</i>, Div. I Court of Appeals No. 7-643-3-1 (June 9, 2014) (unpublished) (Note: motion to publish and motion for reconsideration filed).</p>
<ul style="list-style-type: none"> • An estimate of time for further response can take into account an agency’s resources and amount of work. 	<p><i>Anderson v. Spokane Police Department</i>, Div. III Court of Appeals No. 3-568-1-III (July 17, 2014) (unpublished).</p>
<ul style="list-style-type: none"> • Agencies are not required to conduct legal research or explain public records they provide. 	<p><i>Bonamy v. City of Seattle</i>, 92 Wn. App. 403, 960 P.2d 447 (1998); <i>Limstrom v. Ladenburg (Limstrom II)</i>; 136 Wn.2d 595, 963 P.2d 896 (1998).</p>
<ul style="list-style-type: none"> • An agency has no duty to create a public record in response to a request. 	<p><i>Smith v. Okanogan County</i>, 100 Wn. App. 7, 994 P.2d 857 (2000); <i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014).</p>
<ul style="list-style-type: none"> • However, with electronically store data, there will not always be a “simple 	<p><i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014).</p>

<p>dichotomy” between producing an existing record and creating a new one.</p>	
<ul style="list-style-type: none"> • Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record. 	<p><i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014) (Whether a particular request asks an agency to produce or create a record will likely often turn on the specific facts of the case).</p>
<ul style="list-style-type: none"> • Be careful if the agency’s response describes that exemptions may be applicable, even if the agency has not yet produced records or prepared exemption log/brief explanation. 	<p><i>Mitchell v. Department of Corrections</i>, 164 Wn. App. 597, 277 P.3d 670 (2011) (In processing step, DOC had responded that the requested records would “have redactions that are mandatory exempt from disclosure” so they would not be able to be provided electronically to the inmate; court found that triggered exemption explanation requirements at that point).</p>
<ul style="list-style-type: none"> • If an agency does not find responsive records, should let requester know and give explanation. 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011) (“An adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched.”); <i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014) (The response “should show at least some evidence that the agency sincerely attempted to be helpful.”)</p>
<p>SEARCHES. <i>PRA says agencies are to give “fullest assistance” to requester, and can ask requester for clarification, but PRA is silent as to details about searches or what constitutes an adequate search.</i></p> <p>However, several court decisions have addressed searches.</p>	
<ul style="list-style-type: none"> • When deciding the scope of search, don’t read the request too narrowly. Seek clarification if uncertain. 	<p><i>Helton v. Seattle Police Department</i>, No. 68016-1-1 (Div. 1) (As amended April 23, 2013) 2013 WL 1488998 (unpublished) (Agency gave “too short a shrift” to the request); <i>Gale v. City of Seattle</i>, 2014 WL 545844 (Feb. 10, 2014) (unpublished) (requester’s failure to clarify).</p>
<ul style="list-style-type: none"> • The adequacy of a search for records under the PRA is the 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011).</p>

<p>same as exists under the federal Freedom of Information Act (FOIA).</p>	
<ul style="list-style-type: none"> • Searches for potentially responsive records must be adequate – “reasonably calculated to uncover all relevant documents.” 	<p><i>Yousoufian v. Office of Ron Sims</i>, 162 Wn.2d 1011 (2008) (later decision was issued in 2010) (court noted county’s search was “grossly negligent.”)</p> <p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011) (scope of search, including new and old computers). “The focus of the inquiry is not whether responsive documents do in fact exist, but whether the search was adequate.</p> <ul style="list-style-type: none"> • The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. • What will be considered reasonable will depend upon the facts of each case. • Agencies are required to do make more than a perfunctory search and to follow obvious leads as they are uncovered. • The search should not be limited to one or more places if there are additional sources for the information requested. • Indeed, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. • This is not to say, of course, that an agency must search every possible place a record may conceivably be stored, but only those places where it is likely to be found.” <p><i>See also Forbes v. City of Gold Bar</i>, 171 Wn. App. 857, 288 P.3d 384 (2012) (scope of search by city, including home computers); <i>Greenhalgh v. State Attorney General</i>, No. 41249-7-II (Div. II) (Dec. 6, 2011), 2011 WL 6039556 (unpublished) (scope of search by AGO); <i>Francis v. Department of Corrections</i>, 178 Wn. App. 42, 313 P.3d 457 (2013) (currently on appeal) (search by DOC - “The evidence before the trial court showed that McNeill staff spent no more than 15 minutes considering Francis’s request and did not check any of the usual record storage locations.”); <i>Gale v. City of Seattle</i>, 2014 WL 545844 (Feb. 10, 2014) (unpublished) (use of reasonable search terms; requester’s failure to clarify; failure to locate a responsive record does not indicate search was inadequate).</p>
<ul style="list-style-type: none"> • Searches must be “sincere and adequate.” 	<p><i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014).</p>
<ul style="list-style-type: none"> • Inadequate search can show bad faith [relevant to inmate 	<p><i>Francis v. Department of Corrections</i>, 178 Wn. App. 42, 313 P.3d 457 (2013) (currently on appeal) (court found agency staff spent no more than 15 minutes</p>

<p>requests – RCW 42.56.565].</p>	<p>considering a request and did not check any of the usual storage locations, thus was indicative of bad faith under the facts of that case).</p>
<ul style="list-style-type: none"> • PRA does not require agency to “go outside its own records and resources to identify or locate the records requested.” 	<p><i>Limstrom v. Ladenburg (Limstrom II)</i>, 136 Wn.2d 595, 963 P.2d 896 (1998); <i>Bldg. Indus. Ass’n of Wash. v. McCarthy</i>, 152 Wn. App. 720, 218 P.3d 196 (2009). <i>See also Worthington v. WestNet</i> __ Wn. App. __, 320 P.3d 721 (Div. 2, 2014) (currently on appeal) (request made to task force, which was not a separate legal entity); and, <i>Reid v. Pullman Police Department</i>, 2014 WL 465634 (Div. III, Jan. 28, 2014) (unpublished).</p>
<ul style="list-style-type: none"> • Agency needs to search non-agency owned computers & possibly other devices if agency personnel used those devices for agency business. (<i>Note: Some cases pending</i>). 	<p><i>O’Neill v. City of Shoreline</i> 170 Wn.2d 138, 240 P.3d 1149 (2010) (agency emails on personal computers); <i>Forbes v. City of Gold Bar</i>, 171 Wn. App. 857, 288 P.3d 384 (2012) (personal computers & agency emails, but also noting that “purely personal” emails are not public records); <i>see also Mechling v. Monroe</i>, 152 W. App. 830, 222 P.3d 808 (2009) (personal email addresses).</p> <p>Note pending appellate cases: <i>Nissen v. Pierce County</i>, Court of Appeals Div. II No. 44852-1 (personal cell phone & text messages); <i>Paulson v. City of Bainbridge Island</i>, Court of Appeals Div. II No. 46381-2 (personal computers & emails – search of hard drives).</p>
<ul style="list-style-type: none"> • PRA does not require “mining data from two distinct systems and creating a new document.” However “partially responsive” records must be produced. 	<p><i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014), also citing <i>Citizens for Fair Share v. Dep’t of Corrections</i>, 117 Wn. App. 41 (2003) and <i>Smith v. Okanogan County</i>, 100 Wn. App. 7 (2000).</p>
<ul style="list-style-type: none"> • Agencies should document their search efforts and search terms. Be able to “show your work” if search is challenged so you can include the search details in affidavits or declarations. 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011) (“[A]n agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith. They should include the search terms and the type of search performed, and they should establish that all places likely to contain responsive materials were searched.”)</p> <p><i>See, e.g., Forbes v. City of Gold Bar</i>, 171 Wn. App. 857, 288 P.3d 384 (2012) (examples of what city documented regarding search and provided the court in affidavits); <i>Greenhalgh v. State Attorney General</i>, No. 41249-7-II (Div. II) (Dec. 6, 2011), 2011 WL 6039556 (unpublished) (examples of agency declarations describing search); <i>Gale v. City of Seattle</i> (No. 70212-2-1) (Feb. 10, 2014) (Div. I) 2014 WL 545844 (unpublished decision) (agency described search terms used); <i>Reid v. Pullman Police Department</i>, 2014 WL 465634 (Div. III, Jan. 28, 2014) (unpublished) (city’s explanation with respect to absence of records was credible; purely speculative claims about the existence and discoverability of other documents will not</p>

	overcome agency's affidavit).
<ul style="list-style-type: none"> An inadequate search is "comparable" to a denial but court does not create new cause of action regarding search (see next box). 	<i>Neighborhood Alliance v. Spokane County</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).
<ul style="list-style-type: none"> An inadequate search is an aggravating factor to be considered in assessing penalties. 	<i>Neighborhood Alliance v. Spokane County</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).
<ul style="list-style-type: none"> If an agency does not find responsive records, it should let requester know and give explanation. 	<i>Neighborhood Alliance v. Spokane County</i> , 172 Wn.2d 702, 261 P.3d 119 (2011) ("An adequate response to the initial PRA request where records are not disclosed should explain, at least in general terms, the places searched."); <i>Fisher Broadcasting v. City of Seattle</i> , ___ Wn.2d ___, 326 P.3d 688 (2014) (The response "should show at least some evidence that the agency sincerely attempted to be helpful.")
<p>SUMMARY OF STEPS IN CONSIDERING EXEMPTIONS.</p> <p><i>PRA does not list specific steps in considering how exemptions apply. It does provide that third parties can be notified to determine if they want to seek court order enjoining disclosure, even if agency does not cite exemption. RCW 42.56.540.</i></p> <p>However, Supreme Court has described other steps.</p>	<p><i>Resident Action Council v. Seattle Housing Authority</i>, ___ P.3d ___, (2014), 2013 WL 7024095:</p> <p>"In sum, an agency facing a request for disclosure under the PRA should take the following steps:</p> <ul style="list-style-type: none"> First, determine whether any public records are responsive to the request—if not, the PRA does not apply. Second, insofar as certain public records are responsive, <ul style="list-style-type: none"> determine whether any exemptions apply generally to those types of records or to any of the types of information contained therein. An agency should be sure to consider any specified limitations to an exemption when discerning the exemption's scope of potential application. If no exemption applies generally to the relevant types of records or information, the requested public records must be disclosed. Third, if an exemption applies generally to a relevant type of information or record, <ul style="list-style-type: none"> then determine whether the exemption is categorical or conditional. If the exemption is conditional and the condition is not satisfied in the given case, the records must be disclosed. Fourth, if the exemption is categorical, or if the exemption is conditional and the condition is satisfied, then the agency must consider whether the exemption applies to entire records or only to

	<p>certain information contained therein.</p> <ul style="list-style-type: none"> ○ If the exemption applies only to certain information, then the agency must consider whether the exempted information can be redacted from the records such that no exemption applies (and some modicum of information remains). ○ If the exemption applies to entire records, then those records are exempted and need not be disclosed, unless redaction can transform the record into one that is not exempted (and some modicum of information remains). ○ If effective redaction is possible, records must be so redacted and disclosed. Otherwise, disclosure is not required under the PRA. <ul style="list-style-type: none"> • These are the indispensable steps that an agency should take in order to properly respond to a PRA request. • These steps are visually represented in the flowchart contained in figure 1.” [<i>Flow chart provided in decision</i>].
<p>EXEMPTION LOG/INDEX; BRIEF EXPLANATION.</p> <p><i>The PRA says denials of records must be in writing, and contain specific reasons (brief explanation of how exemption applies to record withheld). RCW 42.56.210; RCW 42.56.070(1). PRA contains no reference to an exemption log or index, or other specific details about how to describe record or information withheld.</i></p> <p>However, the courts have described further details of what must be included in a denial, and have referenced exemptions logs or indexes, although some decisions say they are not required.</p>	<p><i>PAWS v. University of Washington</i>, 125 Wn.2d 243, 884 P.2d 592 (1994). Response must include “specific means of identifying individual records.”</p> <ul style="list-style-type: none"> • “The identifying information need not be elaborate • but should include <ul style="list-style-type: none"> ○ the type of record, ○ its date and ○ number of pages, ○ and unless otherwise protected, the author and recipient, ○ or if protected, other means of sufficiently identifying particular records without disclosing protected content.

	<p>○ Where use of any identifying features whatever would reveal protected content, the agency may designate records by numbered sequence.”</p> <p><i>See also, Rental Housing Association of Puget Sound v. City of Des Moines</i>, 165 Wn.2d 525 (2009) (describing the need to have sufficient identifying information about withheld documents in order to effectuate the goals of the PRA and noting statute of limitations did not run until agency had produced a <i>PAWS II</i> exemption log); <i>Sanders v. State</i>, 169 Wn.2d 827, 240 P.3d 120 (2010) (discussion of “brief explanation” requirement).</p> <p><i>But see Smith v. Okanogan County</i>, 100 Wn. App. 7, 994 P.2d 857 (2000) and <i>Simpson v. Okanogan County</i>, No. 28966-4-III (Div. 3) (April 26, 2011) (unpublished) (no requirement in PRA to create an exemption log, although may be a better practice to create such a log).</p>
<p>PRA LITIGATION PROCEDURES – ADDED BY COURTS OR IN SOME CASES BY OTHER STATUTES</p>	
<p>JURISDICTION & VENUE. <i>PRA provides jurisdiction to superior courts, and describes venues at RCW 42.56.550(1), (2) and (5). PRA is silent as to federal courts but does reference judicial review by “courts” in (3) and (4).</i></p> <p>However, some PRA actions have proceeded against cities in federal court.</p>	<p><i>Reed v. City of Asotin</i>, 917 F.Supp. 1156 (E.D. Wash., 2013) (directing PRA claim “to proceed to trial”); <i>Lindell v. City of Mercer Island</i>, 833 F.Supp. 1276 (W.D.Wash. 2011) (awarding PRA penalties and fees).</p>
<p>REQUESTER’S STATUS. <i>PRA is silent on requester’s status in litigation, if not the Plaintiff.</i></p> <p>However, the courts have held that the requester must be joined as a necessary party.</p>	<p><i>Burt v. Wash. State Dep’t of Corr.</i>, 168 Wn.2d 828, 833, 231 P.3d 196 (2009) (holding that a person who requests public records is a necessary party and must be joined in any action brought under RCW 42.56.540).</p>
<p>SERVICE. <i>PRA is silent on service procedures.</i></p>	

<p>However, a court has held that a county can be dismissed when the proper county entity is not served.</p>	<p>RCW 36.01.010; RCW 4.28.080(1); <i>Day v. Pierce Co. Prosecuting Attorney's Office</i>, No. 40730-2-II (April 23, 2012) (Div. II) (unpublished) (dismissal proper where requester failed to properly serve Pierce County Auditor and failed to re-file and serve before one-year statute of limitations ended); see also <i>Roth v. Drainage Improvement Dist. No. 5</i>, 64 Wn.2d 586 (1964) (service).</p>
<p>DISCOVERY. <i>PRA is silent on discovery.</i></p> <p>However, Supreme Court has addressed discovery in PRA cases.</p>	
<ul style="list-style-type: none"> • General civil rules control discovery in PRA cases. 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011); CR 81; <i>Spokane Research and Def. Fund v. City of Spokane</i>, 155 Wn.2d 89, 117 P.3d 1117 (2005); see also <i>Block v. City of Gold Bar</i>, 2013 WL 5408645 (Sept. 23, 2013) (unpublished)(trial court awarded city attorney fees and dismissed case when requester failed to pay fees or appear for deposition).</p>
<ul style="list-style-type: none"> • PRA does not create special proceeding subject to special rules. 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011); <i>Spokane Research and Def. Fund v. City of Spokane</i>, 155 Wn.2d 89, 117 P.3d 1117 (2005).</p>
<ul style="list-style-type: none"> • Discovery about reasons behind a decision not to disclose records is relevant. 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011); <i>Yousoufian v. Office of Ron Sims</i>, 168 Wn.2d 444, 229 P.3d 735 (2010).</p>
<ul style="list-style-type: none"> • It may be within the trial court's discretion to narrow discovery but it must not do so in a way that prevents discovery of information relevant to the issues that may arise in a PRA lawsuit. 	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011).</p>
<ul style="list-style-type: none"> • Court can sanction a party for failing to comply with discovery in PRA case. 	<p><i>Block v. City of Gold Bar</i>, 2013 WL 5408645 (Sept. 23, 2013) (unpublished)(trial court awarded city attorney fees and dismissed case when requester failed to pay fees or appear for deposition).</p>
<p>INTERVENTION. <i>PRA is silent on intervention.</i></p> <p>However, Supreme Court has said intervention is permissible in PRA cases.</p>	<p><i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011); <i>Spokane Research and Def. Fund v. City of Spokane</i>, 155 Wn.2d 89, 117 P.3d 1117 (2005).</p>
<p>HEARINGS GENERALLY.</p>	

<p><i>PRA describes hearings are “show cause” hearings and courts may conduct a hearing based solely on affidavits. RCW 42.56.550.</i></p> <p>However, courts have said this hearing can also be in the form of a summary judgment motion, or other civil proceedings, although most hearings are “show cause” procedures.</p>	<p><i>See generally Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005); Wood v. Thurston County, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003); Hangartner v. City of Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004) and Newman v. King County, 133 Wn.2d 565, 947 P.2d 712 (1997) (summary judgment); CLEAN v. City of Spokane, 133 Wn.2d 455, 947 P.2d 1169 (1997) (declaratory and injunctive relief); Amren v. City of Kalama, 131 Wn.2d 25 , 29-30, 929 P.2d 389 (1997) (writ of mandamus).</i></p>
<p>HEARINGS – AGENCY INITIATED.</p> <p><i>Under PRA, agencies can also initiate hearings to enjoin inspection. RCW 42.56.540; RCW 42.56.565 (inmate requests); RCW 71.09.120(3)(sexually violent predator requests).</i></p> <p>Courts have also said agencies can seek hearing for declaratory ruling when issue of law presented.</p>	<p><i>See, e.g., City of Seattle v. Egan, 2014 WL 645381(Feb. 18, 2014) (unpublished); City of Seattle v. Egan, __ Wn. App. __, 317 P.3d 568 (2014) (Note: petition for review filed).</i></p>
<p>BURDEN OF PROOF.</p> <p><i>PRA specifies burden of proof if agency is sued for non-disclosure, or for unreasonable estimate of time – burden is on agency. RCW 42.56.550. PRA is silent on burden of proof in other contexts.</i></p> <p>However, courts addressed burden of proof in PRA actions in this and other contexts.</p>	
<ul style="list-style-type: none"> • The burden rests upon the person seeking nondisclosure. 	<p><i>Spokane Police Guild v. Liquor Control Board; 112 Wn.2d 30, 796 P.2d 283 (1989); Dragonslayer, Inc. v. Wash. State Gambling Comm’n, 139 Wn. App. 433, 191 P.3d 428 (2007); see also Robbins, Geller et al. v. State et al., 179 Wn. App. 711, P.3d (2014).</i></p>
<ul style="list-style-type: none"> • When “executive privilege” asserted, burden applies to Plaintiff to overcome that constitutional privilege. 	<p><i>Freedom Foundation v. Gregoire, 178 Wn.2d 686, 310 P.3d 1252 (2013).</i></p>

<ul style="list-style-type: none"> • A court may shift the burden if it finds exemption applies but is argued as unnecessary. 	<p><i>Ameriquist Mortgage Co. v. Wash. State Office of Attorney General</i>, 177 Wn.2d 467, 300 P.3d 799 (2013) (“A court may even allow for the inspection and copying of exempt records if it finds “that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital government function.” RCW 42.56.210(2); <i>Oliver v. Harborview Med. Ctr.</i>, 94 Wash.2d 559, 567–68, 618 P.2d 76 (1980) (burden shifts to the party seeking disclosure to establish that the exemption is clearly unnecessary)).”</p>
<ul style="list-style-type: none"> • It is possible a court might look at other burdens if records are governed by other statutes (<i>not entirely clear</i>). 	<p><i>See, e.g., Ameriquist Mortgage Co. v. Wash. State Office of Attorney General</i>, 177 Wn.2d 467, 300 P.3d 799 (2013); <i>see also Robbins, Geller et al. v. State et al.</i>, ___ P.3d ___ (2014), 2014 WL 83985 (published).</p>
<ul style="list-style-type: none"> • Court will consider agency affidavits in determining whether agency met its burden. 	<p><i>Reid v. Pullman Police Department</i>, 2014 WL 465634 (Div. III, Jan. 28, 2014) (unpublished) (city’s explanation with respect to absence of records was credible; purely speculative claims about the existence and discoverability of other documents will not overcome agency’s affidavit).</p>
<p>IN CAMERA REVIEW. <i>PRA provides that courts may review records in camera (RCW 42.56.550(3)) but does not provide other details about this process.</i></p> <p>However, courts have referenced <i>in camera</i> review procedures in some circumstances.</p>	
<ul style="list-style-type: none"> • The Supreme Court has suggested courts are familiar with the procedures. 	<p><i>Freedom Foundation v. Gregoire</i>, 178 Wn.2d 686, 310 P.3d 1252 (2013) (“Our courts are already familiar with the in camera review process mandated by the PRA to determine whether an exemption applies. RCW 42.56.550.”)</p>
<ul style="list-style-type: none"> • As an example, the Supreme Court has noted it is appropriate in the work product context. 	<p><i>Freedom Foundation v. Gregoire</i> (“In camera review is, similarly, warranted to establish the judicially created PRA exemption for attorney work product. <i>Soter v. Cowles Publ'g Co.</i>, 162 Wn.2d 716, 744, 174 P.3d 60 (2007).”)</p>
<ul style="list-style-type: none"> • And, in court rule, some courts may have provided a PRA litigation process, including an <i>in camera</i> review process. 	<p><i>See, e.g., Thurston County Local Rule 16(c)</i> “Public Records Act Cases” (PRA and <i>in camera</i> review procedures set out in local rule).</p>
<p>VIOLATIONS. <i>RCW 42.56.550 sets out</i></p>	

<p><i>violations of the PRA for denying a request to inspect/copy a public record, and not providing a reasonable estimate of time. It also references judicial review of agency actions under RCW 42.56.030 - .520.</i></p> <p>There has also been case law describing violations.</p>	
<ul style="list-style-type: none"> • Failing to provide a “partially responsive” response violates the PRA. 	<p><i>Fisher Broadcasting v. City of Seattle</i>, __ Wn.2d __, 326 P.3d 688 (2014).</p>
<ul style="list-style-type: none"> • Failure to respond within 5 business days is a violation of the PRA. 	<p><i>West v. Department of Natural Resources</i>, 163 Wn. App. 235 (2011).</p>
<p>PRA PENALTIES. <i>Except for setting penalty ranges in RCW 42.56.550, PRA is silent on how penalties are to be assessed.</i></p> <p>However, Supreme Court held that a court is to consider a nonexclusive list of mitigating and aggravating factors in assessing PRA penalties.</p>	<p><i>Yousoufian v. Office of Ron Sims</i>, 168 Wn.2d 444 (2010) --- Aggravating factors are:</p> <ol style="list-style-type: none"> 1. A delayed response by the agency, especially in circumstances making time of the essence 2. Lack of strict compliance by the agency with all PRA procedural requirements and exceptions 3. Lack of proper training and supervision of agency personnel 4. Unreasonableness of any explanation for noncompliance by the agency [and failure to briefly explain exemptions – see <i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011); and, <i>Sanders v. State</i>, 169 Wn.2d 827, 240 P.3d 120 (2010)] 5. Negligent, reckless, wanton, bad faith or intentional noncompliance with the PRA by the agency 6. Agency dishonesty 7. The public importance of the issue to which the request is related, where importance was foreseeable to the agency 8. Any actual personal economic loss to the requestor resulting from the agency’s misconduct, where the loss was foreseeable to the agency 9. A penalty amount necessary to deter future

	<p>misconduct by the agency considering the size of the agency and the facts of the case. <i>Neighborhood Alliance v. Spokane County</i>, 172 Wn.2d 702, 261 P.3d 119 (2011) ---</p> <p>10. An inadequate search is an additional aggravating factor in assessing penalties. * * *</p> <p><i>Yousoufian v. Office of Ron Sims</i>, 168 Wn.2d 444 (2010) --- Mitigating factors are:</p> <ol style="list-style-type: none"> 1. Lack of clarity in PRA request 2. Agency's prompt response or legitimate follow-up inquiry for clarification 3. Agency's good faith, honest, timely and strict compliance with all PRA procedural requirements and exemptions 4. Proper training and supervision of agency personnel 5. The reasonableness of any explanation for noncompliance by the agency 6. The helpfulness of the agency to the requestor 7. The existence of agency systems to track and retrieve records
<p>ATTORNEY'S FEES. <i>PRA provides prevailing party against an agency per claims specified in PRA (inspect/copy, or estimate of time) shall be awarded costs including reasonable attorney fees, incurred in connection with such action. RCW 42.56.550. PRA is silent on status of pro se litigants.</i></p> <p>However, courts have held that attorney's fees in PRA do not extend to <i>pro se</i> litigants who are not attorneys, in same manner they do not extend to <i>pro se</i> parties in other litigation.</p>	<p><i>Mitchell v. Department of Corrections</i>, 164 Wn. App. 597, 277 P.3d 670 (2011); see also <i>In re Marriage of Brown</i>, 159 Wn. App. 931, 247 P.3d 466 (2011) (no <i>pro se</i> fees); <i>Leen v. Demopolis</i>, 62 Wn. App. 473, 815 P.2d 269 (1991) (no <i>pro se</i> fees).</p>
<p>APPELLATE REVIEW <i>PRA says judicial review is de novo. RCW 42.56.550.</i> The courts have provided more information about appeals.</p>	
<ul style="list-style-type: none"> • Trial court's decision to grant injunction, and its terms, are reviewed for abuse of discretion. • The same is true for fee awards. 	<p><i>Resident Action Council v. Seattle Housing Authority</i>, ___ P.3d ___ (2014), 2013 WL 7024095; <i>City of Kucera v. Dep't of Transp.</i>, 140 Wn.2d 200, 995 P.2d 63 (2000).</p> <p><i>Kitsap County Prosecuting Attorney's Guild v. Kitsap County</i>, 156 Wn. App. 110, 231 P.2d 219 (2010).</p>