Municipal Research and Services Center of Washington SPRING 2023

Municipal Research News

LOCAL GOVERNMENT SUCCESS

Private Lives of Public Employees

The PRA Implications of Working for the Government | **page 3**

ALSO INSIDE THIS ISSUE

MRSC

About MRSC

Municipal Research and Services Center (MRSC) is a nonprofit organization dedicated to proactively supporting the success of local governments through one-on-one consultation, research tools, online and in-person training, and timely, unbiased information on issues impacting all aspects of local governments.

For more than 80 years, local governments in Washington State have turned to MRSC for assistance. Our trusted staff attorneys, policy consultants, and finance experts have decades of experience and provide personalized guidance through Ask MRSC and our extensive online resources. Every year we help thousands of staff and elected officials research policies, comply with state and federal laws, and improve day-to-day operations through best practices.

Municipal Research News is published quarterly to inform, engage, and educate readers about ongoing and emerging issues. In print and online at the MRSC Insight blog, we cover such major topics as the Growth Management Act and the ever-evolving complexities of the Public Records Act, to name a few. When the legal landscape changes, we are here to clarify the issues and help local government leaders access the information they need to better serve their communities.

Washington Trivia Question

In which city did Clyde Pangborn land to complete the first nonstop airplane flight between Misawa, Japan, and the United States on October 5, 1931?

Answer on page 10

Your ideas and comments are appreciated. If you have news you would like to share, please contact the editor, Leah LaCivita, at llacivita@mrsc.org

Municipal Research News

LOCAL GOVERNMENT SUCCESS

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MRSC HIGHLIGHTS

A Promising Year of Public Works Training

The 2022 state budget included funding for MRSC to provide public works contracting training and technical assistance in partnership with the Washington Procurement Technical Assistance Center (PTAC). This funding helped us offer several free webinars, update our website content, and produce a Public Works Resource Guide. We also developed all-day, in-person regional training titled Digging Into Public Works.

DIGGING INTO PUBLIC WORKS (DIPW)

The DIPW training targets local government public works contracting staff and combines formal presentation with peer-to-peer learning. There is no charge for attending and registrants can earn between 4-5 hours APWA-CAEC Certification.

Formal presentations from MRSC and PTAC staff address the following:

- Engaging the contracting community;
- Making government public works projects more appealing to contractors;
- Avoiding common mistakes that deter bidders;
- Increasing the participation of women- and minority-owned firms in the bidding process;
- Getting more bids and better prices for public works projects; and
- Using alternative public works contracting options (i.e., job-order contracting, design build).

Informal learning takes place as attendees discuss public works contracting principles and best practices and debate actionable steps to improve contracting outcomes, both in breakout groups and while socializing during meal breaks.

Five DIPW trainings have taken place statewide since last fall attracting over 500 attendees, including:

- March 17, 2023: Tacoma (Thurston/Pierce County)
- February 15, 2023: Vancouver (Clark County)
- November 17, 2022: Kennewick (Yakima/Tri-Cities)
- October 26, 2022: Lynnwood (North Puget Sound)
- October 24, 2022: Airway Heights (Spokane County)

Thus far, attendees have praised the trainings. David Glasson, from the City of Long Beach had this to say: “Really enjoyed the class (and) learned many new things. I attended mostly to learn how to attract more qualified bidders, but also learned of new types of bid opportunities that we may incorporate in the future.”

Grace Amundsen Barnkow from Pacific County said: “These are well-developed classes packed with useful information that add nuance and new toolsets even for the experienced professional, presented in a digestible format. Highly recommend.”

Two final DIPW trainings will take place this spring, including:

- April 20, 2023, in Bellingham (Whatcom/Skagit County); and
- May 17, 2023, in Sequim (Clallam County).

We are looking forward to offering DIPW training to additional regions in the fall months. Interested public works professionals are invited to learn more about DIPW at mrsc.org/training/digging-into-public-works.

BY SARAH DOAR, MRSC LEGAL CONSULTANT

PRIVATE LIVES OF PUBLIC EMPLOYEES

The PRA Implications of Working for the Government

Those of us that have worked in the public sector for many years may be quite familiar with the guidance to never put anything in writing you wouldn't want to see in the newspaper. Folks that are new to public service are often surprised to learn that the gossip exchanged on the work email account, or the snarky comment they included on a post-it note circulated with a report, or the work venting session they recorded for their friends on Facebook, or other seemingly "private" communications about their public employment are all potentially public records subject to disclosure. A little education up front might save these folks from the embarrassment of seeing their private lives made public.

THE VENN DIAGRAM IS (ALMOST) A CIRCLE

Aren't all records held by a public agency "public" records? Not necessarily, but it's a fine line and I'd generally err on the side of assuming that a record held by an agency is a public record if there is any question. But how did we get here?

The definition of a public record under RCW 42.56.010(3) of the Public Records Act (PRA) is:

> [A]ny 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.

Folks sometimes focus on the third bullet point and assume that just because an agency "owned" or "retained" a record, that makes it a "public record." But that bullet point is only part of the definition, as the Washington Supreme Court explained in the context of emails in *SEIU 925 v. Univ. of Washington, Freedom Foundation*: "[T]he mere retention on a government server is insufficient, by itself, to bring an e-mail within the scope of a government transparency law."

In order to fall within the scope of the PRA, the record must also relate to some aspect of the conduct or performance of government, but "pertaining to the conduct of government" is a pretty broad net. In the *SEIU 925* case, the court found that union emails on university servers were likely public records if they discussed working conditions at the public institution — so complaining about your public job on your work email will cause that email to be a public record. Because of that broad net, it will be pretty rare that an email on an agency server will not pertain to the conduct of government in some manner. We can speculate on a few examples that would not be a public record: emailing family and friends about personal, non-work-related matters; submitting mortgage documents to a lender; conferring with a probate attorney; etc. But in every single one of those cases, a public records officer, and probably also an agency attorney, will need to read those personal emails in order to make the judgment call of whether there is even

a scintilla of government-related content. And it isn't just emails — this same analysis applies to all the different forms of communication over agency-owned devices or accounts.

What's the takeaway for public employees? Be careful what you put in that Microsoft Teams chat. If an applicable records request comes in, someone may have to read that entire chat thread with your co-worker that started out discussing a local program to spay and neuter stray cats but devolved into exchanging memes of an angry woman pointing at a cat that is very much not impressed. This is a funny example, but you can imagine some conversations getting into very personal details or expressing opinions you wouldn't necessarily want to be made public.

TIKTOK MADE ME DO IT

What about personal devices and accounts of agency employees? Even if a record pertains to the conduct of government, can it be considered "prepared, owned, used, or retained" by the agency if it was never on an agency device or account? The answer is yes — but only if the record was prepared, owned, used, or retained by an agency employee within their "scope of employment."

When an agency employee acts within the "scope of employment," the agency itself is acting.

As explained by the Washington Supreme Court, when an agency employee acts within the "scope of employment," the agency itself is acting. See *Nissen v. Pierce County*. For a writing (or post or text or video) to be within an employee's "scope of employment," at least one of the following three things must be true: 1) the job requires it, 2) the employer directs it, or 3) it furthers the employer's interests.

Did your boss direct you to do the ice bucket challenge as a morale booster and then request you post the video on your personal Facebook page? That video is likely a public record. Do your job duties include recruiting for open positions at your agency? The LinkedIn post sharing the job advertisement with your personal network is likely a public record.

Consider this scenario: A city employee responds to the TikTok challenge "Tell me you live in a small town without telling me you live in a small town" by posting on their personal TikTok account a newspaper police blotter entry stating: "Caller reported a vehicle parked at Harbor Pointe Blvd and 47th Pl W with its trunk open. Officer responded to the scene and closed the trunk." Was this within the employee's scope of employment? It is unlikely that their job required posting on TikTok or that the employer directed it. But couldn't you say that highlighting a low crime rate furthers the city's interest?

In *West v. City of Puyallup*, the court found that posting on a personal Facebook page could be a public record, but social media posts that merely offer general information about city activities only provide a "tangential benefit" to the city, and this was not enough to cause a post on a personal page to become a public record.

So the TikTok video? Probably not a public record since generally extolling the virtues of your community is likely only a "tangential benefit" to the city as the person's employer.

ONCE-PRIVATE WORDS IN THE PUBLIC DOMAIN

What about an employee complaining about their public job on their personal Facebook page which is only shared with a limited number of friends and is not set to "public," perhaps making allegations that one of their coworkers was harassing them? Under the scope of employment test, it probably was not a public record when it was first made, but what if one of the employee's Facebook "friends" shared a copy of the video with the employer? And what if the employer then used that video to open an internal investigation into the coworker's behavior?

Another element of the *Nissen* case discussed above involved whether the text message logs held by a private company (i.e., Verizon) were public records simply because they reflected the work of government (i.e., the public employee's work-related texts). The court pointed out that there was no allegation that the county evaluated, reviewed, or took any other action with the logs necessary to "use" them, stating: "Though they evidence the acts of a public employee, the call and text message logs played no role in County business as records themselves and were therefore not public records."

In the Facebook example, I would say that the employer has now "used" and "retained" that video in the performance of a governmental function, namely a public employee personnel issue. So while the video may have started out as a private or personal record that may have been evidence of acts of an employee, it did not become a public record until it was used by the public agency in public business.

...BUT MY HEAD WAS UNDER WATER

It can be quite a shock to new employees to learn just how much of their seemingly private digital conversations and activity are actually public records. Public employers can ease this transition by ensuring their employee training program includes robust public records training for agency employees and elected officials.

Sarah Doar, Legal Consultant, writes on many aspects of government business, including compliance with public records and opening meeting laws, land use issues, and environmental law. Sarah holds a B.A. in Biology from Case Western Reserve University and a J.D. with a certificate in environmental and land use law from Florida State University College of Law.
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ASK MRSC

Questions about the intersection of social media and public records

Every month, Ask MRSC receives hundreds of inquiries from Washington cities, towns, counties, and certain special purpose districts. The following is a sample of these inquiries and the answers provided by our skilled legal and policy consultants.

Our county has a good social media use policy for employees, and we also have a social media disclaimer notifying the public what types of comments won't be accepted (obscene, spam, etc). I have always been under the impression that comments cannot be disabled as function of the social media sites themselves, but is this the case? If our county could disable ALL comments on social media pages, are there any First Amendment or other concerns to be aware of?

Facebook and other social media are not "traditional public forums" such that the public would enjoy the greatest protections for free speech. Examples of traditional public forums are the steps of city hall and public sidewalks. Social media companies are private ventures that create a space for folks to communicate, and the companies themselves are free to regulate the speech that occurs on their private platforms.

A local government can use these private platforms to engage in its own "government speech." Think of social media in the same way as if your county placed a PSA on a billboard owned by a private company or broadcasted a PSA on privately owned television/cable channel. Just as there is no obligation that you allow folks to comment or interact with a PSA, there is no obligation under state law or constitutional law that you must allow comments/interactions on your county's social media posts.

If your county does allow comments/interactions, that means you have created what is known as a "limited public forum" because you have invited the public to speak on a particular topic. In such a case, you do have to be a little more careful, but your county can place reasonable content-based restrictions on speech — like no spam or obscene language — that you would not be able to if it was a traditional public forum. Further, if your county's social media pages do allow comments, the county must allow comments from anyone and cannot block a particular social media user simply because it disagrees with their comments.

Have a Question? Ask MRSC. Call us at (206) 625-1300 or (800) 933-6772 or submit your question online at mrsc.org

Ask MRSC

Is cloud backup the best way to retain social media for the purposes of public records management?

A few years ago, MRSC released the PRA & Records Management Technology Guide as a downloadable document via its website. This guide reviews the types of technology local governments are using to manage records. You can use the guide to search which tools provide social media archiving and then see which jurisdictions use that particular software. Then you can reach out to that jurisdiction and get firsthand feedback on their experience with the tool. You can also see the "deployment" style (i.e. whether the storage is cloud-based or on-site). Smarsh and Archive Social are two tools that are popular for social media archiving. Both allow for cloud storage, but Smarsh also has on-site storage.

Whether to use cloud versus on-site storage is a tricky question that changes over time as technology evolves and becomes more reliable. If an agency is storing records subject to retention periods on the cloud, it should have assurances and protections in the contract that address access, redundancies, back-ups, and liabilities in the event of storage failures.

Note that the social media sites themselves are not sufficient for records retention purposes. Facebook, Twitter, LinkedIn, etc., make no promises that your data will be there when you need it or that it will be unaltered from its original state. Further, they could be shut down without notice at any time and you would lose all data on the sites.

Are there laws/ regulations a public health special purpose district should be following for social media retention?

The preservation and destruction of public records is controlled by Chapter 40.14 RCW. Destruction is only allowed pursuant to the adopted retention schedules. There are two retention schedules health districts should be very familiar with: The first is the Local Government Common Records Retention Schedule (CORE) and the second is the Public Health Records Retention Schedule (PHRR). The PHRR also includes retention periods established by other statutes, like Chapter 70.02 RCW.

The CORE explains that "information provided on the agency's own website or social media channels... is retained according to the information's function and purpose." The function and purpose of most social media posts will be subject to the retention periods in Section 1.4 of the CORE, "Community and External Relations," but there may be other applicable categories depending on the content of the posts. For example, job opening announcements would likely be subject to Section 4.5 CORE, "Recruitment/Hiring."

Additionally, Section 1.1 of the PHRR covers "Community Relations" specific to health departments and districts. In particular, "Client Relations" might apply to certain social media interactions.

NEW LEGAL REQUIREMENTS FOR JOB POSTINGS

As of January 1, there are new legal requirements for compensation transparency in job postings of most public and private employers. This article highlights the new Washington State Department of Labor and Industries (L&I) Administrative Policy for the Washington Equal Pay and Opportunities Act (EPOA).

BY LINDA GALLAGHER, MRSC LEGAL CONSULTANT

TAKING STEPS TOWARD WORKPLACE GENDER EQUALITY

The EPOA, Chapter 49.58 RCW, prohibits gender pay discrimination and promotes workplace fairness by addressing employment practices that contribute to gender-based income disparities. Last year the legislature passed ESSB 5761, amending the EPOA.

The legislative intent in first enacting and then amending the EPOA includes taking steps towards gender equality by requiring employers to provide compensation and benefits information to applicants and employees and by prohibiting employers from seeking the wage or salary history of an applicant for employment in certain circumstances. According to RCW 49.58.005, there continues to be a gap in wages and advancement opportunities among workers in Washington, especially women. Historically, women have been offered lower initial pay than men for the same jobs even when their level of education and experience are the same or comparable.

NEW L&I ADMINISTRATIVE POLICY

The new L&I Administrative Policy ES.E.1 (issued November 30, 2022) provides comprehensive guidance about the EPOA, including the new pay transparency job posting requirements. Please review this policy for more details, as this article simply summarizes the new requirements.

L&I offers free customized consultations to help employers understand the impact EPOA provisions might have on their employment practices, and questions may also be submitted by phone to the Employment Standards Program at 360-902-6625.

SALARY AND BENEFITS INFORMATION NOW REQUIRED IN JOB POSTINGS

RCW 49.58.110, which is part of the EPOA, was amended last year, effective January 1, 2023. This new law requires all employers with 15 or more employees to disclose in their recruitment advertisements the wage scale or salary range for each job opening. Previously, this employer salary disclosure was required only if requested by an applicant or candidate for an open position. It is believed that pay transparency in job postings promotes and improves pay equality, especially with regard to gender disparities.

As outlined by L&I in its Administrative Policy ES.E.1, "wage scale or salary range" means both the minimum and maximum compensation the employer reasonably and genuinely expects to pay. It is not enough to include just a minimum salary, such as "at least $25 per hour," or to list just the top of a salary range. Subsection 5.1 of the policy (see page 5) includes this clarifying section:

> A wage scale or salary range should provide the applicant with the employer's most reasonable and genuinely expected range of compensation for the job. The range should extend from the lowest to the highest pay established by the employer prior to publishing the job posting. If the employer does not already have an existing wage scale or salary range for a position, a scale or range should be created prior to publishing the posting.

A general description of all benefits and other compensation to be offered to a successful candidate must also be included in these job postings. "Postings" include electronic and "hard copy" recruitment postings for specific available positions, whether posted directly by an employer or indirectly, such as with an outside recruiter or on a social media site like LinkedIn. Electronic job postings need not contain all the compensation and benefits information if links are included in the postings that point to more detailed required information and examples.

INTERNAL JOB OPENINGS FOR CURRENT EMPLOYEES

If there is no posting for an internal position, the same automatic compensation disclosure requirements do not apply. Instead, wage scale or salary range must be disclosed to current employees only upon request and when they are offered an internal transfer to a new position or promotion. See RCW 49.58.110(2). As is the case with the new requirements for job postings, this section does not apply to employers with fewer than 15 employees.

REMEDIES FOR VIOLATIONS

By reference to the remedy provisions for other violations of the EPOA, RCW 49.58.110(4) provides remedies for employer violations of the compensation and benefits transparency requirements of this statute. Job applicants and/or employees may pursue a complaint with the Director of L&I (see RCW 49.58.060) or bring a civil lawsuit for damages and/or injunctive relief. Note, however, civil cases will require proof of a pattern of violations. See RCW 49.58.070.

CONCLUSION

Both public and private employers should review their external and internal hiring practices to be sure they are compliant with the EPOA and the new requirements for job postings. If you have legal questions about how this new law may apply to your workplace, please consult with your agency's legal counsel.

All employers with 15 or more employees must disclose in their recruitment advertisements the wage scale or salary range.

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The Breakdown of Compost Product Purchasing

BY JOSH KLIKA, MRSC PROCUREMENT & CONTRACTING CONSULTANT

Beginning January 1, 2023, many cities, towns, and counties must look for opportunities to purchase compost products for specific projects through adoption of a Compost Procurement Ordinance (CPO), which is local legislation that sets forth an agency's plans to comply with compost procurement requirements.

For those agencies required to adopt a CPO, this article breaks down planning, purchase priorities, method of purchase, and reporting requirements for compost products. These are the next steps for implementing the new compost product procurement law.

PLANNING

As outlined in RCW 43.19A.150 (3), agencies that have adopted a CPO must plan to purchase compost products for four specified categories of compost uses:

- Landscaping projects;
- Construction and post-construction soil amendments;
- Applications to prevent erosion, filter stormwater runoff, promote vegetation growth, or improve the stability and longevity of roadways; and
- Low-impact development and green infrastructure to filter pollutants or keep water on site, or both.

When evaluating these projects, unless exemptions provided in RCW 43.19A.120(2) apply for product availability, quality, safety, or cost, agencies should make the decision to purchase compost products. If no exemptions apply, then the priorities to purchase compost products must next be considered.

PURCHASE PRIORITIES

As summarized in both RCW 43.19A.120(4) and RCW 43.19A.150(6), purchase priority exists for:

- Sourcing compost products that are produced locally,
- Ensuring products are certified by a nationally recognized organization, and
- Favoring providers whose products are derived from municipal solid waste compost programs that meet quality standards.

To meet these priorities, my recommendation is to utilize the Washington State Department of Ecology's (DOE) Compost webpage, which both identifies local providers and locates compost products available for purchase. The compost facilities identified on this webpage meet regulatory standards for composting facilities as set by the DOE in WAC 173-350-220.

The agency should next determine how it will source the compost.

METHOD OF PURCHASE

To source compost materials for purchase, there are two approaches for an agency to consider — using statutorily required estimated bid limits or piggybacking on another agency's contract.

Use estimated bid limits: The first method is to follow your agency's specific statutory requirements based on the estimated bid limits. MRSC's website offers a Find Your Contracting Requirements tool,

which can help you determine your specific statutory requirements. Also, when purchasing compost materials, your agency could consider including the preference available in RCW 39.34.040(1).

Use piggybacking: The second approach would be to conduct joint purchasing or use another agency's compost procurement contract (also known as "piggybacking"). This option to conduct joint procurement is called out in RCW 43.19A.150(7) and is also provided with piggybacking as a general authority for agencies under RCW 39.34.030.

After a purchase method has been determined, the final step an agency must undertake requires reporting on compost purchases made.

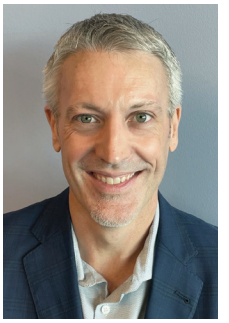
BIANNUAL REPORTING REQUIREMENTS

Agencies with a CPO must submit a report to the DOE every two years beginning in 2024, as set forth in RCW 43.19A.150(5).

Elements to be included in this report are:

- The volume and cost of compost products purchased throughout the year, and
- The source of compost.

An agency should create a method to track this data internally. One option could be to have these data points (volume, cost) included in any purchase agreements with compost product providers (source), essentially turning the data into a contract deliverable and ensuring that it is consistently tracked.



Josh Klika, Procurement & Contracting Consultant, has a broad public procurement background with over 20 years in state and local governments.
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"Miss Veedol" Bellanca CH-400 Skyrocket (replica)
Sampsonsimpson20, CC BY-SA 3.0 <https://creativecommons.org/licenses/by-sa/3.0>, via Wikimedia Commons

Washington Trivia Answer

Although intended to land in Spokane, Pangborn belly-landed in **Wenatchee** after a leg of 4,500 miles, in 41 hours and 13 minutes.

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