Sixteen Things Every Department Employee Should Know About the Public Records Act

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1 Public records are more than what you might think

A public record is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(2). This includes papers, photos, maps, videos, emails, text messages, databases, social media, and other electronic records.

Public records may include records "used" by an agency but possessed by someone else. *Concerned Ratepayers v. PUD No. 1.*138 Wn.2d 950, 983 P.2d 635 (1999) (Agency used an engineering design diagram created by business firm when agency cited it in decision choosing a different design even though the diagram had never left the business premises).

Public records may include records received or created on a personal computer or device. *O'Neill v. City of Shoreline,* 170 Wn.2d 138, 240 P.3d 1149 (2010) (Email sent to assistant mayor's home computer became a public record when she cited it at a public meeting). *See also, Mechling v. City of Monroe,* 152 Wn.App. 830, 222 P.3d 808 (2009), review denied, 169 Wn.2d 1007, 236 P.3d 2010) (City could not redact personal email address from City official's email discussing City business sent from personal computer).

Public records may include "personal" communications written by a government employee at work. *Tiberino v. Spokane County,* 103 Wn.App. 680, 13 P.3d 1104 (2000). (Agency used personal email messages sent on agency computer when they were downloaded in connection with disciplinary action against employee for excessive personal use of email system). See also, *City of Ontario v. Quon,* 560 U.S. 746, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (Police officer did not have a reasonable expectation of privacy in text messages sent on a City-paid device).

Text messages that relate to government business sent or received by government employees on personal cell phones are public records subject to the PRA, and a government employee's personal cell phone billing records may be public records if they are used or retained by a government agency. *Nissen v. Pierce Co., et al.,* 183 Wn.App. 581, 333 P.3d 577 (2014).

Tip: Be aware of the records you may be creating. Some programs, such as Microsoft Lync, contain audio-to-text voicemails sent to email, instant messaging, and the ability to record telephonic meetings.

2. All records are presumed open

Agencies must make a requested public record available unless it is within the specific exemptions of the PRA or another statute that exempts or prohibits disclosure of specific information or records. RCW 42.56.070.

The PRA and court decisions interpreting the PRA say that the act must be liberally construed, and its exemptions narrowly construed. RCW 42.56.030. The PRA says that "free and open expression

of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

3. No request is "too broad"

The PRA specifically says that agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad. RCW 42.56.080.

4. Creating public records on your personal cellphone or device may open it up for inspection

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5. A specific exemption must apply to withhold or redact a record

Agencies must justify the withholding of any public record fully and in writing, by providing an exemption log identifying records withheld, stating the specific exemption that authorizes withholding and providing a brief explanation of how that exemption applies. RCW 42.56.070, RCW 42.56.210.

6. An agency may not withhold an entire record if only part of it is exempt

Generally, an agency may withhold only that part of a public record to which the exemption applies and disclose the rest. RCW 42.56.210. The State Supreme Court recently held that even if an exemption applies to an entire record, it should redact it if redaction can transform the record into one that is not exempted. *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 300 P.3d 376, *republished as amended*, 327 P.3d 600, 607-08 (2013).

7. You must provide or identify all potentially responsive records to the Department PDO

An agency must conduct an adequate search for responsive records. This means a search that is reasonably calculated to locate all responsive records. *Neighborhood Alliance of Spokane County v. County of Spokane,* 168 Wn.2d 1039, 233 P.3d 889 (2010) (Agency failed to conduct an adequate search when it did not examine a hard drive on which a particular record was created). At a minimum, an agency must take the following steps:

a. Determine who may have responsive records and contact them ASAP to gather the records.

b. Make sure no records are erased or destroyed[1]
c. Document all search efforts and save all related emails and other documentation.
d. Pursue "leads" found during the search.
e. Follow up to ensure employees have searched for records.

Department must be able to show that it conducted an adequate search in responding to every PRA request it receives. Responding to a request is not just the PDO's job. The PDO depends on you to identify and help gather responsive records. You must provide or at least identify all potentially responsive records to the PDO. If you do not, the City risks incurring penalties and attorney's fees for failing to conduct an adequate search. The PDO can do her job only as well as you do your part in identifying and providing records.

8. Recognize requests

A public records request need not be in writing or mention the PRA, but it must be clear enough to put an agency on notice that it is a request for an identifiable record. While requests for information, to explain records, or to research records are not requests for identifiable public records, consult Department's PDO for help in determining how to respond.

9. Extracting data from a database is not "creating" a record

Agencies must provide access to "identifiable public records" and, therefore, are not required to create records for requestors. RCW 42.56.080. What constitutes "creating" a record in the context of databases can be complicated. Extracting data from a database is not creating a new record, while compiling data from two non-communicating databases would be creating a record. An agency, nevertheless, must still provide a "partially responsive" record if it can. *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014).

10. A record received from outside the City is the City's record

An agency cannot silently withhold records. *PAWS v. University of Washington,* 125 Wn.2d 243, 884 P.2d 592 (1994). It must provide or identify in an exemption log all records responsive to a request that the agency claims are exempt. *Id.* Agencies frequently receive records from individuals, businesses, and other agencies. If they are in the City's possession, they are the City's records for purposes of the PRA. *Id.* You cannot simply pull these from the records before responding. The same applies to "internal" documents. They must be provided to the requester if they are responsive but not exempt and must be identified in an exemption log if they are exempt. *Id.*

11. There is no "draft" exemption

Some people mistakenly believe that drafts are exempt because the deliberative process exemption applies to "preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action." RCW 42.56.280

[1] An agency may not **destroy or erase** a public record that is subject to a public disclosure request until that request has been resolved. RCW 42.56.100. (Potential trap for the unwary: e-mails, texts, and other electronic records that are automatically deleted.)

Although the language appears to broadly cover all drafts, Washington courts have never interpreted the exemption to do so. In fact, the seminal case on the Washington PRA addressed the exemption and said that the "purpose of the exemption severely limits its scope." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978).

Based on the standards developed through *Hoppe* and its progeny, an agency that asserts the deliberative process exemption must show that (1) the records contain predecisional opinions or recommendations expressed as part of a deliberative process; (2) disclosure would be injurious to the deliberative or consultative function of the process; (3) disclosure would inhibit the flow of recommendations, observations, and opinions; (4) the materials covered by the exemption reflect policy recommendations and opinions and not raw factual data on which a decision is based; **and** (5) that the deliberative process is ongoing (i.e., no policy has been adopted).

Even if a record is exempt under the deliberative process exemption, the exemption no longer applies once the deliberations end.

12. Privacy is not what you think it is

A person's right to privacy under the PRA is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, **and** (2) is not of legitimate concern to the public." RCW 42.56.050. *Hearst v. Hoppe,* 90 Wn.2d 123, 580 P.2d 246 (1978). An agency must meet both prongs. It must disclose even embarrassing records if they are of legitimate public concern.

When a privacy exemption applies, an agency may only be able to redact the individual's identity and must disclose the rest of the record. See, *Bainbridge Island Police Guild v. City of Puyallup,* 172 Wn.2d 398, 259 P.3d 190 (2011) (Only the subject officer's identity could be redacted from an internal investigation of alleged sexual misconduct even though the records were requested by the name of the officer); *see also, Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) (Similar result when investigation of sexual assault investigation was requested by the minor victim's name).

13. Names, addresses, phone numbers, email addresses, and birthdates are not necessarily exempt

It may be uncomfortable to disclose another person's date of birth or other personally identifying information, but that does not mean that it is exempt. The two-prong definition of privacy in the PRA is taken from the Restatement (Second) of Torts § 652. The Restatement specifically provides that "no right to privacy exists for facts that are matters of public record, such as a person's date of birth, the fact of his marriage, his military record, and the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab. By contrast, disclosure of a person's sexual relations, family quarrels, unpleasant or humiliating illnesses, intimate personal letters, and most details of a person's life at home could give rise to a right of privacy." (Restatement (Second) of Torts at § 652D, comment b). Thus, disclosing a person's date of birth will not violate his or her right of privacy.

14. The public has a legitimate interest in employee misconduct investigations.

The contents of an open, ongoing non-EEO employee disciplinary investigation are <u>not</u> categorically exempt. The agency must go through the contents of the investigation and make a

page-by-page determination of what is exempt. The agency also must produce an exemption log. The subject's identity and the substance of any closed sustained employment investigation must be disclosed. The subject of an unsustained employment investigation is not exempt. The identity of the subject of an unsustained employee misconduct investigation is exempt only when disclosure would violate that employee's right to privacy. RCW 42.56.230(3), RCW 42.56.240(1). An individual's right to privacy is violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. RCW 42.56.050. Whether disclosure of particular information would be highly offensive to a reasonable person depends on the nature of the allegations and must be determined on a case by case basis. Many allegations, including allegations of potentially criminal conduct may not be highly offensive to a reasonable individual. *West v. Port of Olympia,* 183 Wn.App. 306, 333 P.3d 488 (2014).

15. The PRA is not discovery and they are not mutually exclusive

The Washington Supreme Court has held that a party to litigation may pursue both discovery and seek records under the PRA. *O'Connor v. DSHS,* 143 Wn.2d 895, 25 P.3d 426 (2001). This applies to criminal and civil litigation and to litigants, defendants, and their attorneys. An agency may withhold records from the requester only if they come within a specific exemption. *See, Wash. Dept. Transp. v. Mendoza de Sugiyama,* 182 Wn.App. 588, 330 P.3d 209 (2014) (Agency could not deny a request for 174,000 emails made by litigant one day after judge issued protective order finding that identical discovery request was overly burdensome).

16. You cannot deny a request just because you think it or the requester is unreasonable

A requester does not have to state the purpose of his or her request. RCW 42.56.080. An agency cannot distinguish among requesters. *Id.* Nor can an agency deny a request because it is too broad. *Id.* Moreover, an agency must provide "fullest assistance" to requesters. RCW 42.56.100. Responding to PRA requests is an essential agency function, and an agency must comply with the PRA even if the request seems burdensome or a requester appears to have an unreasonable motive.