

requestor. No agency should print paper copies of public records unless specifically requested by the requestor.

b. “reasonably translatable records.” The concept of reasonably translatable records is used where existing electronic records are converted from one electronic format to another. That concept should *not* be applied to the copying of paper records, which involves the creation of a new electronic image of an existing paper document. Nor should the concept be used where a requestor asks for paper copies of electronic records (which are created by printing). The existing model rules and parts of the AGO proposal are confusing in several places and should be changed:

- The AGO proposal adds language to WAC 44-14-05001 that equates scanning (copying) paper documents with translating electronic records into another format. AGO Proposal at 37.
- The AGO proposal adds language to WAC 44-14-05001 that erroneously states that agencies have no obligation to obtain the equipment and software necessary to copy public records. AGO Proposal at 38.
- Existing WAC 44-14-05002(2) discusses copying paper records under the heading of “reasonably translatable electronic records,” conflating the two concepts that should be separated.
- Existing WAC 44-14-05002(2)(c)(i) erroneously addresses “paper-only” records as an example of “reasonably translatable” electronic records.

WCOG proposes revising the rules such that copying paper records is only addressed in WAC 44-14-050. All references to “scanning” should be deleted from WAC 44-14-05001 and -.05002.

Agencies may point out that various appellate opinions make erroneous factual statements about the alleged difference between copying and scanning. But appellate opinions are only precedent on legal issues, not factual matters. An incorrect factual statement in an appellate opinion about how a digital copier works is not legal precedent any more than an incorrect mathematical statement that two plus two equals five would be precedent. An incorrect factual statement about technology in a judicial opinion only matters to the parties to that particular case, who may have problems with collateral estoppel.

WCOG notes that there are still several sections of the PRA that purport to distinguish between “photocopying” and electronic copies of public records. *See* RCW 42.56.070(7) (“Each agency may establish, maintain, and make available for public inspection and copying a statement of the actual costs that it charges for providing photocopies or electronically produced copies, of public records...”); RCW 42.56.120(2)(b) (agency shall not charge in excess of “Fifteen cents per page for photocopies of public records, printed copies of electronic public records when requested by the person requesting records, or for the use of agency equipment to photocopy public records”); RCW 42.56.130 (“photocopies or electronically produced copies of public records”). None of these provisions recognize any legal distinction between “photocopying” and scanning paper records to create electronic copies. Unless and until these obsolete provisions are updated,

references to “photocopying” should be understood to refer to machines that scan paper records and then print a paper copy.

c. Databases are public records that can be copied and redacted. There are unfortunately common misperceptions about how databases are treated the PRA. Many agencies do not understand that an entire database is a “writing” and a “record” that can be redacted and copied. In fact, because databases consist entirely of computer data organized into fields, records and tables, they are the *easiest* type of public record to redact. Agencies should not rely in outdated and/or misguided decisions that suggest otherwise, such as *Mitchell v. Department of Corrections*, 164 Wn. App. 597, 260 P.3d 249 (2011). There, the requester asked for records in a computer database. The Court of Appeals upheld the Department’s refusal to produce the records in electronic format:

The requested records are stored in a computer database and ostensibly include information that must be redacted. Requiring DOC to disclose these records electronically would force the agency to print the records, redact them, and then scan them back into electronic format.

Mitchell, 164 Wn. App. at 607. The suggestion that one would redact a database by printing it onto paper reflects a lack of understanding about how databases work, and the fact that databases are easily redacted using software tools. The rules should indicate that databases should always be redacted electronically.

Furthermore, databases—even very large databases—are just computer files that can be copied onto a sufficiently large storage device and redacted. More than 10 years ago Snohomish County erroneously argued that its land use database “AMANDA” could not be copied or redacted. The requestor proved that it was not only possible, but actually very easy.

The model rules need to clearly state that a database is a public record that can be copied and redacted, and that requestor’s are not required to seek customized access to these records. The AGO proposal does not make these points sufficiently clear.

d. WCOG’s proposed revised rule. WCOG proposes amending WAC 44-14-050(3) as follows:

**WAC 44-14-050 Processing of public records requests—
Electronic records.**

(1) Scanning paper records. (Name of agency) shall copy existing paper records by scanning such records to create electronic copies as PDF files, whether or not the requestor wants electronic copies or paper copies.

~~((4))~~ (2) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

~~((2))~~ **(3) Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the (name of agency) and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by ~~((WAC 44-44-07003))~~ RCW 42.56.120 and 42.56.130. The fee schedule is available at (agency address and web site address).

~~((3))~~ **(4) Databases and customized electronic access ~~((to databases))~~ services.** A database is an organized collection of computer data existing in one or more computer files. Databases make it easy for agencies to collect, organize and manipulate large amounts of data. Because the information in databases is contained in organized fields, records and tables it is easier to access, search and manipulate than other forms of information. A database is a "writing" and therefore a "public record" that can be copied and redacted electronically. If a requestor asks for a copy of a database, and provides (or pays for) a sufficient storage device or online account to receive a copy, the agency must provide a redacted electronic copy.

While not required, and with the consent of the requestor, the (name of agency) may decide to provide customized ~~((access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested))~~ electronic access services and assess charges under RCW 42.56.120(2)(f). A customized service charge applies only if the (name of agency) estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other purposes. The (name of agency) may charge a fee consistent with RCW ~~((43.105.280))~~ 42.56.120 (2)(f) for such customized access. The fee schedule is available at (agency address and web site address).

WAC 44-14-05001 Access to electronic records.

WCOG has no objections to the AGO's proposed revisions to the first paragraph of WAC 44-14-05001.

a. Copying paper records is not translation of electronic records. As explained in WCOG's comments on WAC 44-14-050 (above), the concept of reasonably translatable records should not be applied to copying paper records. WCOG has deleted the sentence, added by the AGO proposal to the second paragraph of WAC 44-14-05001, which states that scanning paper records does not create a new public record.

b. Most agencies should make records available over the internet. The AGO proposal at 38 includes a new fourth paragraph relating to delivering electronic records to the requestor. The AGO proposal notes that delivery can be accomplished in several ways. However, in WCOG's experience many agencies that could easily provide records over the internet simply refuse to do so, insisting on providing batches of records on CDRs or DVDs sent in the mail. There is no valid reason for these practices, particularly where public records officers are required to receive training on electronic records. Agencies that don't have their own web portal—or even their own website—can and should use any of several commercial internet delivery services that are available in 2017. The rule needs to be changed to state that most agencies should use internet delivery unless the requested records are small enough to send by email.

c. Agencies must obtain suitable equipment and software. The AGO Proposal at 38 would add a paragraph to the end of WAC 44-14-05001 that erroneously states that agencies are not required to buy new software, hardware or licenses in order to provide access to electronic public records. When the PRA was enacted in 1972 photocopiers were significantly more expensive than scanning technology is today. But in 1972 agencies could not avoid their duty to provide fullest assistance to requestors by refusing to obtain a photocopier. The PRA requires all agencies to adopt procedures that provide for fullest assistance to requestors and the most timely possible action on requests for public records. **In 2017, fullest assistance and most timely possible action mean, at an absolute minimum, scanning paper documents to create electronic copies.** There is no small agency exception to the requirement that agencies appoint and train a PRA officer, which includes producing electronic documents. Nor is there any small agency exception to the requirement that agencies adopt and enforce reasonable rules. Consequently there is no legal basis for the AGO to propose a small agency exception to an agency's obligation to obtain suitable equipment and software. Furthermore, the purpose of the model rules is to provide effective guidance for agencies statewide. The model rules should not be watered down just because some weed control district might still own a mimeograph machine. The new sixth paragraph proposed by the AGO should be rejected.

d. WCOG's proposed revised rule. WCOG proposes amending the rule as follows:

WAC 44-14-05001 Access to electronic records. The Public Records Act does not distinguish between access to paper and electronic records. There is no legal or factual difference between "copying" and "scanning" paper records. Modern copiers and multifunction document machines create copies of paper documents by first scanning the document to create a digital image and then print the image onto paper, if that output is selected by the user. The PRA requires agencies to provide copies of public records, regardless of the form of the writing in which the record is contained. Scanning paper records is just a modern method of copying paper records. Scanning a paper record does not create a new public record but merely a copy of an existing public record. RCW 42.56.120(1).

~~((Instead, t))~~ The act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be

obtained or translated." RCW ~~((42.17.020(48) (incorporated by reference into the act by RCW 42.56.010)))~~ 42.56.010(4). Many agency records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW ~~((43.105.250))~~ 43.105.351 provides: "It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public."

In general, an agency shall provide electronic records in an electronic format if requested in that format, if it is reasonable and feasible to do so.¹ An agency may translate a record into an alternative electronic format at the request of the requestor if it is reasonable and feasible to do so. Such translation into an alternative format does not create a new public record for the purposes of copying fees. RCW 42.56.120(1). An agency can provide links to specific records on the agency's public internet web site. RCW 42.56.520. An agency shall not impose copy charges for access to or downloading records that the agency routinely posts on its internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records by other means. RCW 42.56.120 (2)(e).

Reasonableness and technical feasibility ((is)) are the touchstone for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the agency might consider customized access. ((See WAC 44-14-05004. An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC 44-14-050(3).))

Delivering electronic records can be accomplished in several ways or a combination of ways. For example, an agency may post records on the agency's internet web site and provide the requestor links to specific documents; make a computer terminal available at the agency so a requestor can inspect electronic records and designate specific ones for copying; send records by email; copy records onto a CD, DVD or thumb drive and mail it to the requestor or making it available for pickup; upload

records to a cloud-based server, including to a file transfer protocol (FTP) site and send the requestor a link to the site; provide records through an agency portal; or, through other means. Most agencies should have the ability to provide electronic records by internet transmission, either through the agency's own web portal or by using a commercial file delivery service such as Drop Box. Email delivery is the preferred method of delivery for smaller data files. There may be size limits with the agency's email system or the requestor's email account with respect to the volume, size or types of emails and attachments that can be sent or received.

What is reasonable and technically feasible for copying and delivery of electronic records in one situation or for one agency may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC 44-14-05003. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case...

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records.

a. Agencies are required to keep records organized. It is a common misperception that an agency's obligations under the PRA begin when someone requests records. In fact, the PRA requires agencies to keep public records organized by adopting and enforcing rules. RCW 42.56.100. Nonetheless, many agencies have failed to adopt proper policies and have allowed large amounts of disorganized public records to accumulate, particularly in email accounts.

The existing rule reinforces the expectation of agencies and requestors that agency records may be disorganized, requiring keyword searches to locate responsive records. WCOG proposes additional language to clarify that (i) agencies are supposed to keep their records organized and (ii) the fact that records may have become disorganized does not make the records unlocatable.

b. Copying paper records is not translation of electronic records. As explained in WCOG's comments on WAC 44-14-050 (above), the concept of reasonably translatable records should not be applied to copying paper records. Existing WAC 44-14-05002, like WAC 44-14-05001, contains language about scanning paper documents that does not belong in this rule. WCOG proposes deleting that language from the rule.

c. PDF is a standard file format. Existing WAC 44-14-05002 and the AGO Proposal at 39 contain two references to "Adobe Acrobat PDF®." WCOG proposes revising these rules to reflect the fact that PDF is an open file standard that does not require Adobe software.

d. **WCOG's proposed revised rule.** WCOG proposes amending WAC 44-14-050002 as follows:

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records. (1) **"Reasonably locatable" electronic records.** The act obligates an agency to provide nonexempt "identifiable ... records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC 44-14-04002(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

Agencies are required to adopt and enforce reasonable rules to protect public records from disorganization or destruction. RCW 42.56.100. An agency's failure to comply with this requirement does not relieve the agency from its obligation to produce reasonably locatable records or make any public record not reasonably locatable.

In general, a "reasonably locatable" electronic record is one which can be located by the subject matter of the record or with typical search features and organizing methods contained in the agency's current software. For example, a retained email containing the term "XYZ" is usually reasonably locatable by using the email program search feature. However, ~~((an))~~ some email search ~~((feature has))~~ features have limitations, such as not searching attachments, but ~~((is))~~ are a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained emails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's email program, such as a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a database of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the database to determine which businesses are publicly traded corporations.

(2) "Reasonably translatable" electronic records. The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine, or scanning it to create a PDF file (~~into Adobe Acrobat PDF®~~). Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take ~~((reasonable))~~ steps to translate the agency's original into a useable copy for the requestor, if it is reasonable and feasible for it to do so.

The "reasonably translatable" concept typically operates in two ~~((three kinds of))~~ situations:

~~((a))~~ An agency has only a paper record;

~~((b))~~ (a) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or

~~((c))~~ (b) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

~~((i))~~ **Agency has paper only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual or statutory cost for scanning. See RCW 42.56.120 and WAC 44-14-07003. Providing providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.

~~((ii))~~ (i) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record...

WCOG has no comments on the AGO's proposed revisions to WAC 44-14-05002(2)(ii) or (iii), except that those subsections should be renumbered when subsection (2)(i) is deleted. WCOG has no comments on the AGO's proposed revisions to WAC 44-14-05002(3).

WAC 44-14-05003 Parties should confer on technical issues.

WCOG has no comments on the AGO proposed revisions to WAC 44-14-05003.

WAC 44-14-05004 Customized access.

WCOG has no comments on the AGO proposed revisions to WAC 44-14-05004.

WAC 44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information."

WCOG has no comments on the AGO proposed revisions to WAC 44-14-05005.

**EXEMPTIONS
WAC 44-14-060 et seq.**

WCOG proposes revising the existing rule as follows:

WAC 44-14-060 Exemptions.

(1) The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of agency) for inspection and copying:

(List other laws)

(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.

(3) The (name of agency) will adopt and enforce specific rules for organizing its public records to prevent commonly-asserted exemptions from causing excessive delay or disruption in responding to a PRA request.

WAC 44-14-06001

WCOG concurs in the AGO's proposed amendments to WAC 44-14-06001.

WAC 44-14-06002

a. No "summary" of exemptions is needed. The AGO proposal would repeal much of WAC 44-14-06002 (summary of exemptions). The AGO proposal notes that the comments can become quickly outdated as the legislature amends or enacts exemptions. WCOG concurs, and also notes that the purpose of the model rules is not to interpret PRA exemptions or case law, but to help agencies comply with the PRA, specifically including RCW 42.56.100. Deletion of the incomplete and outdated summary of exemptions allows the model rules to focus on their actual purpose.

WCOG concurs in the AGO's proposed additional paragraph at the end of section 06002, which is included in WCOG's proposed rule. WCOG proposes to rename and revise WAC 44-14-06002 as follows:

WAC 44-14-06002 ((Summary of e)) Exemptions. ((4))
General.)) The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. For a discussion of several commonly used exemptions, see these documents on the attorney general's office web site: *Open Government Resource Manual* at <http://www.atg.wa.gov/open-government-resource-manual> (the manual contains a discussion and summaries of many exemptions, links to statutes, and links to many court decisions and several attorney general opinions); the code reviser's annual list of exemptions in the state code, available at <http://www.atg.wa.gov/sunshine-committee>; and a guidance document on the attorney-client privilege and work-product doctrine, available at <http://www.atg.wa.gov/model-rules-public-disclosure>.

b. Agencies must have rules to deal with common exemptions. RCW 42.56.100 requires agencies to “adopt and enforce reasonable rules and regulations...[to] provide for the fullest assistance to inquirers and the most timely action” on PRA requests. In order to comply with this statute agencies must adopt and enforce specific rules for organizing public records to prevent common exemptions from causing excessive delay or disruption in responding to a PRA request. WCOG is not aware of any agency that has actually adopted such rules. Consequently, responses to many PRA requests take much longer than they should.

For example, WCOG is not aware of any agency that requires its attorneys to identify privileged communications as such, or to keep privileged information (or work product) separate from nonexempt records. As a result, agency responses to requests for records are substantially delayed by the agency's need to review and redact potentially privileged records, and excessive redaction is commonplace. Many agencies and their attorneys make little or no effort to organize their litigation files unless and until a PRA request is made. These agencies are violating RCW 42.56.100 by failing to adopt and enforce rules that would produce the most timely possible action on requests for records.

WCOG suggests adopting model rules to address the organization of records in light of various commonly-asserted exemptions. The following proposed rules address just a few of the most common public record exemption and organization problems that WCOG has encountered. This is far from an exhaustive list. Each agency that routinely redacts information pursuant to certain exemptions should adopt and enforce specific rules to organize its records to minimize the need to review and redact information subject to such exemptions.

c. Attorney-client privilege. Agencies need to adopt and enforce rules that require agency attorneys to clearly document each legal matter, identify the attorney and client officer in charge, state the subject matter, and provide a matter number or name to be consistently used on all records. Agencies also need to adopt and enforce rules for the organization of legal files to

minimize the need for time-consuming review and to avoid unnecessary redaction and unnecessary arguments about the scope of attorney-client privilege exemptions.

(1) **Attorney-client privilege.** Agency legal files are subject to public records requests, and must be produced to the extent they contain material that is not privileged, work product, or otherwise exempt from disclosure. Agencies and their attorneys should recognize that failure to properly organize and identify exempt material in legal records can cause unnecessary and time-consuming delays in responding to public records requests, and can interfere with the agency's obligation to provide fullest assistance to requesters. Accordingly, agencies and their attorneys shall assure proper organization of legal files, and identification of privileged or potentially privileged material, including without limitation through the following practices.

Each agency's attorney, prosecuting attorney or law department shall maintain a list, in a common, convenient electronic format, of all agency litigation and discrete identifiable legal matters, including (i) the case name and court, if any, (ii) a file name or number to be used in all agency documents relating to the matter, (iii) the attorney(s) in charge of the matter, and (iv) the agency personnel who have decision-making authority and/or access to privileged information about the matter. The list shall be available to all agency employees as well as the public, and to the extent possible shall not contain any exempt information whatsoever. Each agency's PRA officer shall ensure that the agency's legal matter list is kept up to date, and that agency attorneys and their staffs are including the required file name and/or number on all related records.

Agency attorneys should, whenever possible, identify attorney-client privileged records as such by (i) making a conspicuous notation such as "****ATTORNEY-CLIENT PRIVILEGED ****" in the subject line, header or footer of every privileged document, and (ii) identifying the legal matter by its approved file name or number. Agency attorneys shall not designate records as privileged absent a well-founded belief that the records are privileged. Agency attorneys should avoid mixing privileged or otherwise protected information and non-exempt information in a single document, and should encourage those with whom they communicate to segregate privileged communications into separate records. Where privileged legal advice is mixed with non-exempt communications, the privileged portion of the document should be clearly identified so that it can be redacted without legal review.

d. Work product. Agencies need to adopt similar rules for work product.

(2) **Records relevant to a controversy (work product).** Each agency's PRA officer shall ensure that the agency's list of legal matters required by subsection (1) is kept up to date, and that agency attorneys

and their staffs are including the required file name or number on all records that contain work product. Because the exemption in RCW 42.56.290 only applies to records that are relevant to a controversy, no agency will redact any information pursuant to that exemption unless and until the agency has specifically identified the relevant controversy and/or updated the agency's legal matter list accordingly.

Agency attorneys should, whenever possible, identify records that contain attorney work product as such by (i) making a conspicuous notation such as "****ATTORNEY WORK PRODUCT - PRIVILEGED ****" in the subject line, header or footer of every document containing work product, and (ii) identifying the legal matter by its approved file name and/or number. Agency attorneys shall not designate records as exempt under RCW 42.56.290 absent a well-founded belief that the records are exempt. Agency attorneys should avoid mixing privileged legal advice, including attorney theories and mental impressions exempt under RCW 42.56.290, with ordinary work product in a single document.

e. Litigation correspondence and pleading files. Litigation involving agencies is a frequent subject of PRA requests. It is a well-established best-practice for attorneys to maintain organized chronological files of (i) pleading and (ii) external correspondence, including email, relating to a legal matter. Yet in WCOG's experience many agency attorneys fail to maintain organized correspondence and pleading files, requiring searches for responsive records that should already be in organized files. Agencies need to adopt rules requiring their attorneys to keep organized chronological correspondence and pleading files in all agency legal matters.

(3) Litigation correspondence and pleading files. Each agency attorney shall maintain organized chronological files of (i) all external correspondence, including email, and (ii) all pleadings, for each separate agency legal matter. Such files shall be kept in electronic format and in the possession of the agency itself, and shall not contain any exempt information so that copies of the files can be quickly provided to requestors without the need for any review of the records.

f. Common Interest and Joint Defense Agreements. WCOG has seen numerous examples of agencies claiming that records shared with other agencies or parties are exempt under the common interest and/or joint defense doctrines where the agencies have no written agreement or other documentation to support such claims. WCOG has also seen written common defense agreements that made no attempt to define the scope of the underlying common interest. WCOG has seen agencies erroneously assume that a common interest agreement makes all communications between the parties privileged, even where the parties have conflicting rights and liabilities on other issues. The failure to properly document the existence of an alleged common interest resulted in litigation in *Kittitas County v. Allphin*, 195 Wn. App. 355, 381 P.3d 1202 (2016), *review granted*, (2017). Although it is possible to create a common interest or joint defense agreement without a written agreement, such practice should be prohibited.

(4) Common interest and joint defense agreements. No record shared with any party or person outside the agency shall be withheld as exempt under either the common interest or joint defense doctrines unless the attorneys for all parties to the common interest or joint defense have stated in a written agreement (i) who the parties to the agreement are, (ii) what the specific common interests and/or joint defenses are, and (iii) that the parties intend and agree to share confidential information within the scope of the specifically identified common interests and/or joint defenses. Whenever records subject to a common interest or joint defense claim are requested the agency will provide the requestor with a copy of the written agreement as part of the explanation of redactions required by RCW 42.56.210(3). The written agreement shall be filed in the correspondence file required by subsection (3). The written agreement shall not contain any exempt information and shall not be redacted. Whenever a party to a joint defense or common interest agreement sends confidential information to another party pursuant to the agreement the shared document(s) shall have a conspicuous notation that the information is governed by the specific agreement identified by name and date.

g. Passwords. Agencies need to adopt rules to prevent passwords from requiring redaction of otherwise nonexempt records. WCOG recently had an agency redact old conference call passwords from dozens of nonexempt email records rather than simply changing the password. Many modern conference call systems can generate a different password for each conference call, eliminating the need to change passwords manually. Otherwise, passwords should be sent in separate documents that serve no other purpose except to convey or record a password. It is particularly important to avoid the need to redact passwords from emails, which could otherwise be produced in native format and without redaction.

(5) Passwords. Each agency shall adopt and enforce rules to prohibit the inclusion of exempt passwords (or access codes) in documents created for any reason other than to communicate or document such passwords. When a non-exempt record containing an exempt password is requested the PRA officer will instruct the person whose password is at issue to change the password and to avoid including passwords in nonexempt records in the future. When a non-exempt email record containing an exempt password is requested the agency will instruct the person whose password is at issue to change the password and then produce the email without redacting the password.

Each agency shall instruct its officers and employees who use conference call systems that conference call passwords and access codes will not be redacted under RCW 42.56.420(4) and that such passwords should be changed on a regular basis.

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS WAC 44-14-070 et seq.

WAC 44-14-070

The AGO proposal makes extensive changes to WAC 44-14-070. WCOG concurs in those changes except as follows:

a. Statutory default costs. The AGO proposal adds a new paragraph (3) to address statutory default costs (shown below). WCOG proposes revisions to the last sentence of this new paragraph as follows (because this is a new paragraph the underlining in the AGO proposal is not shown here):

(3) *(Alternative) Statutory default costs.* *(If the agency determines it will not charge actual costs for copies but instead will assess statutory costs, it must have a rule or regulation declaring the reasons that determining actual costs would be unduly burdensome).* The (name of agency) is not calculating actual costs for copying its records because to do so would be unduly burdensome for the following reasons: The (name of agency) does not have the resources to conduct a study to determine actual copying costs for all its records; to conduct such a study would interfere with other essential agency functions; and, through the legislative process, the public and requestors have commented on and been informed of authorized fees and costs provided in the Public Records Act including RCW 42.56.120 and other laws. Therefore, in order to timely implement a fee schedule consistent with the Public Records Act, it is more cost efficient, expeditious and in the public interest for the (name of agency) to adopt the state legislature's approved fees and costs ~~((for most of the (name of agency) records, as authorized in RCW 42.56.120 and as published in the agency's fee schedule.))~~ for the agency records, as authorized in RCW 42.56.120 except for unique identified records for which actual costs can be determined, or where the agency decides to waive charging costs.

b. Processing payments. The AGO proposal adds new heading (5) for "processing payments" and adds language relating to customized service. WCOG concurs in those changes. However, there is no language in the PRA that requires pre-payment of all costs, only payment prior to providing an installment. WCOG proposes deleting text from the existing rule as follows:

(5) Processing payments. Before beginning to make the copies or processing a customized service, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may ~~((also))~~ require the payment ~~((of the remainder of the copying costs before providing all the records, or the payment))~~ of the costs of copying an installment before providing that

installment. The (name of agency) will not charge sales tax when it makes copies of public records.

WAC 44-14-07001

The AGO proposal makes extensive changes to WAC 44-14-07001. WCOG concurs in those changes except as follows:

c. Copy charges. The AGO proposal makes extensive revisions to subsection (2) relating to actual costs. WCOG concurs in those changes.

However, the existing rule contains text suggesting comparison with commercial copying centers. This text should be deleted because this advice is not based on actual or default costs. Also, the rule should be revised to include the requirement in RCW 42.56.120 that an agency "shall use the most reasonable cost-efficient method available to the agency as part of its normal operations."

WCOG proposes revising the existing rule as follows:

~~((If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.3 A price list with no analysis is insufficient))²~~

The actual costs include the actual cost of the paper and the per page cost for use of agency copying (including scanning) equipment; the actual cost of the electronic production or file transfer of the record; the use of any cloud-based data storage and processing service; costs directly incident to the cost of postage or delivery charges and the cost of any container or envelope used; and, the costs directly incident to transmitting such records in an electronic format, including the cost of any transmission charge and the use of any physical media device provided by the agency. An agency may include staff salaries, benefits or other general administrative or overhead charges only if those costs are directly related to the actual cost of copying the public records. Staff time to copy and send the records may be included in an agency's actual costs. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. ((An agency should generally compare its copying charges to those of commercial copying centers.)) When calculating any fees authorized under this section, an agency shall use the most reasonable, cost-efficient method available to the agency as part of its normal operations.

2. The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. See RCW ((42.17.300/)) 42.56.120. ("No fee shall be charged for locating public documents and making them available for copying.")((.))

d. Estimate of costs for requestor. The AGO proposal adds a new paragraph (5) to address estimates of costs (shown below). WCOG proposes revisions to the new AGO paragraph, for clarity, as follows (because this is a new paragraph the underlining in the AGO proposal is not shown here):

(5) **Estimate of costs for requestor.** If a requestor asks, an agency must provide a summary of the applicable charges, or the cost of customized service charges, before copies are made and the requestor may revise the request to reduce ~~((the number of copies to be made, thus))~~ the applicable charges. RCW 42.56.120(2)(f). An agency must also provide a requestor, in advance, information concerning customized service charges if the request involves customized service. RCW 42.56.120(3).

e. Informing requestor that inspection is free. The AGO proposal would delete a portion of the existing rule as shown here:

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed ~~((, provided that the requestor is informed that inspection is free))~~. Informing the requestor on a request form that inspection is free is sufficient.

WCOG opposes this change because, without the deleted text, the last sentence does not make sense.

f. Use of outside vendor. The AGO proposal adds new text to paragraph (7) relating to outside vendors. WCOG concurs in the AGO's changes with additional changes. The AGO proposal contains an erroneous citation to "RCW 42.56.080(4)" that should be changed to "RCW 42.56.120(4)." WCOG proposes an additional sentence addressing another example of an alternative fee arrangement.

WCOG proposes revising the existing rule as follows:

~~((5))~~ (7) **Use of outside vendor.** Typically an agency makes the requested copies. However, an agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor.³ An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. This is an example of where any agency might enter into an alternative fee arrangement under RCW 42.56.120(4). Another example of a possible alternate fee arrangement involves recurring (i.e. monthly) requests for the same records, which could be provided for a set fee to the requestor without the need for a separate request. An agency cannot charge the default ((fifteen cents per page rate)) charges

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when its "actual cost" at a copying vendor is less. The default rates are only for agency-produced copies. RCW ((42.17.300A)) 42.56.120.

3. ((See also Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).)) Benton County v. Zink, 191 Wn. App. 269, 361 P.3d 801 (2015).

WAC 44-14-07003

WCOG concurs in the AGO's proposed repeal of WAC 44-14-07003.

WAC 44-14-07004

WCOG concurs in the AGO's proposed revisions to WAC 44-14-07004.

WAC 44-14-07005

WCOG concurs in the AGO's proposed revisions to WAC 44-14-07005.

WAC 44-14-07006

WCOG concurs in the AGO's proposed revisions to WAC 44-14-07006.

REVIEW OF DENIALS OF PUBLIC RECORDS WAC 44-14-080 et seq.

WCOG has no comments on WAC 44-14-080.

WCOG has no comments on WAC 44-14-08001.

WCOG has no comments on WAC 44-14-08002.

WCOG has no comments on WAC 44-14-08003.

The AGO proposal would add a sentence to WAC 44-14-08004 that acknowledges that this rule is just a brief description of judicial review under the PRA. AGO proposal at 53. The AGO has proposed revisions to subsections (1), (3), (5), (6) and (7). AGO proposal at 53-56.

The model rules were not intended to address PRA litigation, and the AGO has no authority to make authoritative pronouncements on matters of PRA law. Furthermore, the existing rule is inaccurate in a number of respects, and the AGO proposal does not correct these problems. WCOG believes this entire section should be repealed.

If the entire section is not repealed then a number of revisions are needed.

(1) Seeking judicial review. The AGO proposal would add a sentence to subsection (1), footnote 1 about the discussion of "final action" in *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014). The *Hobbs* case is a poorly-written and confusing decision of one division of the Court of Appeals, and that case has already been questioned or rejected by other appellate courts.

There are numerous pending cases in which the scope and meaning of *Hobbs* is being litigated. It is not clear what the *Hobbs* court meant by final agency action, and the quoted reference to “final action” proposed by the AGO does nothing to alleviate that confusion. The AGO’s proposed citation to *Hobbs* should be rejected.

The second paragraph of WAC 44-14-08001(1) should be revised to clarify that the act provides a speedy court hearing on whether the agency has violated the act and to remedy such violations quickly.

The AGO has proposed a new sentence in the second paragraph that “[t]he court proceeding is a civil action, seeking judicial review.” AGO proposal at 53. WCOG believes this text does not go far enough to rebut the common misconception that the PRA creates only a special statutory proceeding. Furthermore, the term “judicial review” commonly means judicial review of a decision of a quasi-judicial tribunal. The Supreme Court has clarified that an action under the PRA is an ordinary civil action, that the PRA does not create a special proceeding exclusive of other civil procedures, and that normal civil procedures are available in PRA cases. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104-106, 117 P.3d 1117 (2005). WCOG proposes revising the rule to explain this more completely.

(2) Statute of limitations. WCOG has no comments on subsection (2) (except that the entire section is unnecessary and should be repealed).

(3) Procedures. The AGO proposal adds a sentence to subsection (3) about a requestor’s option to file an ordinary civil case. WCOG proposes minor revisions to this subsection. The proposed reference to the requestor filing a motion after initiating a PRA case is misleading because a motion is only one of several litigation events that might follow the filing of PRA case. WCOG also proposes moving footnote 4 down to include the new sentence. WCOG concurs in the AGO’s proposed deletion of the last sentence and footnote 6.

(4) Burden of proof. WCOG has no comments on subsection (4) (except that the entire section is unnecessary and should be repealed).

(5) “Types of cases.” Existing subsection (5) incorrectly states that the PRA “provides three mechanisms” for court review in PRA cases. This language reinforces the erroneous perception that the PRA creates only particular statutory procedures and provides only specifically listed remedies. In fact, every aspect of the liberally-construed PRA can be enforced in superior court, and PRA cases are ordinary civil cases. In addition to liability for wrongfully withholding records an agency can be held liable for failing to conduct an adequate search,³ failing to provide

³ *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011).

a sufficient exemption log,⁴ failing to provide fullest assistance to requestors⁵ and/or failing to adopt proper procedures for PRA compliance.⁶

Subsection (5) needs to be revised to clarify that the special procedures and remedies mentioned in the PRA are in addition to ordinary civil procedures and remedies.

(6) “In camera” review. WCOG concurs in the AGO’s proposed revisions to subsection (6). However, WCOG proposes re-numbering the subsection to “(5)(c)” because in camera review is just another remedy under the PRA. In addition, the existing rule contains an incorrect citation to “& 588” in footnote 8 that should be deleted.

(7) Attorneys’ fees, costs, and penalties to a prevailing requestor. Because subsection (7) also relates to remedies under the PRA, WCOG proposes re-numbering this subsection to “(5)(d).” See above.

The AGO proposal makes minor revisions to the first paragraph of existing subsection (7). Those revisions are acceptable and are shown in WCOG’s proposed rule (below).

The AGO proposal adds a new paragraph relating to body cameras and inmates. AGO Proposal at 55. Those revisions are acceptable and are shown in WCOG’s proposed rule (below).

The existing subsection (7) contains language that narrowly interprets the term “prevailing” requestor. This language does not acknowledge that a requestor can be partially prevailing and still be awarded attorney fees. In addition, the language is based on old case law and erroneously suggests that an agency must wrongfully withhold a record in order to be liable for attorney fees. In fact, an agency can be held liable for the requestors attorney’s fees for a number of reasons, including failing to produce a proper exemption log. In *Lakewood*, 182 Wn.2d 87, the agency brought an unsuccessful declaratory judgment action against the requestor. The requestor was awarded attorney fees even though he was not the plaintiff and he did not obtain any relief under the PRA. Rather than attempt to update this part of the rule to address all the nuances of attorney’s fees under the PRA this text and the supporting note 12 (former note 11) should be deleted.

The AGO proposal makes minor revisions (renumbering and corrected citations) to the next three paragraphs of the section. Those revisions are acceptable and are shown in WCOG’s proposed rule (below).

The AGO proposal makes revises the last paragraph of subsection (7) in light of the fact that penalties are now discretionary under RCW 42.56.550(4). Those revisions are acceptable and are shown in WCOG’s proposed rule (below).

WCOG’s proposed rule. WCOG proposes revising the rule as follows:

⁴ *Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014).

⁵ *ACLU v. Blaine School Dist.*, 86 Wn. App. 688, 937 P.2d 1176 (1999).

⁶ *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 327 P.3d 600 (2013).

WAC 44-14-080 Review of denials of public records.

(1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW ((42.17.320/)) 42.56.520.1 Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.² An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW ((42.17.320/)) 42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act, and to obtain relief from such violations. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2). A court proceedings under the PRA is an ordinary civil action, and is not limited to the specific procedures set forth in the PRA. The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.³ To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW ((42.17.340 (1) and (3)/)) 42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW ((42.17.340(6)/)) 42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2).~~((4))~~ A requestor can also initiate a civil action against an agency by filing a summons and complaint.⁴ The case must be filed in the superior court in the county in which the record is maintained. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW ((42.17.340(5)/)) 42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.⁵ ~~((However, most cases are decided on a motion to show cause.6))~~

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW ~~((42.17.340 (1) and (2)/))~~ 42.56.550 (1) and (2).

(5) **Remedies under the act.** ~~((Types of cases subject to judicial review.))~~ While an action under the PRA is an ordinary civil action, the act provides a number of specific legal remedies ~~((The act provides three mechanisms for court review of a public records dispute)).~~

(a) ~~((Denial of record. The first kind of judicial review is when a requestor's request has been denied by an agency. RCW ((42.17.340(1)/) 42.56.550(1). This is the most common kind of case.~~

~~_____ (b) "Reasonable estimate.")~~ **Estimates.** The act permits ~~((second form of judicial review is when))~~ a requestor to seek judicial review of ~~((challenges))~~ an agency's "reasonable estimate" of the time to provide a full response or estimated charges for copies. RCW ~~((42.17.340(2)/))~~ 42.56.550(2).

(e) (b) **Injunctive action to prevent disclosure.** ~~((The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records.))~~ RCW ~~((42.17.330/))~~ 42.56.540. ~~An action under this statute can be initiated by the agency, a)~~ An agency, a person named in a requested ~~((the disputed))~~ record, or a person to whom the record "specifically pertains~~((=))~~," may seek an injunction to prevent disclosure of the records. The agency or third party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.~~((7))~~ 6 The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.~~((8))~~ 7

(6) (c) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW ~~((42.17.340(3)/))~~ 42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.~~((9))~~ 8

However, in camera review is not always required, and it is up to the discretion of the trial court.9

A court may have local court rules on Public Records Act cases and in camera review procedures. In the alternative, an agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record,

provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

~~(7)~~ **(d) Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees ~~(,)~~ and costs ~~(, and)~~. In addition, it is within the discretion of a court to assess a daily penalty against the agency, considering several factors. RCW ~~((42.17.340(4))~~ 42.56.550(4).¹⁰ Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot. ~~((40))~~
11

A special process regarding attorneys' fees and penalties applies to actions involving the disclosure of body worn camera recordings governed by RCW 42.56.240. Another process applies to requests by inmates; penalties may not be awarded to an inmate unless a court determines the agency acted in bad faith. RCW 42.56.565.

~~((A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.11))~~ In an injunctive action under RCW 42.17.330/42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.¹²

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.¹³ However, a court is only authorized to award "reasonable" attorneys' fees. RCW ~~((42.17.340(4))~~ 42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.¹⁴

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.¹⁵

~~((A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."¹⁶ An agency's "bad faith" can warrant a penalty on the higher end of this scale.¹⁷ The penalty is per day, not per record per day.¹⁸))~~ The penalty range is up to one hundred dollars a day. RCW 42.56.550(4). Courts will consider a nonexclusive list of penalty factors in determining whether to assess a penalty, and the amount.¹⁶

1 *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("*PAWS II*") (RCW ~~((42.17.320))~~ 42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

2 *See, e.g.*, WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

3 *Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

4 *See generally Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

5 *Id.* at 106.

6 (~~Wood v. Thurston County~~, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003)).

7) 6 *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998)

~~((8))~~ 7 *PAWS II*, 125 Wn.2d at 257-58. *See also SEIU Healthcare 775 NW v. State et al.*, 198 Wn. App. 745, X P.3d X (2017) (party seeking injunction under RCW 42.56.540 must show that (1) record pertains to that party, (2) exemption applies, and (3) disclosure would not be in the public interest and would substantially and irreparably harm the party or a vital governmental function.)

~~((9))~~ 8 *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577(~~-&588~~), 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

9 *Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 122 (2015); *Nissen v. Pierce County*, 182 Wn.2d 863, 357 P.3d 45 (2015).

10 *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (factors).

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((40)) 11 RCW ((42.17.340(4)) 42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

((11-Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 4117 (2005))).

12 *Confederated Tribes*, 135 Wn.2d at 757; *Doe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016).

13 *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU II*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

14 *Id.* at 118.

15 *Id.* at 115.

((16 *American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").

17 *Id.* 18))

16 *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

Acknowledgments. WCOG would like to thank all of the members of the WCOG Legal Committee who contributed their efforts to these comments and proposed rules, including William Crittenden, Michele Earl-Hubbard, Judy Endejan, Kathy George, Mike Kahrs and Eric Stahl.

Thank you for your consideration.

A rectangular box containing a handwritten signature in cursive script, which appears to read "Toby Nixon".

Toby Nixon
President
Washington Coalition for Open Government

INTRODUCTORY COMMENTS
WAC 44-14-00001 et seq.

WAC 44-14-00001 Statutory authority and purpose.

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-00001.]

WAC 44-14-00002 Format of Model Rules

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-00002.]

WAC 44-14-00003 Model rules and comments are nonbinding

WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and agencies. ~~((The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.))~~ Local agencies are encouraged to consider them in establishing local ordinances implementing the act. RCW 42.56.570. Agencies are required to adopt and enforce rules pursuant to RCW 42.56.100 whether or not agencies adopt these model rules in whole or in part. Local agencies should consult these model rules when establishing their own local ordinances.

WAC 44-14-00004 Recodification of the act

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-00004.]

WAC 44-14-00005 Training is critical

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-00005.]

WAC 44-14-00006 Additional resources

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-00006.]

AUTHORITY AND PURPOSE WAC 44-14-010 et seq.

WAC 44-14-010 Authority and purpose.

WAC 44-14-010 Authority and purpose. (1) RCW ~~((42.17.260(1)))~~ 42.56.070(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public record" at RCW 42.56.010(3) to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency. RCW ~~((42.17.260(2)))~~ 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

(2) The purpose of these rules is to establish the reasonable rules and regulations that procedures (name of agency) will enforce pursuant to RCW 42.56.100 ~~follow~~ in order to protect provide fullest assistance to requesters, provide the most timely possible action on requests, public records from damage or disorganization and provide full access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act, ~~((and))~~ these model rules, and the rules adopted by (name of agency) will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

WAC 44-14-01001 Scope of coverage of Public Records Act

WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW ~~((42.17.260(1)))~~ 42.56.070(1). "'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW ~~((42.17.020(2)))~~ 42.56.010(1).

Court ~~((files and))~~ records, judges' files, and the records of judicial branch agencies are not subject to the act.¹ Access to these records is governed by court rules and common law. The model rules, therefore, do not address access to court or judicial branch records.

An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:

- (1) Whether the entity performs a government function;
- (2) The level of government funding;
- (3) The extent of government involvement or regulation; and
- (4) Whether the entity was created by the government (~~Op. Att'y Gen. 2 (2002)~~).²

Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and prosecuting attorney). The act includes a county "office" as an agency. RCW 42.56.010(1). However, the act (~~defines~~) also includes the county as a whole as an "agency" subject to the act. Id. (~~RCW 42.17.020(2)~~). An agency should coordinate responses to records requests across departmental lines as needed to ensure that each agency as a whole properly responds to request for records. (~~RCW 42.17.253(1)~~) Some counties may have only one public records officer for the entire county; others may have public records officers for each county official or department. But each county and city is an agency under the PRA and must have a public records officer for the entire county or city. The act does not require a public agency that has a records request directed to it to coordinate its response with other public agencies.³ Regardless, public records officers must be publicly identified. RCW 42.56.580 (2) and (3) (agency's public records officer must "oversee the agency's compliance" with act).

WAC 44-14-00002 Requirement that agencies adopt reasonable regulations for public records requests.

WAC 44-14-00002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides: "Agencies shall adopt and enforce reasonable rules and regulations...to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency.... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW (~~42.17.290~~) 42.56.100. Therefore, an agency must adopt and enforce "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."

At the same time, an agency (~~'s regulations~~) must adopt and enforce reasonable rules and regulations to "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW (~~42.17.270~~) 42.56.080.

This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

[optional text based on AGO proposal] The act also provides that state agencies are to publish a rule in the Washington Administrative Code (WAC) and local agencies are to make publicly available at the central office guidance for the public that includes where the public may obtain information and make submittals and requests. RCW 42.56.040.

WAC 44-14-01003 Construction and application of act.

WAC 44-14-00003 Construction and application of the act. The act declares: "The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW ((42.17.251/)) 42.56.030. The initiative creating the act further provides: "... mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW ((42.17.040(11))) 42.17A.001(11). The act further provides: "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW ((42.17.340(3)/)) 42.56.550(3).

Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.¹

The act emphasizes ((~~three separate times~~)) that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW ((42.17.010, 42.17.251/)) 42.56.030((, 42.17.920.4)). The act places the burden on the agency of proving that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records, and/or ((a record is not subject to disclosure or)) that its estimate of time to provide a full response is "reasonable." RCW ((42.17.340(1) and (2)/)) 42.56.550 (1) and (2). The act also encourages disclosure by awarding a prevailing or partially-prevailing requestor reasonable attorneys fees, costs. In addition, (and) a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure, ((or its estimate is not "reasonable.")) RCW ((42.17.340(4)/)) 42.56.550(4).

An additional incentive for disclosure is RCW ((42.17.258)) 42.56.060, which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release

of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply" with the act.

1 See *King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the ((three)) legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.")

**AGENCY DESCRIPTION—CONTACT INFORMATION
—PUBLIC RECORDS OFFICER
(WAC 44-14-020 et seq.)**

WAC 44-14-020 Agency description—Contact information—Public records officer

WAC 44-14-020. Agency description—Contact information—Public records officer. (1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(~~fax number~~)
(email)

Information is also available at the (name of agency's) web site at (web site address).

(3) The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee." The public records officer (~~or designee and the (name of agency)~~) will ensure that (name of agency) actually enforces the reasonable rules adopted by (name of agency) to provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).

WAC 44-14-02001 Agency must publish its procedures

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-00004.]

WAC 44-14-02002 Public records officers

WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records and to "oversee the agency's compliance" with the PRA, including the enforcement of reasonable rules pursuant to RCW 42.56.100. RCW ((42.17.253(1))) 42.56.580(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. RCW 42.56.580(2). A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW ((42.17.253(3))) 42.56.580(3).

The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person or persons in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.

AVAILABILITY OF PUBLIC RECORDS WAC 44-14-030 et seq.

WAC 44-14-030 Availability of public records

WAC 44-14-030 Availability of public records. (1) Hours for inspection of records. Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency). Many public records are also available for inspection and copying on the (name of agency's) web site at any time, at no cost.

(2) Records index. *(If agency keeps an index.)* An index of public records is available for use by members of the public, including (describe contents). The index may be accessed online at (web site address). (If there are multiple indices, describe each and its availability.)

(If agency is local agency opting out of the index requirement.) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) Organization of records. The (name of agency) shall adopt and enforce reasonable rules and regulations to ((will maintain its records in a reasonably organized manner. The (name of agency) will take reasonable actions to)) protect records from

damage and disorganization. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.

(4) Making a request for public records. (a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing (The request may be made) on the (name of agency's) request form or through an online portal, or by letter, fax (if the agency uses fax), or email addressed to the public records officer at the email address publicly designated by (name of agency), or by submitting the request in person at (name of agency and address). The request may include ((and including)) the following information: ((

- ~~o Name of requestor;~~
- ~~o Address of requestor;~~
- ~~o Other contact information, including telephone number and any email address;))~~
Contact information sufficient for the agency to respond to the request;
- o Identification of the public records adequate for the public records officer or designee to locate the records; and
- o The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), ~~((standard photocopies will be provided at (amount) cents per page))~~ charges for copies are provided in a fee schedule available at (agency office location and web site address).

(c) A records request form is available for use by requestors at the office of the public records officer and online at (web site address)....

WAC 44-14-03001 "Public record" defined

WAC 44-14-03001 "Public record" defined. The PRA uses ((Courts use)) a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.((4)) RCW 42.56.030. Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

(1) Writing. A "public record" can be any writing "regardless of physical form or characteristics." RCW ~~((42.17.020(4)))~~ 42.56.010(3). "Writing" is defined very broadly as: "...handwriting, typewriting, printing, photostating, photographing, and every

other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW ((42.17.020(48))) 42.56.010(4). ((An email is a "writing.")) Emails, text messages, social media postings, databases and all other forms of electronic records and data are therefore also "writings."

(2) Relating to the conduct of government. To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW ((42.17.020(44))) 42.56.010(3).1 Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be if its existence was used for a governmental purpose.² For example, a record showing the existence of a purely personal email sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the email itself were not.⁽²⁾ 3

(3) "Prepared, owned, used, or retained." A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW ((42.17.020(41))) 42.56.010(3).

A record can be "used" or "owned" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."⁽³⁾ 4 For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.⁽⁴⁾ 5 ((The agency could be required to obtain the public record, unless doing so would be impossible.)) An agency cannot send its only copy of a public record to a third party for the ((sole)) purpose of avoiding disclosure. ⁽⁵⁾ 6

Sometimes agency employees or officials may work on agency business from home computers((~~These home computer~~)) or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's employment, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."⁷ RCW ((42.17.020(41))) 42.56.010(3). ((However, the act does not authorize unbridled searches of agency property.⁶ If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. Yet, because the home computer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where they were created, should eventually be stored on agency

computers. Agencies should ask employees to keep agency related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work emails back to the employee's agency email account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.))

An agency's right and duty to retain or recover control over its own public records is **not** found in the PRA itself, but is a function of other areas of law, including but not limited to, the law of property, agency, and employment. In addition, destruction of public records is a crime. See Chap. 40.16 RCW. Although a PRA request may trigger an agency's legal obligation to retrieve public records from the possession of an agency official, employee, or contractor, the PRA does **not** address how that might be accomplished. A discussion of how an agency might take legal action to recover public records in the possession of an agency official, employee or contractor is beyond the scope of these model rules. A public records officer who encounters any difficulty in retrieving public records from any agency official, employee or contractor should immediately contact the agency's legal advisor.

1 *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 748, 958 P.2d 260 (1998)((-For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41))) (broadly interpreting the provision concerning governmental function).

2 *See Mechling v. Monroe*, 152 Wn. App. 830, 867, 222 P.3d 808 (2009) ("IP]urely personal emails of those government officials are not public records."); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) (describing that an employee or official must provide the agency responsive "public records" but is not required to provide "personal records").

3 *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (record of volume of personal emails used for governmental purpose).

((3)) 4 *Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).1999((-); *Nissen*, 183 Wn.2d at 882 (For a record to be "used" it must bear a nexus with the agency's decision-making process; a record held by a third party, without more, is not a public record unless an agency "uses" it.)

((4-Id.))5 *Concerned Ratepayers*, 138 Wn.2d 950.

((5)) 6See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

((6)) 7 *Nissen*, 183 Wn.2d at 882; *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). In *Nissen* the State Supreme Court held that a communication is "within the scope of employment" when the job requires it, the employer directs it, or it furthers the employer's interests. This inquiry is always case- and record-specific.

~~((6—See Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).))~~

WAC 44-14-03002 Times for inspection and copying of records

WAC 44-14-03002 Times for inspection and copying of records. An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW ~~((42.17.280/))~~ 42.56.090. If the agency is very small and does not have customary office hours of at least thirty hours per week, and while the act does not specify a particular schedule, making the records ~~((must be))~~ available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. satisfies the thirty-hour requirement. The agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.

~~**WAC 44-14-03004 Organization of records.**~~ An agency must "protect public records from damage or disorganization." RCW ~~((42.17.290/))~~ 42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy nonexempt records) and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take original agency records out of the agency's office, or alter or damage an original record. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).

The legislature encourages agencies to electronically store and provide public records:

Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens, organizations, business, and governments. Information must be managed with great care to meet the objectives of citizens and their governments.

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW ~~((43.105.250))~~ 43.105.351. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. RCW 42.56.520. Agencies are encouraged to do so, and requestors are encouraged to access records posted online in order to preserve taxpayer resources.[2] For those requestors without access to the internet, an agency ~~((could provide a))~~ is to provide copies or allow the requestor to view copies using an agency computer terminal at its office. RCW 42.56.520.

WAC 44-14-03003 Index of records

[WCOG concurs in the AGO's proposed amendments to WAC 44-14-03003.]

WAC 44-14-03004 Organization of records.

[WCOG proposes the following new WAC 44-14-03004]

WAC 44-14-03004 Organization of records. ~~((An agency must "protect...[all existing text deleted]... at its office.))~~ Each agency is required to adopt and enforce reasonable rules and regulations to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information. RCW 42.56.100.

Each agency is different. Each agency needs to adopt specific rules to address the particular type and organization of the records of the agency. The following sections provide model rules for some of the most commonly requested types of public records. This list is not exhaustive, and each agency shall adopt additional specific rules appropriate for its particular records and organization.

(1) Use of personal computers, devices and accounts prohibited - exceptions. Agencies should instruct employees and officials that all public records, regardless of where they were created, should promptly and consistently be transferred to agency computers for retention and organization. Agencies should instruct employees and officials to keep agency-related documents on home computers, personal devices, or in personal accounts in separate folders temporarily, until the documents are transferred to the agency.

The use of personal email accounts for public business should be prohibited, with only narrow exceptions permitted. Agencies should instruct employees and officials that all email public records must be kept in agency-controlled email accounts. Where an employee or public official receives a public record email in a personal email account that email shall be forwarded to an official agency email account, with a copy to the sender, before responding to the email. The sender should be instructed to use the agency email address in the future. In the unusual situation where an agency employee needs to send an email from a personal account (because they don't have access to their agency email account) that email should be copied ("CC") to an agency email account.

Where agency employees or officials need a smart phone, laptop or other electronic device or account to perform their work the agency shall provide such employees and officials with an agency-issued device or account that the agency maintains and for which the agency retains a right to access. Agencies should instruct their employees and officials that they have no expectation of privacy in such devices, and that such devices should not be used for personal communications.

Agencies should have policies describing permitted uses, if any, of home computers, personal devices or personal accounts for agency business. The policies should also describe the obligations of employees and officials for retaining, searching for and producing the agency's public records.

If the agency receives a request for records that may be located on agency employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the individual to search their computer, device and/or account to confirm that all public records have been transmitted to the agency. After that, the agency should process the request as it would if the records were on the agency's computers or devices or in agency-owned devices or accounts. The agency employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.⁹

((9)) 1. *Nissen*, 183 Wn.2d at 886-887.

(2) Text messages. The use of text messaging (SMS, MMS) for agency business is prohibited unless and until the agency has (i) implemented procedures, and obtained the necessary software and/or equipment, to retain all agency-related text messages in a manner that can be organized, searched and retrieved, and (ii) has trained agency personnel in such procedures. All employees are encouraged to use email instead of text messaging for agency business.

(3) Social media. Social media is an important tool for communicating with the public, but must be done in a manner that is consistent with the Act. Social media posts by the agency or its employees in connection with agency business are, and must be treated as, public records. Unless and until an agency has adopted a written policy for the use of social media, and the agency has adopted a procedure for organizing and archiving the agency's social media records, the use of social media for agency business is prohibited. Only social media accounts controlled by the agency may be used for public business. Social media policies adopted under this rule must specify, at a minimum, (i) the purpose of an agency's social media accounts, (ii) the person(s) authorized to use such accounts, and (iii) procedures for organizing and archiving the agency's social media data.

(4) File names and file systems for electronic records. Each agency must adopt and enforce rules for file names and file systems for the organization of electronic records. Such rules must address, at a minimum, the following issues:

(a) Each agency shall create and use a logical filing system for all electronic records.

(b) Each agency shall establish rules to provide consistent, meaningful file names for all electronic records.

(c) Each agency shall require that electronic records be organized and stored on servers that are controlled by the agency, backed up, and protected from viruses, malware or unauthorized access. Each agency shall prohibit the use of local hard drive or storage devices that are not controlled by the agency.

(5) Email. Each agency must adopt and enforce rules for the organization of email messages, addressing. Such rules must address, at a minimum, the following issues:

(a) A user's Inbox and Sent Items folder are temporary locations for incoming and sent email, and **not** a permanent filing system. Allowing emails to accumulate in a user's Inbox or Sent items folder that must be searched in order to respond to a PRA request does not comply with RCW 42.56.100. Each agency must have appropriate software, procedures and training to enable emails to be regularly organized and easily retrieved. Each agency must adopt and enforce a rule requiring all agency personnel to move email messages from their Inbox and Sent Items folders to specific organized files on a regular basis to ensure that all public records are properly organized.

(b) Emails should be organized by subject or matter, just like other agency records. Each agency will determine the specific process to be used by the agency, such as (i) using folders within the agency's email program, (ii) using additional document organization software, or (iii) extracting email messages as separate files, or converting them to PDF files, to be stored along with other electronic records on the same subject matter. Emails should be organized and stored in the same manner as other agency records on the same subject.

(c). Each agency must adopt and enforce rules that specify how files received as email attachments will be organized.

(d) Each agency must adopt and enforce rules specifying the information—such as a project name, matter name, case number or file number—that must be included in the subject line of every email. Public records officers must ensure that lists of approved email subject lines or matter or file numbers are updated and available to all email users, and that email users are in fact following the agency's email rules.

(e) Each agency must adopt and enforce rules specifying (i) who is responsible for filing email messages, and (ii) where emails are sent to numerous recipients or received by numerous recipients, who is responsible for such email records.

(6) Word processing files. Each agency must adopt and enforce rules for the organization of word processing files. Such rules must address, at a minimum, the following issues:

(a) Each agency must adopt rules that treat word processing files as drafts and require final versions of public text documents to be published as PDF files (unless some other format is needed).

(b) Each agencies must adopt specific rules for naming and preserving the original word processing files for important public documents.

(c) Each agency must adopt specific rules to ensure that whenever significant changes are made to important public documents that the word processing files are preserved, and that file names or file locations are changed to prevent previous versions of files from being overwritten.

(d) Each agency must adopt rules establishing procedures by which a word processing file received as an attachment to an email message is given a proper file name and moved to the appropriate location in the agency's document filing system before working with the file.

(7) Drafts shared with other agencies or officials. Each agency must adopt and enforce rules to protect successive drafts of important public documents from different agencies from disorganization or destruction. Such rules must, at a minimum, ensure that all different versions of important public documents are retained in an organized filing system and that file names and/or locations are changed to prevent previous versions from being overwritten or destroyed.

(8) Exempt information in commonly-used forms. Each agency that uses standard forms in its government processes should review and revise its forms on a regular basis to limit the time and cost of redaction. Forms should be revised to (i) eliminate any unnecessary exempt information, and (ii) identify and segregate any necessary exempt information that should be redacted in response to a PRA request.

(9) Records of PRA compliance. In the event of a dispute over whether an agency has conducted a reasonable search calculated to uncover all responsive documents the burden of proof is on the agency to prove that a reasonable search was conducted. Public records officers and other agency personnel engaged in searching for responsive records must retain written records of where, when and how the agency searched for records, including without limitation, the key words used, the custodians whose records were searched, whether any privately owned devices or accounts were searched, and the electronic and physical locations that were searched. Such records are not exempt, even if they are prepared by an attorney, and must be organized and retained along with all other documentation relating to a request for records.

Public records officers and other agency personnel engaged in searching for responsive records may request legal advice from an agency's attorney. However, requests for legal advice and responses thereto must be identified as such and kept separate from records that contain nonexempt information about an agency's search for records.

(10) Attorney invoices. Attorney invoices are important public records. RCW 42.56.903. Any redactions to attorney invoices causes delay and interferes with complete transparency. All outside legal counsel shall be instructed in writing as part of their retainer agreement with the agency, and each agency shall adopt and enforce a

rule, that (i) attorney invoices shall include detailed information about the specific attorney work performed and shall not contain any exempt information except in specific unusual circumstances explained in writing (see below), and (ii) attorney invoices shall indicate the specific persons who were present at any meeting with legal counsel. In the unusual situation where an invoice must contain privileged information the billing attorney shall make a notation on the invoice explaining what information is privileged and why.

(11) Records of external legal counsel. Records relating to the legal work of external legal counsel are the public records of the represented agency. Each agency that employs outside legal counsel must specify, both by rule and in the attorney's retainer agreement, that (i) during the course of representation the litigation files of outside counsel are public records whether or not those records are actually in the possession of the agency itself, and (ii) at the conclusion of representation the entire file must be provided to the agency in an organized fashion. When records relating to litigation or agency legal advice are requested the search must include responsive records that might be in the possession of an agency's external legal counsel. A private attorney or law firm may act as the sole custodian of some or all of an agency's legal files during the course of a representation but such files must be provided to the agency (i) when requested under the PRA and/or (ii) at the conclusion of representation so that the records can be properly archived. Each agency that employs outside legal counsel shall specify, both by rule and in the attorney's retainer agreement, (i) how the agency's legal files will be organized and delivered to the agency, and (ii) that the attorney shall not receive additional compensation for searching or organizing legal files in response to a PRA request.

(12) Multi-agency organizations. (a) "Multi-agency organization" means any organization that represents a particular type of government official or local government entity and/or whose members include representatives of a particular type of government official or local government entity. Examples include Washington Association of Prosecuting Attorneys (WAPA), Washington State Association of Municipal Attorneys (WSAMA), Washington Association of Public Records Officers (WAPRO), the Association of Washington Cities (AWC), and the Washington State Association of Counties (WSAC).

(b) No agency shall participate in any multi-agency organization unless and until that organization (1) has made a determination as to whether it is an "agency" under the PRA (such determinations may be subject to legal challenge), and (2) prominently discloses on its website, and states in its bylaws, the determination of whether an organization is an "agency" subject to the PRA.

(c) Where a multi-agency organization is itself an "agency" subject to the PRA, the organization is responsible for all of its own public records. No agency shall participate in any multi-agency organization unless and until that organization (i) appoints a public records officer pursuant to RCW 42.56.580, and (ii) adopts and enforces reasonable rules to protect the organization's records from disorganization and destruction pursuant to RCW 42.56.100. A member agency may not rely on the

organization to comply with the PRA with respect to any public records unless the member agency's PRA officer has determined that the organization has adopted reasonable rules pursuant to RCW 42.56.100 and that those rules are actually being enforced.

(d) Whether or not a multi-agency organization is itself an "agency" under the PRA each member agency remains responsible for all of its own public records, including all organization records in its possession. Each agency officer or employee who is a member of a board or committee of a multi-agency organization shall ensure the board or committee's compliance with RCW 42.56.100 by either accepting responsibility for PRA compliance for all of the board or committee's records or confirming in writing that another agency and its public records officer is responsible for such records. All public records must be organized and retained by an "agency" under the PRA. A member agency may not rely on a non-agency organization to comply with the PRA even if the organization offers or agrees to provide access to public records as if it were an agency. Each member agency must adopt and enforce reasonable rules for the organization of all organization records in its possession. A member agency may not rely on another agency to comply with the PRA with respect to any public records unless the member agency's PRA officer has determined that other agency has adopted reasonable rules for organization records pursuant to RCW 42.56.100 and that those rules are being enforced.

(e) No agency shall participate in any non-agency organization unless and until the organization ensures that an agency governed by the PRA has agreed in writing to be responsible for the organization's compliance with the PRA, to provide a PRA officer for the organization, and to adopt rules for the organization as if it were a single agency under RCW 42.56.100. That agency and public records officer must adopt and enforce reasonable rules to ensure that all of the records of an organization, board, or committee are retained in electronic format in organized files or folders as if the organization were an "agency" under the PRA. All records of the organization must be kept under the control of the appointed agency and its public records officer unless and until a new agency and/or public records officer is appointed and actually takes control over the records in compliance with RCW 42.56.100 and record retention statutes.

(f) Records of multi-agency organization meetings, conferences and email discussions among member agencies are important and time-sensitive. Such records must be kept organized in a single location under the control of a single agency. Each organization shall adopt and enforce specific rules for email discussion groups that specify (i) the content of an email subject line, and (ii) a PRA officer or designee that must be copied on every email to enable the appointed agency to collect and organize email records.

(13) Correspondence with legislators. Each agency must adopt and enforce rules for the retention and central organization of any and all records sent to or received from individual members of the legislature and/or their staff.

(14) Identifiable future records. Legislative and administrative proceedings frequently require agencies to issue official decisions, recommendations and reports. In many cases such records are time-sensitive because parties and concerned citizens have only short period of time in which to take action in response. Any pending decision, order, ordinance, resolution, recommendation or other official record that an agency is required by law to produce in any particular legislative or administrative matter is an identifiable public record for purposes of RCW 42.56.080 whether or not the record exists at the time it is requested. Agencies shall honor requests for such records by requiring the officer or body that will issue a decision, order, ordinance, resolution, recommendation or other official record to keep a list of persons who have requested the record, and to provide the record to those persons as soon as it is available.

WAC 44-14-03005 Retention of records

WCOG proposes revising the existing rule as follows:

WAC 44-14-03005 Retention of records. The Public Records Act (chapter 42.56 RCW) and the records retention statutes (chapter 40.14 RCW) are two different laws. The record retention statutes were enacted by the legislature and have been in effect for many decades. The PRA was enacted in 1972 by popular initiative. Compliance with records retention laws does not necessarily comply with the PRA, particularly RCW 42.56.100, which requires agencies to adopt and enforce rules to prevent the disorganization and destruction of public records, and which forbids the scheduled destruction of records that have been requested under the PRA.

Both statutes require the appointment of an officer to comply with the statute. RCW 40.14.040 requires each agency to designate a "records officer." RCW 42.56.580(1) requires each agency to appoint a "public records officer." Although these offices are created by different statutes, an agency should appoint the same person to perform the functions of both offices.

Except as required by RCW 42.56.100, [a]n agency is not required to retain every record it ever created or used. The state and local records committees approve a general retention schedule for state and local agency records that applies to records that are common to most agencies.¹ Individual agencies seek approval from the state or local records committee for retention schedules that are specific to their agency, or that, because of particular needs of the agency, must be kept longer than provided in the general records retention schedule. The retention schedules for state and local agencies are available at ((www.secstate.wa.gov/archives/gs.aspx)) www.sos.gov/archives/ (select "Records Management").

Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling emails can be destroyed when no longer needed, but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all emails after a short period of time (such as thirty days). While many of the emails ((like other

public records)) could be destroyed when no longer needed, many others must be retained for several years. Indiscriminate automatic deletion of all emails or other public records after a short period no matter what their content may prevent an agency from complying with its retention duties and could complicate performance of its duties under the Public Records Act. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules. Public records officers must receive training on retention of electronic records. RCW 42.56.152(5).

The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.

An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW ((42.17.290/)) 42.56.100. Additional retention requirements might apply if the records may be relevant to actual or anticipated litigation. The agency is required to retain the record until the record request has been resolved. RCW 42.56.100. An exception exists for certain portions of a state employee's personnel file. RCW ((42.17.295/)) 42.56.110.

1. An agency can be found to violate the Public Records Act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record after a request is made. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).

WAC 44-14-03006 Form of requests

WCOG proposes the following new introductory paragraph to WAC 44-14-03006 (changes are shown in comparison to language in the current model rule):

WAC 44-14-03006. Form of requests. There is no statutorily required format for a valid public records request. ((4)) RCW 42.56.080(2). Agencies may recommend, but may not require, that requestors submit requests using an agency-provided form or web page. Agencies must respond to any "specific request" for "identifiable records" which provides "fair notice" and "sufficient clarity" that it is a records request.¹ An agency may publish rules, for the guidance of the public, describing the established places at which, the employees from whom, and the methods whereby, records may most readily be requested. RCW 42.56.040; RCW 42.56.070(1); RCW 42.56.100; RCW 34.05.220 (1)(b) (state agencies).

1. RCW 42.56.080 (1) and (2); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA [PRA] request."); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (an agency's duty under the act is triggered when it receives a "specific request" for records and when the requestor states "the request with sufficient clarity to give the agency fair notice that it had received a request for public records").

Agency public internet web site records – No request required. A requestor is not required to make a public records request before inspecting, downloading or

copying records posted on an agency's public web site. To save resources for both agencies and requestors, agencies are strongly encouraged to post commonly requested records on their web sites. Requestors are strongly encouraged to review an agency's web site before submitting a public records request.

In-person requests. An agency must honor requests received in person during normal business hours. RCW 42.56.080(2). An agency should have its public records request form available at the office reception area so it can be provided to a "walk-in" requestor. The form should be directed to the agency's public records officer.

Mail, email and fax requests. A request can be sent by U.S. mail. RCW ((42.17.290A)) 42.56.100. ((A request can also be made by email, fax, or orally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies).)) Agencies also must accept requests orally; by email or, alternatively, via website portal (if available); or by fax (if an agency still uses fax). Oral requests should be confirmed in writing; see further comment herein. Fax requests may be offered as a convenience to requestors who still use fax machines, but agencies shall not require that requests be made by fax.

Public records requests using the agency's form or web page. An agency should have a public records request form. An agency is encouraged to make its public records request form available at its office, and on its web site. ((An agency should have a public records request form.)) Some agencies also have online public records request forms or portals on a page on their web sites, set up to specifically receive public records requests. Agencies may recommend that requestors submit requests using an agency-provided form or web page. RCW 42.56.080(2). In this comment, requestors are strongly encouraged to use the agency's public records request form or online form or portal to make records requests, and then provide it to the designated agency person or address. Following this step begins the important communication process under the act between the requestor and the agency.² This step also helps both the requestor and the agency, because it better enables the agency to more promptly identify the inquiry as a public records request, timely confirm its receipt with the requestor, promptly seek clarification from the requestor if needed, and otherwise begin processing the agency's response to the request under the act.

An agency request form or online form or portal should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form or online portal should recite that inspection of records is free and provide ((the per page charge for standard photocopies)) information about copying fees.

An agency request form or online form or portal should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number, and address or email should be provided. Requestors should provide an email

address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

2. *See Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3) ("Communication is usually the key to a smooth public records process for both requestors and agencies.").

Bot requests. An agency may deny a "bot" request that is one of multiple requests from a requestor to the agency within a twenty-four-hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential agency functions. RCW 42.56.080(3). A "bot" request means a records request that an agency reasonably believes was automatically generated by a computer program or script.

Oral requests. A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger or complex ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in this comment and in WAC 44-14-04002(1), a requestor must provide the agency with ((reasonable)) fair notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required ((reasonable)) notice or satisfy the agency's Public Records Act procedures. Therefore, requestors are strongly encouraged to make written requests, directed to the designated agency person or address.

If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request. If the staff person is not the agency's public records officer, he or she should inform the public records officer that the request has been submitted. The public records officer serves "as a point of contact for members of the public in requesting disclosure of public records and oversees the agency's compliance with the public records disclosure requirements." RCW 42.56.580.

Prioritization of records requested. An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

Purpose of request. An agency cannot require the requestor to disclose the purpose of the request, ((with two exceptions)) except to establish whether inspection and copying would violate RCW 42.56.070(8) or 42.56.240(14), or other statute which

exempts or prohibits disclosure of specific information or records to certain persons. RCW ~~((42.17.270/))~~ 42.56.080. ~~((First))~~ For example, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose; and, if (and only if) circumstances suggest the list might be used for a commercial purpose, the agency may require the requestor to state the purpose of the use of the list.⁵ An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW ~~42.17.260/~~42.56.070~~((8))~~-9).

~~((Second))~~ And, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to ((a claimant for benefits or his or her representative)) identified persons. In such cases, an agency is authorized to ask the requestor if he or she fits the ~~((criterion))~~ statutory criteria for disclosure of the record.

5. Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4; SEIU Healthcare 775W v. State et al., 193 Wn. App. 377, 377 P.3d 214 (2016).

Indemnification. An agency is not authorized to require a requestor to indemnify the agency. ~~((Op. Att'y Gen. 12 (1988).3))~~⁶

6. Op. Att'y Gen. 12 (1988). See also RCW ~~((42.17.258/))~~ 42.56.060 which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." ~~((Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.))~~

PROCESSING OF PUBLIC RECORDS REQUESTS—GENERAL WAC 44-14-040 et seq.

[See separate comment letter for WCOG's comments on WAC 44-14-040 through 44-14-04005]

WAC 44-14-04006 Closing request and documenting compliance.

WCOG proposes revising the section as follows:

WAC 44-14-04006 Closing request and documenting compliance. (1)
Fulfilling request and closing letter. A records request has been fulfilled and can be closed when a requestor has inspected all the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an entirely unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. A closing letter may not be necessary for smaller requests, or where the last communication with the requestor established that the request would be closed on a date certain. The outcome described in the closing letter might be that the

requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.

(2) Returning assembled records. An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW (~~(42.17.270)~~) 42.56.080. In those cases where the agency has not made an electronic copy of the records provided to the requestor, after a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW (~~(42.17.290)~~) 42.56.100.

(3) Retain copy of records provided. Except in unusual circumstances an agency should create and retain an electronic copy of the records provided to the requestor. Even where a requester asks for paper copies, the agency should make a PDF copy of the requested records and then print the paper copies from the PDF file. Agencies should use electronic PDF redaction software rather than redacting paper records by hand. Where a PDF file has been electronically redacted the agency should also retain a copy of the unredacted PDF file. ((In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided.)) A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for ((a)) the period of time consistent with the agency's retention schedules for records related to disclosure of documents.

WAC 44-14-04007 Later discovered records.

No comments.

PROCESSING OF PUBLIC RECORDS REQUESTS—ELECTRONIC RECORDS

WAC 44-14-050 et seq.

**WAC 44-14-050 Processing of public records requests—
Electronic records.**

WAC 44-14-050 Processing of public records requests—Electronic records. (1) Scanning paper records. (Name of agency) shall copy existing paper records by scanning such records to create electronic copies (usually PDF files), whether or not the requestor wants electronic copies or paper copies.

((4)) (2) **Requesting electronic records.** The process for requesting electronic public records is the same as for requesting paper public records.

((2)) (3) **Providing electronic records.** When a requestor requests records in an electronic format, the public records officer will provide the nonexempt records or portions of such records that are reasonably locatable in an electronic format that is used by the (name of agency) and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record. Costs for providing electronic records are governed by ((WAC 44-14-07003)) RCW 42.56.120 and 42.56.130. The fee schedule is available at (agency address and web site address).

((3)) (4) **Databases and customized electronic access ((to databases)) services.** A database is an organized collection of computer data existing in one or more computer files. Databases make it easy for agencies to collect, organize and manipulate large amounts of data. Because the information in databases is contained in organized fields, records and tables it is easier to access, search and manipulate than other forms of information. A database is a "writing" and therefore a "public record" that can be copied and redacted electronically. If a requestor asks for a copy of a database, and provides (or pays for) a sufficient storage device or online account to receive a copy, the agency must provide a redacted electronic copy.

While not required, and with the consent of the requestor, the (name of agency) may decide to provide customized ((access under RCW 43.105.280 if the record is not reasonably locatable or not reasonably translatable into the format requested)) electronic access services and assess charges under RCW 42.56.120(2)(f). A customized service charge applies only if the (name of agency) estimates that the request would require the use of information technology expertise to prepare data compilations, or provide customized electronic access services when such compilations and customized access services are not used by the agency for other purposes. The (name of agency) may charge a fee consistent with RCW ((43.105.280)) 42.56.120 (2)(f) for such customized access. The fee schedule is available at (agency address and web site address).

WAC 44-14-05001 Access to electronic records.

WAC 44-14-05001 Access to electronic records. The Public Records Act does not distinguish between access to paper and electronic records. There is no legal or factual difference between "copying" and "scanning" paper records. Modern copiers and multifunction document machines create copies of paper documents by first scanning the document to create a digital image and then print the image onto paper, if that output is selected by the user. The PRA requires agencies to provide copies of public records, regardless of the form of the writing in which the record is contained. Scanning paper records is just a modern method of copying paper records. Scanning a paper record does not create a new public record but merely a copy of an existing public record. RCW 42.56.120(1).

~~((Instead, t))~~ The act explicitly includes electronic records within its coverage. The definition of "public record" includes a "writing," which in turn includes "existing data compilations from which information may be obtained or translated." RCW ~~((42.17.020(48) (incorporated by reference into the act by RCW 42.56.010))~~ 42.56.010(4). Many agency records are now in an electronic format. Many of these electronic formats such as Windows® products are generally available and are designed to operate with other computers to quickly and efficiently locate and transfer information. Providing electronic records can be cheaper and easier for an agency than paper records. Furthermore, RCW ~~((43.105.250))~~ 43.105.351 provides: "It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public."

In general, an agency shall provide electronic records in an electronic format if requested in that format, if it is reasonable and feasible to do so. An agency may translate a record into an alternative electronic format at the request of the requestor if it is reasonable and feasible to do so. Such translation into an alternative format does not create a new public record for the purposes of copying fees. RCW 42.56.120(1). An agency can provide links to specific records on the agency's public internet web site. RCW 42.56.520. An agency shall not impose copy charges for access to or downloading records that the agency routinely posts on its internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records by other means. RCW 42.56.120(2)(e).

Reasonableness and technical feasibility ((is)) are the touchstone for providing electronic records. An agency should provide reasonably locatable electronic public records in either their original generally commercially available format (such as an Acrobat PDF® file) or, if the records are not in a generally commercially available format, the agency should provide them in a reasonably translatable electronic format if possible. In the rare cases when the requested electronic records are not reasonably locatable, or are not in a generally commercially available format or are not reasonably translatable into one, the agency might consider customized access. ((See WAC 44 14 05004. An agency may recover its actual costs for providing electronic records, which in many cases is de minimis. See WAC 44 14 050(3).))

Delivering electronic records can be accomplished in several ways or a combination of ways. For example, an agency may post records on the agency's internet web site and provide the requestor links to specific documents; make a computer terminal available at the agency so a requestor can inspect electronic records and designate specific ones for copying; send records by email; copy records onto a CD, DVD or thumb drive and mail it to the requestor or making it available for pickup; upload records to a cloud-based server, including to a file transfer protocol (FTP) site and send the requestor a link to the site; provide records through an agency portal; or, through other means. Most agencies should have the ability to provide electronic records by internet transmission, either through the agency's own web portal or by using a commercial file delivery service such as Drop Box. Email delivery is the preferred

method of delivery for smaller data files. There may be size limits with the agency's email system or the requestor's email account with respect to the volume, size or types of emails and attachments that can be sent or received.

What is reasonable and technically feasible for copying and delivery of electronic records in one situation or for one agency may not be in another. Not all agencies, especially smaller units of local government, have the electronic resources of larger agencies and some of the generalizations in these model rules may not apply every time. If an agency initially believes it cannot provide electronic records in an electronic format, it should confer with the requestor and the two parties should attempt to cooperatively resolve any technical difficulties. See WAC 44-14-05003. It is usually a purely technical question whether an agency can provide electronic records in a particular format in a specific case.

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records.

WAC 44-14-05002 "Reasonably locatable" and "reasonably translatable" electronic records. (1) "Reasonably locatable" electronic records. The act obligates an agency to provide nonexempt "identifiable ... records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC 44-14-04002(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.

Agencies are required to adopt and enforce reasonable rules to protect public records from disorganization or destruction. RCW 42.56.100. An agency's failure to comply with this requirement does not relieve the agency from its obligation to produce reasonably locatable records or make any public record not reasonably locatable.

In general, a "reasonably locatable" electronic record is one which can be located by the subject matter of the record or with typical search features and organizing methods contained in the agency's current software. For example, a retained email containing the term "XYZ" is usually reasonably locatable by using the email program search feature. However, ~~((an))~~ some email search ~~((feature has))~~ features have limitations, such as not searching attachments, but ~~((is))~~ are a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained emails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's email program, such as a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a database of permit holders including the name of the business. The agency does not separate the businesses by whether they are

publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the database to determine which businesses are publicly traded corporations.

(2) "Reasonably translatable" electronic records. The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine, or scanning it to create a PDF file (~~into Adobe Acrobat PDF®~~). Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take (~~reasonable~~) steps to translate the agency's original into a useable copy for the requestor, if it is reasonable and feasible for it to do so.

The "reasonably translatable" concept typically operates in two (~~three kinds of~~) situations:

~~((a) An agency has only a paper record;~~

~~—(b))~~ (a) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or

~~((c))~~ (b) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

~~(i) **Agency has paper only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual or statutory cost for scanning. See RCW 42.56.120 and WAC 44-14-07003. Providing providing a PDF copy of the record is analogous to making a paper copy. However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.~~

~~((ii))~~ (i) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. An

agency cannot instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect® "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

~~((iii))~~ (ii) **Agency has electronic records in an electronic format other than the format requested.** When an agency has an electronic record in an electronic format (such as a Word® document) but the requestor seeks a copy in another format (such as WordPerfect®), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, and the agency has a WordPerfect® license, this would be "reasonably translatable." The agency's record might not translate perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a database in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a database program (such as Access®) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word®) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word® format but the requestor refuses. The agency can easily convert the Word® document into a standard text file which, in turn, can be converted into most programs. The Word® document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, an agency should keep ~~(, when feasible,)~~ an electronic copy of the electronic records it provides to a requestor to show the exact records it provided, for the time period required in its records retention schedule. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

WAC 44-14-05003 Parties should confer on technical issues.

[WCOG has no comments on the AGO's proposed amendments to WAC 44-14-05003.]

WAC 44-14-05004 Customized access.

[WCOG has no comments on the AGO's proposed amendments to WAC 44-14-05004.]

WAC 44-14-05005 Relationship of Public Records Act to court rules on discovery of "electronically stored information."

[WCOG has no comments on the AGO's proposed amendments to WAC 44-14-05005.]

**EXEMPTIONS
WAC 44-14-060 et seq.**

[WCOG proposes revising the existing rule as follows:]

WAC 44-14-060 Exemptions.

(1) The Public Records Act provides that a number of types of documents are exempt from public inspection and copying. In addition, documents are exempt from disclosure if any "other statute" exempts or prohibits disclosure. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents held by (name of agency) for inspection and copying:

(List other laws)

(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.

(3) The (name of agency) will adopt and enforce specific rules for organizing its public records to prevent commonly-asserted exemptions from causing excessive delay or disruption in responding to a PRA request.

WAC 44-14-06001 Agency must publish list of applicable exemptions.

WCOG concurs in the AGO's proposed amendments to WAC 44-14-06001.

WAC 44-14-06002 Exemptions.

[WCOG proposes revising the existing rule as follows:]

WAC 44-14-06002 ((Summary of e)) Exemptions. (((1) General.)) The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. For a discussion of several commonly used exemptions, see these documents on the attorney general's office web site: *Open Government Resource Manual* at <http://www.atg.wa.gov/open-government-resource-manual> (the manual contains a discussion and summaries of many exemptions, links to statutes, and links to

many court decisions and several attorney general opinions); the code reviser's annual list of exemptions in the state code, available at <http://www.atg.wa.gov/sunshine-committee>; and a guidance document on the attorney-client privilege and work-product doctrine, available at <http://www.atg.wa.gov/model-rules-public-disclosure>.

(1) Attorney-client privilege. Agency legal files are subject to public records requests, and must be produced to the extent they contain material that is not privileged, work product, or otherwise exempt from disclosure. Agencies and their attorneys should recognize that failure to properly organize and identify exempt material in legal records can cause unnecessary and time-consuming delays in responding to public records requests, and can interfere with the agency's obligation to provide fullest assistance to requesters. Accordingly, agencies and their attorneys shall assure proper organization of legal files, and identification of privileged or potentially privileged material, including without limitation through the following practices.

Each agency's attorney, prosecuting attorney or law department shall maintain a list, in a common, convenient electronic format, of all agency litigation and discrete identifiable legal matters, including (i) the case name and court, if any, (ii) a file name or number to be used in all agency documents relating to the matter, (iii) the attorney(s) in charge of the matter, and (iv) the agency personnel who have decision-making authority and/or access to privileged information about the matter. The list shall be available to all agency employees as well as the public, and to the extent possible shall not contain any exempt information whatsoever. Each agency's PRA officer shall ensure that the agency's legal matter list is kept up to date, and that agency attorneys and their staffs are including the required file name and/or number on all related records.

Agency attorneys should, whenever possible, identify attorney-client privileged records as such by (i) making a conspicuous notation such as "****ATTORNEY-CLIENT PRIVILEGED ****" in the subject line, header or footer of every privileged document, and (ii) identifying the legal matter by its approved file name or number. Agency attorneys shall not designate records as privileged absent a well-founded belief that the records are privileged. Agency attorneys should avoid mixing privileged or otherwise protected information and non-exempt information in a single document, and should encourage those with whom they communicate to segregate privileged communications into separate records. Where privileged legal advice is mixed with non-exempt communications, the privileged portion of the document should be clearly identified so that it can be redacted without legal review.

(2) Records relevant to a controversy (work product). Each agency's PRA officer shall ensure that the agency's list of legal matters required by subsection (1) is kept up to date, and that agency attorneys and their staffs are including the required file name or number on all records that contain work product. Because the exemption in RCW 42.56.290 only applies to records that are relevant to a controversy, no agency will redact any information pursuant to that exemption unless and until the agency has specifically identified the relevant controversy and/or updated the agency's legal matter list accordingly.

Agency attorneys should, whenever possible, identify records that contain attorney work product as such by (i) making a conspicuous notation such as "***ATTORNEY WORK PRODUCT - PRIVILEGED ****" in the subject line, header or footer of every document containing work product, and (ii) identifying the legal matter by its approved file name and/or number. Agency attorneys shall not designate records as exempt under RCW 42.56.290 absent a well-founded belief that the records are exempt. Agency attorneys should avoid mixing privileged legal advice, including attorney theories and mental impressions exempt under RCW 42.56.290, with ordinary work product in a single document.

(3) **Litigation correspondence and pleading files.** Each agency attorney shall maintain organized chronological files of (i) all external correspondence, including email, and (ii) all pleadings, for each separate agency legal matter. Such files shall be kept in electronic format and in the possession of the agency itself, and shall not contain any exempt information so that copies of the files can be quickly provided to requestors without the need for any review of the records.

(4) **Common interest and joint defense agreements.** No record shared with any party or person outside the agency shall be withheld as exempt under either the common interest or joint defense doctrines unless the attorneys for all parties to the common interest or joint defense have stated in a written agreement (i) who the parties to the agreement are, (ii) what the specific common interests and/or joint defenses are, and (iii) that the parties intend and agree to share confidential information within the scope of the specifically identified common interests and/or joint defenses. Whenever records subject to a common interest or joint defense claim are requested the agency will provide the requestor with a copy of the written agreement as part of the explanation of redactions required by RCW 42.56.210(3). The written agreement shall be filed in the correspondence file required by subsection (3). The written agreement shall not contain any exempt information and shall not be redacted. Whenever a party to a joint defense or common interest agreement sends confidential information to another party pursuant to the agreement the shared document(s) shall have a conspicuous notation that the information is governed by the specific agreement identified by name and date.

(5) **Passwords.** Each agency shall adopt and enforce rules to prohibit the inclusion of exempt passwords (or access codes) in documents created for any reason other than to communicate or document such passwords. When a non-exempt record containing an exempt password is requested the PRA officer will instruct the person whose password is at issue to change the password and to avoid including passwords in nonexempt records in the future. When a non-exempt email record containing an exempt password is requested the agency will instruct the person whose password is at issue to change the password and then produce the email without redacting the password.

Each agency shall instruct its officers and employees who use conference call systems that conference call passwords and access codes will not be redacted under RCW 42.56.420(4) and that such passwords should be changed on a regular basis.

COSTS OF PROVIDING COPIES OF PUBLIC RECORDS
WAC 44-14-070 et seq.

WAC 44-14-070

WAC 44-14-070 Costs of providing copies of public records. (1) ~~((Costs for paper copies))~~ **Inspection.** There is no fee for inspecting public records, including inspecting records on the (name of agency) web site. ~~((A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.~~

~~(If agency decides to charge more than fifteen cents per page, use the following language:) The (name of agency) charges (amount) per page for a standard black and white photocopy of a record selected by a requestor.)~~

(2) **Actual costs.** *(If the agency determines it will charge actual costs for copies, it may do so after providing notice and a public hearing.)* A statement of the factors and the manner used to determine ((this charge)) the charges for copies is available from the public records officer. The costs for copies of records are as follows (provide details):

(3) (Alternative) **Statutory default costs.** *(If the agency determines it will not charge actual costs for copies but instead will assess statutory costs, it must have a rule or regulation declaring the reasons that determining actual costs would be unduly burdensome).* The (name of agency) is not calculating actual costs for copying its re-cords because to do so would be unduly burdensome for the following reasons: The (name of agency) does not have the resources to conduct a study to determine actual copying costs for all its records; to conduct such a study would interfere with other essential agency functions; and, through the legislative process, the public and requestors have commented on and been informed of authorized fees and costs provided in the Public Records Act including RCW 42.56.120 and other laws. Therefore, in order to timely implement a fee schedule consistent with the Public Records Act, it is more cost efficient, expeditious and in the public interest for the (name of agency) to adopt the state legislature's approved fees and costs ((for most of the (name of agency) records, as authorized in RCW 42.56.120 and as published in the agency's fee schedule.)) for the agency records, as authorized in RCW 42.56.120 except for unique identified records for which actual costs can be determined, or where the agency decides to waive charging costs.

(4) **Fee schedule.** The fee schedule is available at (office location) and on (name of agency) web site at (insert web site address).

(5) **Processing payments.** Before beginning to make the copies or processing a customized service, the public records officer or designee may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer or designee may ((also)) require the payment ((of the remainder of the copying costs before providing all the records, or

the payment)) of the costs of copying an installment before providing that installment. The (name of agency) will not charge sales tax when it makes copies of public records.

~~((2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a CD-ROM. (If the agency has scanning equipment at its offices: The cost of scanning existing (agency) paper or other nonelectronic records is (amount) per page.) There will be no charge for emailing electronic records to a requestor, unless another cost applies such as a scanning fee.~~

~~(3)) (6) **Costs of mailing.** The (name of agency) may also charge actual costs of mailing, including the cost of the shipping container.~~

~~((4)) (7) **Payment.** Payment may be made by cash, check, or money order to the (name of agency).~~

WAC 44-14-07001

WAC 44-14-07001 General rules for charging for copies. (1) No fees for costs of locating records or preparing records for inspection or copying. An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW ~~((42.17.300))~~ 42.56.120.¹ An agency cannot charge fees for a person to inspect or access records on the agency's public internet web site. An agency cannot charge a fee for access to or downloading records the agency routinely posts on its public internet web site prior to the receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

1. See also Op. Att'y Gen. 6 (1991).

An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from ~~((offsite))~~ off-site. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying and cannot be charged to the requestor.

~~(2) ((**Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.~~

~~If it attempts to charge more than the fifteen cents per page maximum for photocopies,)) **Actual costs.** If assessing actual costs, an agency must establish a statement of the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to determine the actual per page cost." RCW ~~((42.17.260(7))~~ 42.56.070(7). ~~((An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.260 (7)(a)/ 42.56.070 (7)(a).2~~~~

~~— An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260(7)(a) and (b)/42.56.070(7)(a) and (b) and 42.17.300/42.56.120.~~

~~((If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7)/42.56.070(7) and 42.17.300/42.56.120.3 A price list with no analysis is insufficient))²~~

The actual costs include the actual cost of the paper and the per page cost for use of agency copying (including scanning) equipment; the actual cost of the electronic production or file transfer of the record; the use of any cloud-based data storage and processing service; costs directly incident to the cost of postage or delivery charges and the cost of any container or envelope used; and, the costs directly incident to transmitting such records in an electronic format, including the cost of any transmission charge and the use of any physical media device provided by the agency. An agency may include staff salaries, benefits or other general administrative or overhead charges only if those costs are directly related to the actual cost of copying the public records. Staff time to copy and send the records may be included in an agency's actual costs. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. ((An agency should generally compare its copying charges to those of commercial copying centers.)) When calculating any fees authorized under this section, an agency shall use the most reasonable, cost-efficient method available to the agency as part of its normal operations.

2. The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. See RCW ((42.17.300/)) 42.56.120. ("No fee shall be charged for locating public documents and making them available for copying.")((.))

An agency's statement of such actual costs may be adopted by an agency only after providing notice and public hearing. RCW 42.56.070(3).

(3) **Statutory default costs.** If an agency opts for the default copying charges ~~((of fifteen cents per page))~~ pursuant to RCW 42.56.120, it need not calculate its actual costs. RCW ((42.17.260(8)/42.56.070(8)).

~~(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, and photo graphs. An agency can charge its actual costs for nonstandard photo copies. RCW 42.17.300/42.56.120. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency can provide a requestor with documentation for its actual costs by providing a catalog or price list from a vendor.~~

(4)) 42.56.120(2)(b). However, it must declare the reasons for why calculating the actual costs would be unduly burdensome, and then it is limited to the statutory costs for those records. Id.

The statutory default costs include different charges per record or groups of records, or an alternative flat fee of up to two dollars for any request when the agency reasonably estimates and documents that the allowable statutory costs are clearly equal to or more than two dollars. RCW 42.56.120 (2)(d). If using the statutory flat fee, the agency can charge the flat fee only for the first installment for records produced in multiple installments, and no fees can be assessed for subsequent installments.

Statutory default charges can be combined to the extent that more than one type of charge applies to a particular request, unless the agency is assessing the statutory flat fee for a request. RCW 2.56.120 (3)(c). The statutory default costs include actual costs of digital storage media, mailing containers, and postage. RCW 42.56.120 (3)(d).

(4) **Fee schedule.** The agency should make its fee schedule publicly available on its web site and through other means.

(5) **Estimate of costs for requestor.** If a requestor asks, an agency must provide a summary of the applicable charges, or the cost of customized service charges, before copies are made and the requestor may revise the request to reduce ~~((the number of copies to be made, thus))~~ the applicable charges. RCW 42.56.120(2)(f). An agency must also provide a requestor, in advance, information concerning customized service charges if the request involves customized service. RCW 42.56.120(3).

(6) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW ~~((42.17.300/))~~ 42.56.120 (charges allowed for "providing" copies to requestor).

The requestor should specify whether he or she seeks inspection or copying. The agency should inform the requestor that inspection is free. This can be noted on the agency's request form. If the requestor seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed, provided that the requestor is informed that inspection is free. Informing the requestor on a request form that inspection is free is sufficient.

~~((5))~~ (7) **Use of outside vendor.** Typically an agency makes the requested copies. However, an agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor.³ An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. This is an example of where any agency might enter into an alternative fee arrangement under RCW 42.56.120(4). Another example of a possible alternate fee arrangement involves recurring (i.e. monthly) requests for the same records, which could be provided for a set fee to the requester without the need for a separate request. An agency cannot charge the default ((fifteen cents per page rate)) charges when its "actual cost" at a copying vendor is less. The default rates ((is)) are only for agency-produced copies. RCW ((42.17.300)) 42.56.120.

3. ((See also Op. Att'y Gen. 6 (1994) (agency must "justify" its copy charges).)) Benton County v. Zink, 191 Wn. App. 269, 361 P.3d 801 (2015).

~~((6))~~ (8) **Sales tax.** An agency cannot charge sales tax on copies it makes at its own facilities. RCW 82.12.02525.

~~((7))~~ (9) **Costs of mailing or sending records.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope or CD mailing sleeve). RCW ((42.17.260 (7)(a))) 42.56.070 (7)(a).

(10) **Sample fee statutory default schedule.** A sample statutory default fee schedule is provided in this comment. Some agencies may have other statutes that govern fees for particular types of records and which they may want to also include in the schedule. See RCW 42.56.130. Or, an agency may use the statutory default schedule for the majority of its records and go through the process to determine actual costs for some specialized records (for example, for large blueprints or oversized colored maps that are printed onto paper). While not included in the sample schedule below, an agency might also decide to use the up to two dollar statutory flat fee for some types of requests, per RCW 42.56.120 (2)(d).

[WCOG has no comments on the AGO's sample fee schedule]

WAC 44-14-07003

[WCOG concurs in the AGO's proposed repeal of WAC 44-14-07003.]

WAC 44-14-07004

[WCOG concurs in the AGO's proposed revisions to WAC 44-14-07004.]

WAC 44-14-07005

[WCOG concurs in the AGO's proposed revisions to WAC 44-14-07005.]

WAC 44-14-07006

[WCOG concurs in the AGO's proposed revisions to WAC 44-14-07006.]

**REVIEW OF DENIALS OF PUBLIC RECORDS
WAC 44-14-080 et seq.**

WAC 44-14-080 Review of denials of public records.

[WCOG has no comments on the AGO's proposed amendments to WAC 44-14-080.]

**WAC 44-14-08001 Agency internal procedure for review of denials
of requests.**

[WCOG has no comments on the AGO's proposed amendments to WAC 44-14-08001.]

**WAC 44-14-08002 Attorney general's office review of denials by
state agencies.**

[WCOG has no comments on the AGO's proposed amendments to WAC 44-14-08002.]

WAC 44-14-08003 Alternative dispute resolution.

[WCOG has no comments on WAC 44-14-08003.]

WAC 44-14-08004 Judicial review

[WCOG proposes deleting this section. If this section is not deleted then WCOG proposes the following revisions to this section.]

WAC 44-14-08004 Judicial review.. While a full discussion of judicial review is not provided in these comments, a few processes in the act are described.

(1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW ((42.17.320/)) 42.56.520.¹ Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.² An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW ((42.17.320/)) 42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act, and to obtain relief from such violations. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2). A court proceedings under the PRA is an ordinary civil action, and is not limited to the specific procedures set forth in the PRA. The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.³ To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW ((42.17.340 (1) and (3)/)) 42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW ((42.17.340(6)/)) 42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2).((4)) A requestor can also initiate a civil action against an agency by filing a summons and complaint.⁴ The case must be filed in the superior court in the county in which the record is maintained. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW ((42.17.340(5)/)) 42.56.550(5). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.⁵ ((However, most cases are decided on a motion to show cause.⁶))

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2).

(5) **Remedies under the act.** ((Types of cases subject to judicial review.)) While an action under the PRA is an ordinary civil action, the act provides a number of specific legal remedies ((The act provides three mechanisms for court review of a public records dispute)).

(a) ((Denial of record.—The first kind of judicial review is when a requestor's request has been denied by an agency. RCW ((42.17.340(1)/)) 42.56.550(1). This is the most common kind of case.

———(b)———"Reasonable estimate.") **Estimates.** The act permits ((second form of judicial review is when)) a requestor to seek judicial review of ((challenges)) an agency's "reasonable estimate" of the time to provide a full response or estimated charges for copies. RCW ((42.17.340(2)/)) 42.56.550(2).

(e) (b) **Injunctive action to prevent disclosure.** ((The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330/ 42.56.540. An action under this statute can be initiated by the agency, a)) An agency, a person named in a requested ((the disputed)) record, or a person to whom

the record "specifically pertains(~~(-)~~)," may seek an injunction to prevent disclosure of the records. The agency or third party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.~~((7))~~ 6 The party seeking to prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.~~((8))~~ 7

(6) (c) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW ~~((42.17.340(3)/))~~ 42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.~~((9))~~ 8

However, in camera review is not always required, and it is up to the discretion of the trial court.⁹

A court may have local court rules on Public Records Act cases and in camera review procedures. In the alternative, an agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) (d) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees~~((7))~~ and costs~~((, and))~~. In addition, it is within the discretion of a court to assess a daily penalty against the agency, considering several factors. RCW ~~((42.17.340(4)/))~~ 42.56.550(4).10 Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.~~((10))~~ 11

A special process regarding attorneys' fees and penalties applies to actions involving the disclosure of body worn camera recordings governed by RCW 42.56.240. Another process applies to requests by inmates; penalties may not be awarded to an inmate unless a court determines the agency acted in bad faith. RCW 42.56.565.

~~((A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully~~

withheld record was provided for another reason.11)) In an injunctive action under RCW 42.17.330/42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.12

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.13 However, a court is only authorized to award "reasonable" attorneys' fees. RCW ((42.17.340(4)/) 42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.14

The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.15.

~~((A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."16 An agency's "bad faith" can warrant a penalty on the higher end of this scale.17 The penalty is per day, not per record per day.18))~~ The penalty range is up to one hundred dollars a day. RCW 42.56.550(4). Courts will consider a nonexclusive list of penalty factors in determining whether to assess a penalty, and the amount.16

1 *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) ("PAWS II") (RCW ((42.17.320/)) 42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

2 See, e.g., WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

3 *Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

4 See generally *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

5 *Id.* at 106.

6 ((*Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003)).

7)) 6 *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

((8)) 7 PAWS II, 125 Wn.2d at 257-58. See also *SEIU Healthcare 775 NW v. State et al.*, 198 Wn. App. 745, X P.3d X (2017) (party seeking injunction under RCW 42.56.540 must show that (1) record pertains to that party, (2) exemption applies, and (3) disclosure

would not be in the public interest and would substantially and irreparably harm the party or a vital governmental function.)

((9)) 8 *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 (–& 588), 983 P.2d 676 (1999), review denied, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

9 *Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 122 (2015); *Nissen v. Pierce County*, 182 Wn.2d 863, 357 P.3d 45 (2015).

10 *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (factors).

((10)) 11 RCW ((42.17.340(4))) 42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

((11 *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 4117 (2005))).

12 *Confederated Tribes*, 135 Wn.2d at 757; *Doe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016).

13 *Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("*ACLU I*") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

14 *Id.* at 118.

15 *Id.* at 115.

((16 *American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").

17 *Id.* 18))

16 *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

Krier, Nancy (ATG)

From: Katherine A. George <kathy@johnstongeorge.com>
Sent: Wednesday, October 4, 2017 6:30 PM
To: Krier, Nancy (ATG)
Cc: president@washingtoncog.org
Subject: PRA rulemaking
Attachments: 10 4 17 WCOG Supp Comments on 040.pdf

Hi Nancy. I'm submitting this supplemental letter from WCOG on behalf of Toby Nixon.

Thanks,
Kathy

Officers

Toby Nixon, President
Kirkland City Council
Microsoft Corporation

Micnele Earl-Hubbard, Vice-President
Allied Law Group

Sam Pace, Secretary
Association of REALTORS®

D. Edson Clark, Treasurer
Clark, Raymond & Company

Board of Directors

Matt Beaton
Franklin County Auditor

William Crittenden
Attorney at Law

David Dewhirst
The Freedom Foundation

Judith A. Endejan
Garvey Schubert Barer

George Erb
Journalist, Educator

Mike Fancher
Private Citizen

Angela Galloway
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Kathy George
Johnston George LLP

Marty McCurry
McCurry Investments, Inc.

Walter Neary
Comcast PR Director
Former Lakewood City Council

Fred Obee
WA Newspaper Publishers Association

Karen Peterson
The News Tribune

Rep. Gerry Pollet
WA State Representative, 46th District
Executive Director, Heart of America NW

Kate Riley
The Seattle Times

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Washington Coalition for Open Government

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October 4, 2017

Via Email (PDF)
nancyk1@atg.wa.gov

Nancy Krier
Washington Attorney General
PO Box 40100
Olympia WA 98504-0100

**RE: WAC Chap. 44-14 Model Rules - Proposed Rule Making
Supplemental Comments on WAC 44-14-040 et seq.**

Dear Ms. Krier:

This letter supplements the comments and proposed rules submitted today by the Washington Coalition for Open Government (WCOG) on the Proposed Rule Making (WSR 17-17-157) published on August 23, 2017. This letter includes WCOG's comments on WAC 44-14-040 et seq., relating to processing of public records requests.

WAC 44-14-040 Processing of public records requests—General.

This model rule should focus on fulfilling the Act's requirements to respond promptly and to provide the fullest assistance and most timely possible action on requests. Accordingly, Subsection (1) should not refer to "the most efficient manner" of processing requests. Maximum efficiency is not the same as fullest assistance. Also, the categorization provisions in proposed subsection (1) should be stricken. The model rule should reflect a goal of completing each request immediately, or within five days, if possible. The rule as proposed assumes that all requests will go straight into a "queue," without first requiring at least a preliminary search for the desired records. Some search is needed before a records officer can determine the difficulty or complexity of the request.

WCOG notes, also, that there is no requirement for a requester to contact an agency when the initial response deadline is missed. Nor is there any statutory time limit on inspecting records once they are made available. Thirty days may be insufficient for some requesters who must take time off from work or travel a long distance to inspect records at an agency office. Finally, the proposed rule fails to reflect that the purpose of installments is to help the requester obtain

records as they become available. The reference to what the records officer believes is "practical" should be removed.

WCOG proposes to revise the rule to read as follows:

WAC 44-14-040 Processing of public records requests—General.

Providing "fullest assistance." The (name of agency) is charged by statute with adopting and enforcing rules which provide for how it will ~~"provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency,"~~ provide for "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests, consonant with the intent of the Public Records Act to "provide full access to public records," "protect records from damage or disorganization," and "prevent excessive interference with other essential functions of the agency,". The public records officer or designee will process requests as promptly as possible and grant access to requested records as fully as possible in the order allowing the most requests to be processed in the most efficient manner.

~~((2))~~ (a) Upon receipt of a request, the (name of agency) will assign it a tracking number and log it in.

(b) The public records officer or designee will evaluate the request according to the nature of the request, volume, and availability of requested records, and give it a priority category.

The priority category guides the (name of agency) in determining its reasonable level of effort to devote to responding to the request, as the (name of agency) is obligated to prevent public disclosure demands from causing excessive interference with other essential agency functions. RCW 42.56.100.

The priority category also guides the (name of agency) in providing a reasonable estimate of time to respond to a request. RCW 42.56.520.

The priority category also guides the (name of agency) in determining the order of requests processed. Responding to a records request is not always a sequential process. The (name of agency) may process requests out of order, enabling it to better respond to simple as well as complex requests. At any given time, the (name of agency) may have multiple records requests in the queue. The processing of requests in the queue will depend upon the priority category; the number of records responsive to a request; the number and size of other records requests in the queue; the amount of processing required for a request or other requests in the queue; the status of a particular request, such

~~as whether the (name of agency) is awaiting clarification or payment from the requestor, a response to a third party notice, or legal review; and, the current volume of other (name of agency) work, as it affects the amount of staff time that can be devoted to a request or requests.~~

~~The request will be evaluated for prioritization using the following criteria: The immediacy of the required response in the interest of public safety (documented imminent danger); the complexity of the records request in terms of breadth, ease of identification of potentially responsive records, clarity and accessibility; the amount of coordination required between (departments) (divisions); the number of records requested; the extent of research and searching needed by staff who are not primarily responsible for public disclosure; the format of the records; the need for legal review and/or additional assistance from third parties in identification and assembly; the need to notify affected third parties; the need to consider customized access, and, other criteria the public records officer deems appropriate.~~

~~Following evaluation, the (name of agency) will assign a category number. After initial categorization, requests may be recategorized in response to unanticipated circumstances or additional information. The estimated time periods for each category are goals; the (name of agency) may not be able to comply with the goals but will notify the requestor if the estimated time periods will not be met and need to be adjusted.~~

(2) Acknowledging receipt of initial response to request. ~~Following the initial evaluation of the request under (2) and (3) of this subsection, and~~
~~within five business days¹ of receipt of the request, the public records officer will do one or more of the following, depending upon which response provides the fullest assistance and most timely possible action on the category assigned to the request:~~

~~(a) Make the records available for inspection or copying((; (b))) including:~~

~~If copies are available on the (name of agency's) internet web site, provide an internet address and link on the web site to specific records requested;~~

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

~~((e)) (b) Acknowledge receipt of the request and provide a reasonable estimate of when records or an installment of records will be available (the public records officer or designee may revise the estimate of when records will be available); or~~

~~((d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor.)) (c) Acknowledge receipt of the request and ask the requestor to provide clarification for a request that is unclear, and provide, to the greatest extent possible, a reasonable estimate of time the (name of agency) will require to respond to the request if it is not clarified.~~

Such clarification may be requested and provided by telephone((. The public records officer or designee may revise the estimate of when records will be available)), and memorialized in writing;

If the requestor fails to respond to a request for clarification and the entire request is unclear, the (name of agency) need not respond to it. The (name of agency) will respond to those portions of a request that are clear; or

~~((e)) (d) Deny the request.~~

~~((3)) (5) **Consequences of failure to respond.** If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should ((consider contacting)) contact the public records officer to determine the reason for the failure to respond.~~

~~((4)) (6)-(3) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.~~

~~((5)) (47) **Records exempt from disclosure.** Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief written explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor which exemption justifies the redaction and why y portions of the record are being redacted.~~

~~((6)) (8) **Inspection of records.**~~

Consistent with other demands, the (name of agency) shall promptly provide space to inspect public records. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to copy.

The requestor must claim or review the assembled records within ~~thirty~~ 60 days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the ~~sixty~~ thirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

~~((7))~~ (69) **Providing copies of records.** After inspection is complete, the public records officer or designee shall make the requested copies or arrange for copying. Where (name of agency) charges for copies, the requestor must pay for the copies.

~~((8))~~ (740) **Providing records in installments.** When the request is for a large number of records, the public records officer or designee will provide records access for inspection and copying in installments as they become available or as prioritized by the requester, consistently with providing the fullest assistance and most timely possible action on the request. ~~if he or she reasonably determines that it would be practical to provide the records in that way.~~ If, within ~~sixty~~ thirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

WAC 44-14-04001 Introduction.

WCOG has no comments.

WAC 44-14-04002 Obligations of requestors.

A request for a "future" record can be identifiable. For example, a citizen may ask for a council meeting packet to be provided when it is available. WCOG proposes to eliminate the proposed blanket statement that the Act "does not allow" any requests for "future" records.

The AGO proposal adds substantial text to WAC 44-14-04002 relating to key word searches. *AGO Proposal* at 21-22. As WCOG has stated in its main comment letter, all public records

should be properly organized in the first place. Agencies should minimize reliance on key word searches by organizing records according to subject matter or names.

WAC 44-14-04003 Responsibilities of agencies in processing requests.

A. Categorization. The categorization provisions should be removed from WAC 44-14-04003(1) for the reasons discussed above.

B. Fullest assistance. Existing WAC 44-14-04003(2) addresses “fullest assistance” under RCW 42.56.100. The AGO proposal does not make any changes to this section other than renumbering it to (3) and correcting various RCW citations. The existing rule contains language suggesting that “fullest assistance” and “most timely possible action” are mere principles, which is inconsistent with the explicit directive of RCW 42.56.100. WCOG proposes revising this section as follows:

~~(((2)))~~ **(3) Provide "fullest assistance" and "most timely possible action."** The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor and the "most timely possible action on requests." RCW ~~((42.17.290/))~~ 42.56.100. The (name of agency) must comply with this requirement by actually adopting and enforcing rules that will result in the agency providing fullest assistance to requestors and the most timely possible action on requests, specifically including rules to protect public records from disorganization or destruction. ~~((The "fullest assistance" principle should guide agencies when processing requests. In general, a) An agency must ((should)) devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW ((42.17.290/)) 42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.((~~

~~————The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW ((42.17.290/)) 42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.))~~

C. Databases. Existing WAC 44-14-04003(5) states the basic proposition that agencies have no duty to create new records to respond to a PRA request. The AGO proposal makes various changes to this section, including renumbering the section to (6).

The AGO proposal adds text discussing databases and the “dichotomy” between producing existing electronic records and creating new records. The text added by the AGO is unnecessary

and redundant, because databases are already discussed in more detail in WAC 44-14-050. The AGO proposal misleadingly implies that customized access is the only way to request a database under the PRA. As explained in WCOG's comments on WAC 44-14-050, a database is a "writing" and therefore a "public record" that can be copied and redacted electronically.

The AGO's proposed revisions to the first and second paragraphs of WAC 44-14-04003(5) should be rejected.

D. Searching for records - Documentation. Existing WAC 44-14-04003(9) addresses searching for records. The AGO proposal at 28 adds language that "Documentation of searches is recommended." Documentation of searches should be mandatory. Agencies have the burden to prove that they have actually searched for records, and should not be permitted to rely on self-serving declarations prepared only after an agency has been sued. This revision should be rejected. Please see WCOG's main comment letter for WCOG's proposed rule to specifically address records of PRA compliance in WAC 44-14-03004.

E. Third-party notice. The proposed WAC 44-14-04003(12) is inconsistent with RCW 42.56.540 and case law regarding third-party injunction suits, as well as sound public policy. First, to be accurate, third-party plaintiffs must prove not just that disputed records are exempt but also that disclosure would not be in the public interest. Second, WCOG is troubled by the statement that third-party notice is appropriate only when an agency reasonably believes that records are exempt. It is the agency's responsibility to promptly determine if requested records are exempt, and if they are exempt, the agency should assert the exemption itself rather than shift the burden to a third party. That way the requester can decide whether to challenge the exemption claim, and is not dragged into court unnecessarily or forced to wait until a court resolves the dispute. Third-party notice should be avoided except in rare cases when it is required by law. A 10-day deadline to obtain an injunction should be explicitly required.

WCOG proposes to amend WAC 44-14-04003(12) as follows:

(12) Notice to affected third parties. Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure and that disclosure would not be in the public interest. ((⁷) RCW ((42.17.330/)) 42.56.540. ~~Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.~~

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW ((42.17.330/)) 42.56.540.¹⁵ ~~This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency~~

has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW ((42.17.330/)) 42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its failure to notify enough people under the act. RCW ((42.17.258/)) 42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW ((42.17.258/)) 42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

Agencies should ~~The practice of many agencies is to give no more than ten days' notice that records will be released, absent an injunction.~~ Many agencies expressly indicate the deadline is when date on which it must receive a court order enjoining disclosure, not when the third party must express interest in seeking an injunction, to avoid any confusion or potential liability. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include in its calculation the notice period in the "reasonable estimate" of time it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, unless the agency intends to defend against a third-party injunction suit, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

WAC 44-14-04004 Responsibilities of agency in providing records.

A. Redactions. The AGO proposal revises WAC 44-14-04003 with respect to redactions. AGO proposal at 32-33. The AGO proposal fails to delete language that suggests redacting paper records with a black marker, and adds language suggesting that electronic redaction is merely "another approach." This entire paragraph is out-of-date and should be deleted.

Please see WCOG's main comment letter for WCOG's proposed rules to address electronic redaction of paper records and keeping electronic copies of all records provided to requestors.

B. Explanation of exemptions. The AGO proposal revises WAC 44-14-04003 with respect to the brief explanation required by RCW 42.56.210(3). The existing rule suggests that an exemption log is sufficient if it states the exemption and "identifies the type of record, its date and number of pages, and the author or recipient of the record." That information is not

sufficient for many exemptions, particularly attorney-client privilege and work product. This text should be revised as follows:

(b) Brief explanation of withholding...

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding ~~((index-#))~~ log, along with the statutory citation permitting withholding, and a description of how the exemption applies to the information withheld. The log identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).~~((7))~~ § For some exemptions merely identifying an exemption and providing the log information is not a sufficient explanation of how the exemption applies to the record, and an additional explanation will be required. The withholding ~~((index))~~ log need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

Another way to properly provide a brief explanation is to use another format, such as a letter providing the required exemption citations, description of records, and brief explanations. Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency's response.

WAC 44-14-04005 Inspection of records.

As noted above, WCOG believes the 30-day time limit to inspect records is too short. It should be at least 60 days.

Thank you for your consideration.



Toby Nixon
President
Washington Coalition for Open Government

October 4, 2017

Nancy Krier
Office of the Attorney General
1125 Washington St.
Olympia, Wash. 98504
Submitted at public hearing and by email to: nancyk1@atg.wa.gov

Re: Public Records Act Rulemaking

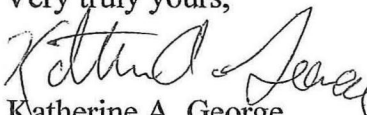
Dear Nancy:

Thank you for involving stakeholders in this important effort to update and improve the model rules for the Public Records Act, Chap. 42.56 RCW. I submit the attached comments on behalf of Allied Daily Newspapers of Washington ("Allied"), a statewide association dedicated to informing the public about matters of public interest. Allied supports many of the proposed changes, and appreciates the hard work involved.

The attached comments are offered to assist the Office of Attorney General in understanding and addressing the requester's perspective. For ease of reference, each proposed rule of concern is shown with suggested revisions highlighted and in change-tracking mode, followed by explanatory comments. Proposed rules which raise no concerns are omitted from the attachment.

In light of the sheer volume, breadth and complexity of the proposed rule changes and related public comments, Allied requests that you circulate a revised proposal for additional comment prior to adopting final rules. Please let me know if you need clarification of any comments or if I may be of assistance in any way.

Very truly yours,


Katherine A. George

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-000 **Comment 02** Format of model rules. ((We are publishing)) The model rules are published with followed by comments. ~~The comments have five-digit WAC numbers such as WAC 44-14-04001.~~ The model rules themselves have three-digit WAC numbers such as WAC 44-14-040.

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

Allied comment: Despite this introductory comment, it is not clear to the casual reader of the Attorney General's model rules that only the sections with shorter numbers are intended to be adopted by agencies, and that sections with longer numbers are merely explanatory. To make this distinction more clear, the word "Comment" should be inserted within each heading as shown above and below.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-000 **Comment 03** Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules use the word "should" or "may" to describe what an agency or re-questor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any le- gal duty.

While the model rules and comments are nonbinding, they should be carefully considered by requestors and state agencies. ((The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.)) Local agencies are encouraged required to consider them in establishing local ordinances implementing the act. RCW 42.56.570. The Washington courts have also considered the model rules in several appellate decisions.¹

Note: ¹ See, e.g., *Mechling v. City of Monroe*, 152 Wn. App. 830, 222 P.3d 808 (2009); *Mitchell v. Washington State Dep't of Corr.*, 164 Wn. App. 597, 277 P.3d 670 (2011); *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009).

Allied comment: RCW 42.56.570(4) says "Local agencies *should* consult the advisory model rules when establishing local ordinances..." (italics added). It does not say "shall" or "must." Therefore it is more accurate to say "encouraged" rather than "required."

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-010 **Authority and purpose.** ~~(1)~~ RCW ((42-17-260(1)/)) 42.56.070(1) requires [name of each agency] to make available for inspection and copying nonexempt "public records" in accordance with published rules. RCW 42.56.100 requires [name of agency] to adopt and

[1]

OTS-8829.3

enforce reasonable rules and regulations to "provide for the fullest assistance to inquirers and the most timely possible action on requests for information," consonant with the intent of the Act to provide full public access to public records, protect public records from damage or disorganization, and prevent excessive interference with other essential functions of [name of agency].

The act defines "public record" at RCW 42.56.010(3) to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained" by the agency. RCW 42.56.010(3) excludes from the definition of "public record" the records of volunteers that are not otherwise required to be retained by the agency and which are held by volunteers who do not serve in an administrative capacity; have not been appointed by the agency to an agency board, commission or internship; and do not have a supervisory role or delegated authority. RCW ((42.17.260(2)/) 42.56.070(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records held by that agency.

The purpose of these rules is to establish how the procedures (name of agency) will follow in order to provide fullest assistance to requesters and the most timely possible action on requests consonant with the intent of the Act, access to public records. These rules provide information to persons wishing to request access to public records of the (name of agency) and establish processes for both requestors and (name of agency) staff that are designed to best assist members of the public in obtaining such access.

~~The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government.~~ The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (name of agency) will be guided by the provisions of the act describing its purposes and interpretation.

Allied comment: Because this is a model rule intended to be adopted by state and local agencies, it should lend itself to adoption verbatim (replacing "each agency" with the agency's name). Also, because this rule is labeled "authority and purpose," Allied suggests sticking to that topic. The definition of public records, the requirement to set forth exemption laws, and the purpose of the Act generally, are unrelated to the authority and purpose of *agency rules* and therefore should be separated from this model rule. Most importantly, this model rule should accurately reflect the purpose of the agency "rules" prescribed by the Act. RCW 42.56.100 clearly states that agency rules "*shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information*" (italics added). In serving that purpose of fullest assistance and most timely action, the agency rules must be consistent with the intent of the Act to "provide full public access to public records," to "protect public records from damage and disorganization," and to prevent excessive interference with other essential functions. RCW 42.56.100. This model rule should recognize these distinct concepts and not conflate them into a single purpose to "provide full access."

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-010 **Comment 02** Requirement that agencies adopt **and enforce** reasonable regulations for **fullest assistance to requesters and the most timely possible action on public records requests.** ~~The act provides that state agencies are to publish a rule in the Washington Administrative Code (WAC) and local agencies are to make publicly available at the central office guidance for the public that includes where the public may obtain information and make submittals and requests. RCW 42.56.040.~~

The act provides: "Agencies shall adopt and enforce reasonable rules and regulations...**consonant with the intent of this chapter** to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency... Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW ((42.17.290/)) 42.56.100. Therefore, an agency must adopt **and enforce** "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."¹

~~At the same time, a~~An agency's regulations must **serve the intent of the Act to provide full public access to public records,** "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. **This includes preventing damage by complying with records retention schedules and not destroying records subject to a pending request, preventing disorganization by systematically organizing records so that they can be located promptly in response to records requests, and preventing excessive interference with other essential functions by ensuring adequate staffing to process requests.**

Another provision of the act states that providing public records should not "unreasonably disrupt the operations of the agency." RCW ((42.17.270/)) 42.56.080. This provision allows an agency to take reasonable precautions to prevent a requestor from being unreasonably disruptive or disrespectful to agency staff.

The courts have held that the act requires strict compliance **and that rules adopted under RCW 42.56.100 provide for compliance "in a manner most conducive to the orderly administration of business." with its procedural provisions., but also that reasonable procedures will be sustained.**²

Notes: ¹*Andrews v. Washington State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014) (Court of Appeals recognized that agencies must provide fullest assistance to requestors, but also that "a flexible approach" that focuses on the thoroughness and diligence of an agency's response is most consistent with the concept of "fullest assistance.")

²*Zink v. City of Mesa*, 140 Wn. App. 328, 166 P.3d 738 (2007); *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008).

Allied comment: This WAC comment should use the exact language of the Act for clarity. RCW 42.56.040, and the 2008 *Parmelee* case related to it, belong in a separate section addressing the duty to publish "procedures" for *all* matters (not just public records) which is different from the duty to adopt and enforce "rules and regulations" for public records under RCW 42.56.100. Also, this WAC comment needs more balance. The focus should be on preventing unnecessary delays and unauthorized destruction by agencies.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-020 Agency description—Where to find decisions, rules and policies Contact information—Public records officer.

(1) The (name of agency) (describe services provided by agency). The (name of agency's) central office is located at (describe). The (name of agency) has field offices at (describe, if applicable).

(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (name of agency):

Public Records Officer (Agency)
(Address) (Telephone number)
(fax number if relevant) (email)

~~Information is also available at the (name of agency's) web site at (web site address).~~

The public records officer will oversee compliance with the act but another (name of agency) staff member may process the request. Therefore, these rules will refer to the public records officer "or designee."

~~(3) Information is also available at the (name of agency's) web site at (web site address). The public records officer or designee and the (name of agency) will provide the "fullest assistance" to requestors; create and maintain for use by the public and (name of agency) officials an index to public records of the (name of agency, if applicable); ensure that public records are protected from damage or disorganization; and prevent fulfilling public records requests from causing excessive interference with essential functions of the (name of agency).~~

~~(4) A description of [name of agency]'s central and field organization is available at [link to relevant WACs for state agency; central office, and web link if applicable, for local agency].~~

~~(5) A description of [name of agency] operations is available at [link to relevant WACs for state agency; central office, and web link if applicable, for local agency].~~

~~(6) Copies of [name of agency] decisions are available at [link to relevant WACs for state agency; central office, and web link if applicable, for local agency].~~

~~(7) A description of formal and informal operating procedures for [name of agency], are available at [link to relevant WACs for state agency; central office, and web link if applicable, for local agency].~~

~~(8) Formal rules of procedure for [name of agency] are published at [link to relevant WACs for state agency; central office, and web link if applicable, for local agency].~~

~~(9) Adopted policies of [name of agency] applicable to the general public are available at [link to relevant WACs for state agency; central office, and web link if applicable, for local agency].~~

~~(10) Policy interpretations applicable to the general public are available at [link to relevant WACs for state agency; central office,~~

and web link if applicable, for local agency].

Allied comment: According to the WAC comments, this model rule is intended to carry out RCW 42.56.040. But that statute is not about making public records requests – it’s about preventing the need for them. RCW 42.56.040 requires each state agency to publish in the Washington Administrative Code, and requires each local agency to prominently display at its central office, all of the agency’s decisions, rules and procedures that citizens are expected to comply with. RCW 42.56.040(1) states:

- (1) Each state agency shall separately state and currently publish in the Washington Administrative Code and each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public:
 - (a) Descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain copies of agency decisions;
 - (b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available;
 - (c) Rules of procedure;
 - (d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
 - (e) Each amendment or revision to, or repeal of any of the foregoing.

Thus, an agency needs to make readily available an explanation of how it is organized, how it operates, and where citizens can find its “decisions,” “formal and informal procedures,” “rules of procedure,” “substantive rules of general applicability,” “statements of general policy” and “interpretations of general applicability,” so that citizens and businesses have fair notice of government decisions and procedures affecting them. For example, a city’s parking, traffic, noise, building, health and safety codes should be readily available for copying at City Hall - and posted on the city’s Web site - before they are enforced. The legislative purpose to provide fair notice of such “generally applicable” rules is apparent from RCW 42.56.040(2), which states: “Except to the extent that he or she has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed.” The model rule misconstrues RCW 42.56.040 as merely requiring a designated records officer, and confuses it with RCW 42.56.100 and RCW 42.56.580. A more logical interpretation is that RCW 42.56.040 *prevents the need for public records requests* for essential public information. RCW 42.46.040 is similar to (and complimented by) RCW 42.56.070 subsections (3) through (6), which require agencies to maintain an index identifying opinions, orders, policies, manuals, policy interpretations, plans, studies and reports affecting the rights of the public.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-020 **Comment 01 Agency must publish its procedures.** An agency must publish and make readily available its public records generally applicable rules, policies and procedures, organizational information, and methods for requestors to obtain public records and information. RCW ((42.17.250(1)-)) 42.56.040(1).¹ A state agency must publish its rules, policies and procedures in the Washington Administrative Code and a local agency must prominently display and make them available at the central office of such local

agency. RCW ((42.17.250(1)/)) 42.56.040(1). An agency should post its public records rules, policies and procedures on its web site. An agency cannot invoke a procedure, rule or policy of general applicability if it did not publish or display it as required (unless the party had actual and timely notice of its contents). RCW ((42.17.250(2)/)) 42.56.040(2).

Note: ¹Sec. e.g., WAC 44-06-030 (attorney ((general office's)) general's office organizational and public records methods statement); WAC 388-01-020 (department of social and health services organizational structure rule); City of Kirkland Public Records Act Rule 020 available at <http://www.kirklandwa.gov/depart/Finance and Administration/Public Records/Public Records Request.htm> (agency description).

Allied comment: Please see the remarks on Model Rule 44-14-020 above. RCW 42.56.040 is designed to make available for public review, without the need for a records request, all kinds of rules and procedures - not just the method for requesting public records.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 Availability of public records. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (name of agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (name of agency). Many public records are also available for inspection and copying on the (name of agency's) web site, at [web address], at any time, at no cost.

(2) **Records index.** (If agency keeps an index.) An index of public records is available for use by members of the public, including (describe contents). The index may be accessed online at (web site address). (If there are multiple indices, describe each and its availability.)

(If agency is local agency opting out of the index requirement.) The (name of agency) finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with (name of agency) operations in the following ways (specify reasons).

(3) **Organization of records.** The (name of agency) will maintain its records in a reasonably organized manner in such an organized manner as is necessary to provide the fullest assistance to the requestor and most timely possible action on public records requests. The (name of agency) will take reasonable actions to protect records from damage and disorganization by regularly labeling and filing them according to subject matter and/or name, and by using searchable record formats whenever possible.

~~(3)(4)~~ **Preventing damage.** The (name of agency) will prevent damage to public records, consonant with providing the fullest assistance to requesters, by complying with applicable retention schedules and by not destroying records subject to a pending request. A requestor shall not take (name of agency) records from (name of agency) offices without the permission of the public records officer or designee. A variety of records is available on the (name of agency) web site at (web site address). ~~Requesters are encouraged to view the documents available on~~

~~the web site prior to submitting a records request.~~

(4)(5) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form or through an online portal, or by letter, fax (if the agency uses fax), or email addressed to the public records officer at the email address publicly designated by (name of agency), or by submitting the request in person at (name of agency and address) and including the following information:

- ~~Name of requestor;~~
- ~~Address of requestor;~~
- ~~Other eContact information for the requestor, including telephone number and any email address;~~
- Identification of the public records adequate for the public records officer or designee to locate the records; and
- The date ~~and time of day~~ of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), ~~((standard photocopies will be provided at (amount) cents per page))~~ charges for copies are provided in a fee schedule available at (agency office location and web site address).

(c) A records request form is available for use by requestors at the office of the public records officer and online at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

Allied comment: The main suggestion here is to separate organization from damage prevention, and to give each of those duties more heft. Preventing damage and disorganization are part of the larger duty to provide the fullest assistance and most timely possible action, and therefore should involve making it as easy as possible to find and produce records. Also, the model rule should not require so much detail from requestors, who are permitted to be anonymous.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 **Comment 01** "Public record" defined. ~~For most public records, the courts use a three-part test to determine if a record is a "public record."~~ ~~is~~ The document must be: ~~A~~ a "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency. ⁽¹⁾ Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

(1) **Writing.** A "public record" can be any writing "regardless of

physical form or characteristics." RCW ((42.17.020(41))) 42.56.010(3). "Writing" is defined very broadly as: "... handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation((r)) including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW ((42.17.020(48))) 42.56.010(4). An email ((is a "writing)), text, social media posting and database are therefore also "writings."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW ((42.17.020(41))) 42.56.010(3).¹ Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be if its existence was used for a governmental purpose.² For example, a record showing the existence of a purely personal email sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the email itself were not.^{(2) 3}

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW ((42.17.020(41))) 42.56.010(3). A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."^{(3) 4} For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.^{(4) 5} The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a public record to a third party for the sole purpose of avoiding disclosure.^{(5) 6}

(4) Records on personal devices. Sometimes agency employees or officials may work on agency business from home computers (~~These home computers~~) or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's agency business employment, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."⁷ RCW ((42.17.020(41))) 42.56.010(3). However, the act does not authorize

~~unbridled searches of agency property.~~⁽⁶⁾ ⁹ ~~If agency property is not subject to unbridled searches, then neither is the home computer, or personal device or personal account of an agency employee or official. Yet, because the ((home computer documents)) records relating to agency business are "public records," they are subject to disclosure (unless exempt).~~

Allied comment: This comment model rule is supposed to define public records, according to its heading, and should be limited to that subject. The discussion about retrieving public records from personal devices should be moved to a separate new rule as shown below.

WAC 44-14-0xx Retrieving records from personal devices.

~~Name of agency] employees and officials shall be provided with agency devices and agency email accounts for conducting agency business, and shall avoid using personal devices and personal accounts for agency business whenever possible. that a~~All public records, regardless of where they were created, ~~shall could eventually~~ be stored on agency computers. ~~Agencies should ask e~~Employees and officials ~~shall to~~ keep agency-related documents with any retention requirements on home computers or personal devices in separate folders ((and)) temporarily, until they are provided to the agency. ~~An agency could also require an~~[Name of agency] employees and ~~ex~~ officials ~~shall to~~ routinely blind carbon copy ("bcc") work emails in a personal account back to ((the employee's)) an agency email account. If [name of the agency] receives a request for records that are located solely on employees' or officials' home computers or personal devices, or in personal accounts, ~~the agency should direct the ((employee)) individual to ((forward))~~ employees or officials shall search for and provide any responsive documents ((back)) to the agency, and the agency will ~~should~~ process the request as it would if the records ~~originated were~~ on the agency's computers((-)) or in agency-owned devices or accounts. The [name of agency] employee or official may be required by the agency to sign an affidavit describing the nature and extent of his or her search for and production of responsive public records located on a home computer or personal device, or in a nonagency account, and a description of personal records not provided with sufficient facts to show the records are not public records.⁹

~~Agencies could provide employees and officials with an agency issued device that the agency retains a right to access. Or an agency could limit or prohibit employees' and officials' use of home computers, personal devices or personal accounts for agency business. Agencies should have policies describing permitted uses, if any, of home computers, personal devices or personal accounts for agency business. The policies should also describe the obligations of employees and officials for retaining, searching for and producing the agency's public records.~~¹⁰

Notes: ⁹Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wn.2d 734, 748, 958 P.2d 260 (1998)((-For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41))) (broadly interpreting the provision concerning governmental function).

²See *Mechling v. Monroe*, 152 Wn. App. 830, 867, 222 P.3d 808 (2009) ("Purely personal emails of those government officials are not public records."); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015) (describing that an employee or official must provide the agency responsive "public records" but is not required to provide "personal records").

³*Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691, 13 P.3d 1104 (2000) (record of volume of personal emails used for governmental purpose).

⁽³⁾⁴*Concerned Ratepayers v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999)(:); *Nissen*, 183 Wn.2d at 882. (For a record to be "used" it must bear a nexus with the agency's decision-making process; a record held by a third party, without more, is not a public record unless an agency "uses" it.)

⁽⁴⁾*Id.*; ⁵*Concerned Ratepayers*, 138 Wn.2d 950.

⁽⁵⁾See Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

⁽⁶⁾⁷*Nissen*, 183 Wn.2d at 882; *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016). In *Nissen* the State Supreme Court held that a communication is "within the scope of employment" when the job requires it, the employer directs it, or it furthers the employer's interests. This inquiry is always case- and record-specific.

⁸See *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

⁹*Nissen*, 183 Wn.2d at 886-887.

¹⁰*Id.* at 877, 886-887.

Allied comment: Dealing with public records on personal devices is a distinct issue, warranting its own model rule, and does not belong in a comment defining public records. Like other model rules, this one should be written for adoption and enforcement by individual agencies, and should use the agency's name rather than saying what other agencies "should" or "could" do.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 Comment 03 Index of records. State and local agencies are required by RCW ((42.17.260-)) 42.56.070 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot use, rely on, or cite to as precedent a public record unless it was indexed or made available to the parties affected by it. RCW ((42.17.260(6)-)) 42.56.070(6). An agency should post its index on its web site.

The index requirements differ for state and local agencies. A state agency must index only two categories of records:

(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and

(2) Final orders, declaratory orders, interpretive statements, and statements of policy issued after June 30, 1990. RCW ((42.17.260(5)-)) 42.56.070(5).

A state agency must adopt a rule governing its index.

A local agency may opt out of the indexing requirement if it issues a formal order specifying the reasons why doing so would "unduly burden or interfere with agency operations." RCW ((42.17.260(4)(a)-))

42.56.070(4)(a). To lawfully opt out of the index requirement, a local agency must actually issue an order or adopt an ordinance specifying the reasons it cannot maintain an index.

The index requirements of the act were enacted in 1972 when agencies had far fewer records, the vast majority of records were paper, and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources vary greatly so not every agency can afford to utilize this technology. However, agencies should explore

~~the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.~~ Agencies could also consider using their records retention schedules as part of their index, or direct requestors to the schedules as a way to describe the types of records an agency retains and for what periods of time. See chapter 40.14 RCW and WAC 44-14-03005.

Allied comment: Searching and indexing are two different things. A search locates a specific record that has been requested. An index tells the public what records exist. Search technology is not a substitute for the index of records required by RCW 42.56.070, because it is solely for internal use, and does not help the public determine what to request in the first place. Also, RCW 42.56.070(3) does not require an index of *all* public records. The records to be indexed are enumerated in the statute, and generally consist of documents affecting the rights of the public, such as adjudicative and agency orders, policies, staff manuals, plans and goals. This comment should be clarified to comport with the statute.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 Comment 04 Organization--(1) Protection of records. An agency must "protect public records from damage ~~or disorganization.~~" RCW ((42.17.290/)) 42.56.100. An agency owns public records (subject to the public's right, as defined in the act, to inspect or copy non-exempt records) and must maintain custody of them consistent with retention schedules. RCW 40.14.020; chapter 434-615 WAC. An agency's information "must be managed with great care to meet the objectives of citizens and their governments." RCW 43.105.351. Therefore, an agency should not allow anyone requestor to take original agency records out of the agency's office, or alter or damage an original record. Also, an agency may not destroy a public record while a request for that record is pending, regardless of the retention schedule. RCW 42.56.100. An agency may send original records to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).¹

(2) Organization of records. Each agency must protect records from disorganization as part of the duty of fullest assistance to requesters. RCW 42.56.100. Agencies should organize records in the manner most likely to facilitate searches for them. This may include filing and labeling them according to subject matter, name or other readily identifiable characteristic, and using searchable record formats whenever possible.

The legislature encourages agencies to electronically store and provide public records:
Broad public access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens((---and)), organizations, business, and governments. Information must be managed with great care to meet the objectives of citizens and their governments. ((---))

It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.

RCW ((43.105.250)) 43.105.351. An agency could fulfill its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. RCW 42.56.520. Agencies are encouraged to do so, and requestors are encouraged to access records posted online in order to preserve taxpayer resources.² For those requestors without access to the internet, an agency ((could provide a)) is to provide copies or allow the requestor to view copies using an agency computer terminal at its office. RCW 42.56.520.

Notes: ¹See also *Benton County v. Zink*, 191 Wn. App. 269, 361 P.3d 801 (2015) (agency can send records to outside vendor for copying).

²See legislative findings in chapter 69, Laws of 2010 ("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.")

Allied comment: Organization and damage prevention are different things and should be broken into separate comment subsections, as shown above. Also, the comment on protecting records should be primarily concerned with the actions of agencies, not requestors. The comment on organization should offer practical guidance on how to make records easily retrievable.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-030 Comment 06 Form of requests. There is no statutorily required format for a valid public records request ((⁷¹)) RCW 42.56.080(2). Agencies may recommend that requestors submit requests using an agency-provided form or web page. However, a person seeking records must make a "specific request" for "identifiable records" which provides "fair notice" and "sufficient clarity" that it is a records request.¹ An agency may prescribe the means of requests in its rules, which must provide for the fullest assistance to requestors and most timely possible action on requests. RCW 42.56.040; RCW 42.56.070(1); RCW 42.56.100; RCW 34.05.220(1)(b) (state agencies). ~~An agency can adopt reasonable procedures requiring requests to be submitted only to designated persons² (such as the public records officer), or a specific agency address (such as a dedicated agency email address for receiving requests, or a mailing/ street address of the office where the public records officer is located).~~

Agency public internet web site records - No request required. A requestor is not required to make a public records request before inspecting, downloading or copying records posted on an agency's public web site. To save resources for both agencies and requestors, agencies are strongly encouraged to post commonly requested records on their web sites. Requestors are strongly encouraged to review an agency's

web site before submitting a public records request.

In-person requests. An agency must honor requests received in person during normal business hours. RCW 42.56.080(2). An agency should have its public records request form available at the office reception area so it can be provided to a "walk-in" requestor. The form should be directed to the agency's public records officer.

Mail, email and fax requests. A request can be sent ~~((in))~~ to the appropriate person or address by U.S. mail. RCW ~~((42.17.290/))~~ 42.56.100. A request can also be made by email, fax (if an agency still uses fax), or orally~~((.~~ A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250/42.56.040 and 42.17.260(1)/42.56.070(1); RCW 34.05.220 (state agencies)) (but should then be confirmed in writing; see further comment herein).

Public records requests using the agency's form or web page. An agency should have a public records request form. An agency is encouraged to make its public records request form available at its office, and on its web site~~((.~~

~~A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger ones, oral requests may be allowed but are problematic. An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-04002(1), a requestor must provide the agency with reasonable notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives an oral request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.~~

~~An agency should have a public records request form)). Some agencies also have online public records request forms or portals on a page on their web sites, set up to specifically receive public records requests. Agencies may recommend that requestors submit requests using an agency-provided form or web page. RCW 42.56.080(2). In this comment, requestors are strongly encouraged to use the agency's public records request form or online form or portal to make records requests, and then provide it to the designated agency person or address. Following this step begins the important communication process under the act between the requestor and the agency.³ This step also helps both the requestor and the agency, because it better enables the agency to more promptly identify the inquiry as a public records request, timely confirm its receipt with the requestor, promptly seek clarification from the requestor if needed, and otherwise begin processing the agency's response to the request under the act.~~

An agency request form or online form or portal should ask the

requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form or online portal should recite that inspection of records is free and provide ~~((the per page charge for standard photocopies))~~ information about copying fees.

An agency request form or online form or portal should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. ~~Contact information such as a name, phone number, and address or email should be provided.~~ Requestors should provide an email address because it is an efficient means of communication and creates a written record of the communications between them and the agency. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might intimidate some requestors.

Bot requests. An agency may deny a "bot" request, which is one of multiple requests from a requestor to the agency within a twenty-four-hour period, if the agency establishes that responding to the multiple requests would cause excessive interference with other essential agency functions. RCW 42.56.080(3). A "bot" request means a records request that an agency reasonably believes was automatically generated by a computer program or script.

Oral requests. A number of agencies routinely accept oral public records requests (for example, asking to look at a building permit). Some agencies find oral requests to be the best way to provide certain kinds of records. However, for some requests such as larger or complex ones, oral requests may be allowed but are problematic.⁴ An oral request does not memorialize the exact records sought and therefore prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in this comment and in WAC 44-14-04002(1), a requestor must provide the agency with fair notice that the request is for the disclosure of public records; oral requests, especially to agency staff other than the public records officer or designee, may not provide the agency with the required notice or satisfy the agency's Public Records Act procedures. Therefore, requestors are strongly encouraged to make written requests, directed to the designated agency person or address.

If an agency receives an oral request, the agency staff person authorized to receive the request such as the public records officer, should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorialized the request. If the staff person is not the proper recipient, he or she should inform the person of how to contact the public records officer to receive information on submitting records requests. The public records officer serves "as a point of contact for members of the public in requesting disclosure of public records and oversees the agency's compliance with the public records disclosure requirements." RCW 42.56.580.

Prioritization of records requested. An agency may ask a requestor to prioritize the records he or she is requesting so that the agency is able to provide the most important records first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.

Purpose of request. An agency cannot require the requestor to disclose the purpose of the request (~~(with two)~~), apart from exceptions permitted by law. RCW ~~((42.17.270/))~~ 42.56.080. ~~((First))~~ For example, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose and require the requestor to provide information about the purpose of the use of the list.⁽²⁾ ⁵ An agency should specify on its request form that the agency is not authorized to provide public records consisting of a list of individuals for a commercial use. RCW ~~((42.17.260(9)/))~~ 42.56.070(9).

~~((Second))~~ And, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to ~~((a claimant for benefits or his or her representative))~~ identified persons. In such cases, an agency is authorized to ask the requestor if he or she fits ~~((this criterion))~~ the statutory criteria for disclosure of the record.

Indemnification. An agency is not authorized to require a requestor to indemnify the agency. ~~((Op. Att'y Gen. 12 (1988)-3))~~ ⁶

Notes: ¹RCW 42.56.080 (1) and (2); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA "RAI request."); *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000) (an agency's duty under the act is triggered when it receives a "specific request" for records and when the requestor states "the request with sufficient clarity to give the agency fair notice that it had received a request for public records").

²(Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.) *Parmelee v. Clarke*, 148 Wn. App. 748, 201 P.3d 1022 (2008) (upholding agency's procedures requiring public records requests to be made to a designated person).

³See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their PRA requests) and WAC 44-14-04003(3) ("Communication is usually the key to a smooth public records process for both requestors and agencies.")

⁴Oral requests make it "unnecessarily difficult" for the requestor to prove what was requested. *Beal v. City of Seattle*, 150 Wn. App. 865, 874-75, 209 P.3d 872 (2009); see also *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151, 240 P.3d 1149 (2010) (holding that an oral request for "that email" did not provide the city with sufficient notice that metadata was also being requested).

⁵*SEIU Healthcare 775W v. State et al.*, 193 Wn. App. 377, 377 P.3d 214 (2016).

⁶Op. Att'y Gen. 12 (1988). See also RCW ~~((42.17.258/))~~ 42.56.060 which provides: "No public agency, public official, public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter." ((Therefore, an agency has little need for an indemnification clause. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.))

Allied comments: Requesters can be anonymous. The *Parmelee v. Clarke* case was limited to its facts.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-040 Processing of public records requests—General.

(1) Providing "fullest assistance." The (name of agency) is charged by statute with adopting and enforcing rules which provide for how it will "provide full access to public records," "protect records from damage or disorganization," "prevent excessive interference with other essential functions of the agency," provide for "fullest assistance" to requestors, and provide the "most timely possible action" on public records requests, consonant with the intent of the Public Records Act to

"provide full access to public records," "protect records from damage or disorganization," and "prevent excessive interference with other essential functions of the agency,". The public records officer or designee will process requests as promptly as possible and grant access to requested records as fully as possible in the order allowing the most requests to be processed in the most efficient manner.

((2)) (a) Upon receipt of a request, the (name of agency) will assign it a tracking number and log it in.

(b) The public records officer or designee will evaluate the request according to the nature of the request, volume, and availability of requested records, and give it a priority category.

(i) The priority category guides the (name of agency) in determining its reasonable level of effort to devote to responding to the request, as the (name of agency) is obligated to prevent public disclosure demands from causing excessive interference with other essential agency functions. RCW 42.56.100.

(ii) The priority category also guides the (name of agency) in providing a reasonable estimate of time to respond to a request. RCW 42.56.520.

(iii) The priority category also guides the (name of agency) in determining the order of requests processed. Responding to a records request is not always a sequential process. The (name of agency) may process requests out of order, enabling it to better respond to simple as well as complex requests. At any given time, the (name of agency) may have multiple records requests in the queue. The processing of requests in the queue will depend upon the priority category; the number of records responsive to a request; the number and size of other records requests in the queue; the amount of processing required for a request or other requests in the queue; the status of a particular request, such as whether the (name of agency) is awaiting clarification or payment from the requestor, a response to a third party notice, or legal review; and, the current volume of other (name of agency) work, as it affects the amount of staff time that can be devoted to a request or requests.

(2) The request will be evaluated for prioritization using the following criteria: The immediacy of the required response in the interest of public safety (documented imminent danger); the complexity of the records request in terms of breadth, ease of identification of potentially responsive records, clarity and accessibility; the amount of coordination required between (departments) (divisions); the number of records requested; the extent of research and searching needed by staff who are not primarily responsible for public disclosure; the format of the records; the need for legal review and/or additional assistance from third parties in identification and assembly; the need to notify affected third parties; the need to consider customized access, and, other criteria the public records officer deems appropriate.

(3) Following evaluation, the (name of agency) will assign a category number. After initial categorization, requests may be recategorized in response to unanticipated circumstances or additional information. The estimated time periods for each category are goals; the (name of agency) may not be able to comply with the goals but will notify the requestor if the estimated time periods will not be met and need to be adjusted.

(2) Acknowledging receipt of Initial response to request. Following the initial evaluation of the request under (2) and (3) of this subsection, and within five business days¹ of receipt of the request, the public records officer will do one or more of the following, depending upon which response provides the fullest assistance and most timely possible action: the category assigned to the request:

(a) Make the records available for inspection or copying (with (b)) including:

(i) If copies are available on the (name of agency's) internet web site, provide an internet address and link on the web site to specific records requested;

(ii) If copies are requested and payment of a deposit for the copies, if any, is made or other terms of payment are agreed upon,

send the copies to the requestor;

~~((e))~~ (b) Acknowledge receipt of the request and provide a reasonable estimate of when records or an installment of records will be available (the public records officer or designee may revise the estimate of when records will be available); or

~~((d) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor.)~~ (c) Acknowledge receipt of the request and ask the requestor to provide clarification for a request that is unclear, and provide, to the greatest extent possible, a reasonable estimate of time the (name of agency) will require to respond to the request if it is not clarified.

(i) Such clarification may be requested and provided by telephone (The public records officer or designee may revise the estimate of when records will be available), and memorialized in writing;

(ii) If the requestor fails to respond to a request for clarification and the entire request is unclear, the (name of agency) need not respond to it. The (name of agency) will respond to those portions of a request that are clear; or

~~((e))~~ (d) Deny the request.

~~((3))~~ (5) Consequences of failure to respond. If the (name of agency) does not respond in writing within five business days of receipt of the request for disclosure, the requestor should (consider contacting) contact the public records officer to determine the reason for the failure to respond.

~~((4))~~ (6)-(3) Protecting rights of others. In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure. The notice to the affected persons will include a copy of the request.

~~((5))~~ (47) Records exempt from disclosure. Some records are exempt from disclosure, in whole or in part. If the (name of agency) believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief written explanation of why the record or a portion of the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer will redact the exempt portions, provide the nonexempt portions, and indicate to the requestor which exemption justifies the redaction and why. y portions of the record are being redacted.

~~((6))~~ (58) Inspection of records.

(a) Consistent with other demands, the (name of agency) shall promptly provide suitable space to inspect public records. No member of the public may remove a document from the viewing area without permission or disassemble or alter any document. The requestor shall indicate which documents he or she wishes the agency to

copy.

(b) The requestor must claim or review the assembled records within thirty 60 days of the (name of agency's) notification to him or her that the records are available for inspection or copying. The agency will notify the requestor in writing of this requirement and inform the requestor that he or she should contact the agency to make arrangements to claim or review the records. If the requestor or a representative of the requestor fails to claim or review the records within the sixtythirty-day period or make other arrangements, the (name of agency) may close the request and refile the assembled records. Other public records requests can be processed ahead of a subsequent request by the same person for the same or almost identical records, which can be processed as a new request.

~~((77))~~ (69) Providing copies of records. After inspection is complete, the public records officer or designee shall promptly make the requested copies available~~er arrange for copying~~. Where (name of agency) charges for copies, the requestor must pay for the copies.

~~((88))~~ (710) Providing records in installments. When the request is for a large number of records, the public records officer or designee will provide records access for inspection and copying in installments as they become available or as prioritized by the requester, consistently with providing the fullest assistance and most timely possible action on the request. if he or she reasonably determines that it would be practical to provide the records in that way. If, within sixtythirty days, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer or designee may stop searching for the remaining records and close the request.

~~((99))~~ (811) Completion of response inspection. When the inspection and production of the requested records is complete and all requested copies are provided, the public records officer or designee will indicate that the (name of agency) has completed a ~~((diligent))~~ reasonable search for the requested records and made any located nonexempt records available for inspection.

~~((100))~~ (912) Closing withdrawn or abandoned request. When the requestor either withdraws the request, or fails to clarify an entirely unclear request, or fails to fulfill his or her obligations to inspect the records ~~((ex))~~, pay the deposit, pay the required fees for an installment, or make final payment for the requested copies, the public records officer will close the request and indicate to the requestor that the (name of agency) has closed the request.

~~((111))~~ (103) Later discovered documents. If, after the (name of agency) has informed the requestor that it has provided all available records, the (name of agency) becomes aware of additional responsive documents existing at the time of the request, it will promptly inform the requestor of the additional documents and provide them on an expedited basis.

Note: ¹In calculating the five business days, the following are not counted: The day the agency receives the request, Saturdays, Sundays and holidays. RCW 1.12.040. See also WAC 44-14-03006.

Allied comment: This model rule should focus on fulfilling agency obligations as quickly and helpfully as

possible, consistent with the Act's requirements to respond promptly (RCW 42.56.070(1); RCW 42.56.520) and with the requirements for the fullest assistance and most timely possible action on requests (RCW 42.56.100). Subsection (1), with the heading "fullest assistance," should eliminate the reference to "the most efficient manner" of processing requests. Maximum efficiency is not required, nor is it a substitute for fullest assistance. Also, the entire categorization scheme in proposed subsection (1) should be stricken. It assumes that all requests will receive a "tracking number" and go into a "queue" instead of being resolved immediately. It does not address the agency's obligation to devote sufficient resources to processing requests, so as to avoid a backlog in the first place. Also, the categorization proposal is problematic because it does not require even a cursory search for the desired records as an initial step. A request cannot be categorized as exceptionally large or difficult until an initial search determines how many records, and which records, are potentially responsive. Similarly, the proposed subsection (2) improperly assumes that the initial response will be a delay instead of simply producing the requested records via a link, mailing or email attachment. The proposed subsection (5) should be eliminated or clarified. There is no requirement for a requester to contact an agency when the initial response deadline is missed, and the content seems unrelated to the heading ("consequences for failure to respond"). In proposed subsection (8), the 30-day time limit to inspect records seems arbitrary. It often takes time to arrange a mutually acceptable inspection time, and if the volume of records is large, the requester may find it difficult to carve out sufficient time during a workday for inspection at an agency office – particularly if the office is a long distance away. If a time limit is necessary, it should be doubled, at least. Finally, the subsection on installments needs to be tethered to the over-arching requirement for the fullest assistance and most timely possible action. What seems "practical" to the records officer may not seem helpful to the requester.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-040 **Comment** 02 Obligations of requestors. (1) ((Reasonable)) Fair notice that request is for public records. A requestor must give an agency ((reasonable)) fair notice that the request is being made pursuant to the act. Requestors are encouraged to cite or name the act but are not required to do so.¹ A request using the agency's request form or online request form or portal, or using the terms "public records," "public disclosure," "FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests), especially in the subject line of an email or letter, is recommended. The request should be directed to the agency-designated person to receive requests (such as the public records officer) or the agency-designated address for public records requests, which should provide an agency with ((reasonable)) fair notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW ((42.17.270/)) 42.56.080 and ((42.17.340(1)/)) 42.56.550(1).

An "identifiable record" is one that is existing at the time of the request and which agency staff can reasonably locate.((2)) The act does not require agencies to be "mind readers" and to guess what records

are being requested.² ~~The act does not allow a requestor to make "future" or "standing" (ongoing) requests for records not in existence; nonexistent records are not "identifiable."~~³

A request for all or substantially all records prepared, owned, used or retained by an agency is not a valid request for identifiable records, provided that a request for all records regarding a particular topic or containing a particular keyword or name shall not be considered a request for all of an agency's records. RCW 42.56.080(1). A "keyword" must have some meaning that reduces a request from all or substantially all of an agency's records. For example, a request seeking any and all records from the department of ecology which contain the word "ecology" is not a request containing a keyword. The word "ecology" is likely on every agency letterhead, email signature block, notice, order, brochure, form, pleading and virtually every other agency document. A request for all of an agency's emails can encompass substantially all of an agency's records, and such a request contains no keywords. The act does not allow a requestor nor require an agency to search through agency files for records which cannot be reasonably identified or described to the agency.⁽³⁾⁴ It benefits both the requestor and the agency when the request includes terms that are for identifiable records actually sought by the requestor, and which produce meaningful search results by the agency.

However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.⁽⁴⁾⁵

An "identifiable record" is not a request for "information" in general.⁽⁵⁾⁶ For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."⁶ A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories (questions). An agency is not required to answer questions about records, or conduct legal research for a requestor.⁷ A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek clarification of the request from the requestor or explain how the agency is interpreting the requestor's request.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable public records based solely on the basis that the request is overbroad." RCW ((42-17-270/)) 42.56.080. However, if such a

request is not for identifiable records or otherwise is not proper, the request can still be denied. When confronted with a request that is unclear, an agency should seek clarification.

Notes: ¹*Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

²*Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), ((~~review denied~~, 137 Wn.2d 1012, 978 P.2d 1099 (1999))) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

³*Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002); *Sargent v. Seattle Police Dept.*, 16 Wn. App. 1, 260 P.3d 1006 (2011), *aff'd in part, rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013) ("We hold that there is no standing request under the PRA."); *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P.2d 857 (2000) (agency not required to create a record to respond to a PRA request).

⁴*Bonamy*, 92 Wn. App. at 409.

⁵*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002). ((⁵*Bonamy*, 92 Wn. App. at 409.))

⁶((~~Id.~~)) *Bonamy*, 92 Wn. App. at 409.

⁷See *Limstrom*, 136 Wn.2d at 604, n.3 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public(())").

Allied comment: A "future" record can be identifiable. For example, a reporter may ask in advance for a council meeting packet or meeting minutes when they are available. The Act does not prohibit such a request.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-040 Comment 03 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is seeking a list of individuals for a commercial use or would violate another statute prohibiting disclosure or restricting disclosure to only certain persons). RCW ((42.17.270/)) 42.56.080.¹ The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW ((42.17.290/)) 42.56.100 and ((42.17.270/)) 42.56.080. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger or more complex request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible **as quickly as possible** even if they are out of order. ((³))

(a) Agencies can use criteria to assess whether the request is routine or complex (WAC 44-14-040) in order to assist them in calculating their estimate of time and in their processing. Complex and broad requests typically take more time to process and 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.²

(b) For example, upon receipt of a request, an agency will log it in (see subsection (14) of this section). Then, an agency could apply categories of similar requests and thus treat them similarly in pro-

processing the request. To further illustrate, an agency could consider the following processing categories or similar categories with response goal initial estimates:

(i) **Category 1.** Requests requiring immediate response in the interest of public safety (requestor has documented imminent danger), and limited redaction or legal review is needed. These requests take priority over all other requests.

Generally, the agency will respond to these requests immediately (including to seek clarification if necessary), or within the next business day or thereafter as soon as possible.

(ii) **Category 2.** Requests that are routine or readily filled because they request easily identified and immediately accessible records requiring little or no coordination among departments or divisions, and do not require clarification or production in installments. Examples include records that are available on the agency's web site, records typically made available at an office reception or often provided without a formal records request (such as copies of current agency brochures or forms, sometimes called "counter records"), and similar records.

Generally, the agency will respond to Category 2 requests within five business days. If the records cannot be made available within five business days, the agency may extend the time to respond.

(iii) **Category 3.** Requests that are routine and involve a large number of records; responsive records are not easily identified (thus clarification may be needed) or are not easily located or accessible; and, processing the request requires some coordination among departments or divisions.

The agency will provide a written response to the requestor within five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 3 requests usually require between five and thirty business days.

(iv) **Category 4.** Requests that are complex and which may be especially broad and vague and which involve: A large number of records that are not easily identified (thus clarification may be needed) or are not easily located or accessible; require significant coordination among multiple departments or divisions; require research by agency staff who are not primarily responsible for public disclosure; and/or require review by public disclosure staff to determine whether any of the records are exempt from production; and/or involve third-party notice to one person or entity.

The agency will provide a written response to the requestor within five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 4 requests may require several weeks or months.

(v) **Category 5.** Requests that meet the criteria of Category 4 and in addition: Require legal review and creation of an exemption log or other multiple brief explanations of withheld or redacted information;

~~and/or involve third party notice to multiple persons or entities. Category 5 also separately includes a request for customized access to information under RCW 42.56.120(3) where the request would require the use of information technology expertise to prepare data compilations, or notice that the agency may proceed with the request by providing customized access services when such compilations and customized access services are not used by the agency for other agency purposes.~~

~~The agency will provide a written response to the requestor within five business days with a reasonable estimate of time necessary for further response, including seeking clarification if needed, or notice of customized access service procedures and charges if relevant. The estimate is made on a case-by-case basis. Depending upon the nature and the scope of the request, and clarifications, Category 5 requests may require several weeks or months, or longer.~~

~~(2) Purpose of request.~~ An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW ((42.17.270/)) 42.56.080. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).

~~((+2+)) (3) Provide "fullest assistance" and "most timely possible action."~~ The act requires agencies to adopt and enforce reasonable rules to provide for the "fullest assistance" to a requestor. RCW ((42.17.290/)) 42.56.100. The "fullest assistance" principle should guide agencies when processing requests. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the agency's "other essential functions." RCW ((42.17.290/)) 42.56.100. The agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires agencies to adopt and enforce rules to provide for the "most timely possible action on requests." RCW ((42.17.290/)) 42.56.100. This principle should guide agencies when processing requests. It should be noted that this provision requires the most timely "possible" action on requests. This recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

~~((+3+)) (4) Communicate with requestor.~~ Communication is usually the key to a smooth public records process for both requestors and agencies.³ Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request. If a requestor asks for a summary of applicable charges before any copies are made, an agency must provide it. RCW 42.56.120 (2)(f). The requestor may then revise the request to reduce the number of requested copies. If the request is clarified or modified orally, the public records officer or designee should memorialize the communication

in writing.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing.

~~((4))~~ (5) **Failure to provide initial response within five business days.** Within five business days of receiving a request, an agency must provide an initial response to requestor. The initial response must do one of four things:

(a) Provide the record;
(b) Acknowledge that the agency has received the request and provide a reasonable estimate of the time it will require to ~~((fully))~~ further respond;

(c) Seek a clarification of the request and if unclear, provide to the greatest extent possible a reasonable estimate of time the agency will require to respond to the request if it is not clarified;
or

(d) Deny the request. RCW ~~((42.17.320/))~~ 42.56.520. An agency's failure to provide an initial response is arguably a violation of the act.⁽²⁾ ⁴

~~((5))~~ (6) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.⁽⁴⁾ ⁵ However, sometimes it is easier for an agency to create a record responsive to the request rather than collecting and making available voluminous records that contain small pieces of the information sought by the requestor or find itself in a controversy about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency. With respect to databases, for example, there is not always a simple dichotomy between producing an existing record and creating a new record. In addition, an agency may decide to provide a customized service and if so, assess a customized service charge for the actual costs of staff technology expertise needed to prepare data compilations, or when such customized access services are not used by the agency for other business purposes. RCW 42.56.120.

If the agency is considering creating a new record instead of disclosing the underlying records, or creating new records from a database, it should obtain the consent of the requestor to ensure that the requestor is not actually seeking the underlying records, and describe any customized service charges that may apply.

Making an electronic copy of an electronic record is not "creating" a new record; instead, it is similar to copying a paper copy. If an agency translates a record into an alternative electronic format at the request of a requestor, the copy created does not constitute a new

public record. RCW 42.56.120(1). Similarly, eliminating a field of an electronic record can be a method of redaction; it is ~~((similar to))~~ like redacting portions of a paper record using a black pen or white-out tape to make it available for inspection or copying. Scanning paper copies to make electronic copies is a method of copying paper records and does not create a new public record. RCW 42.56.120(1).

~~((6))~~ (7) Provide a reasonable estimate of the time to fully respond. Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to ~~((fully))~~ respond to the request. RCW ~~((42.17.320/))~~ 42.56.520. ~~((Fully))~~ Responding can mean processing the request (locating and assembling records, redacting, preparing a withholding ~~((index))~~ log, making an installment available, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW ~~((42.17.340(2)/))~~ 42.56.550(2). See WAC 44-14-08004

(5)(b). The burden of proof is on the agency to prove its estimate is "reasonable." RCW ~~((42.17.340(2)/))~~ 42.56.550(2).

To provide a "reasonable" estimate, an agency should not use the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. It can consider if a request falls into a category it has defined for processing purposes. See subsection (1)(b) of this section. Some very large requests can legitimately take months ~~or longer~~ to fully provide. See WAC 44-14-040. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates for every requestor, regardless of the nature of the request, are rarely "reasonable" because an agency, which has the burden of proof, could find it difficult to prove that every single request it receives would take the same thirty-day period.

While not required,⁷ in order to avoid unnecessary litigation over the reasonableness of an estimate, an agency ~~((should))~~ could briefly explain to the requestor the basis for the estimate in the initial response, including describing or referring to its processing categories. See WAC 44-14-040. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate.⁸ An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable."

Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

~~((7))~~ (8) **Seek clarification of a request or additional time.** An agency may seek a clarification of an "unclear" or partially unclear request. RCW ~~((42.17.320/))~~ 42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.

If the requestor fails to clarify an entirely unclear request, the agency need not respond to it further. RCW ~~((42.17.320/))~~ 42.56.520. However, an agency must respond to those parts of a request that are clear. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request or other specified time, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor if it has not already explained when it will close a request due to lack of response by the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW ~~((42.17.320/))~~ 42.56.520. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

~~((8))~~ (9) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. RCW ~~((42.17.290/))~~ 42.56.100-⁽⁵⁾ ⁹ Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

~~((9))~~ (10) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. The adequacy of a search is judged by the standard of reasonableness.¹⁰ A requestor is not required to "ferret out" records on his or her own.⁽⁶⁾ A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to initially ask all agency employees and officials if they have responsive records. If the agency is larger, the agency may choose to initially ask only the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project might initially be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same

documents. Meanwhile, other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor which departments are being surveyed for the documents so the requestor may suggest other departments.

If agency employees or officials are using home computers, personal devices, or personal accounts to conduct agency business, those devices and accounts also need to be searched by the employees or officials who are using them when those devices and accounts may have responsive records.¹¹ If an agency's contractors performing agency work have responsive public records of an agency as a consequence of the agency's contract, they should also be notified of the records request. It is better to be over inclusive rather than under inclusive when deciding which staff or others should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An email to staff or agency officials selected as most likely to have responsive records is usually sufficient. Such an email also allows an agency to document whom it asked for records. Documentation of searches is recommended. The courts can consider the reasonableness of an agency's search when considering assessing penalties for an agency's failure to produce records.¹²

Agency policies should require staff and officials to promptly respond to inquiries about responsive records from the public records officer.

After records which are deemed potentially responsive are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents. If an agency does not find responsive documents, it should explain, in at least general terms, the places searched.¹³

~~((+10+))~~ (11) Expiration of reasonable estimate. An agency should provide a record within the time provided in its reasonable estimate or communicate with the requestor that additional time is required to fulfill the request based on specified criteria. ~~((Unjustified failure to provide the record by the expiration of the estimate is a denial of access to the record))~~ A failure of an agency to meet its own internal deadline is not a violation of the act, assuming the agency is working diligently to respond to the request.¹⁴ Nevertheless, an agency should promptly communicate with a requestor when it determines its original estimate of time needs to be adjusted.

~~((+11+))~~ (12) Notice to affected third parties. Sometimes an agency decides it must release all or a part of a public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from

disclosure and that disclosure would not be in the public interest. ((⁷)) RCW ((42.17.330/)) 42.56.540. ~~Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.~~

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The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains (unless notice is required by law). RCW ((42.17.330/)) 42.56.540.¹⁵ ~~This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record.~~ An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not (unless notice is required by law). RCW ((42.17.330/)) 42.56.540. Second, if it acted in good faith, an agency cannot be held liable for its decision not failure to notify enough people under the act. RCW ((42.17.258/)) 42.56.060. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW ((42.17.258/)) 42.56.060 because breaching the agreement probably is not a "good faith" attempt to comply with the act.

The appropriate practice of many agencies is to give no more than ten days' notice of the date when records will be released, absent an injunction. Many agencies expressly indicate the deadline late on which it must receive a court order enjoining disclosure, to avoid any confusion or potential liability. ~~More notice might be appropriate in some cases, such as when numerous notices are required, but e~~Every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include in its calculation the notice period in the "reasonable estimate" of time it provides to a requestor.

The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, unless the agency intends to defend against a third-party injunction suit, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

((~~12~~)) (13) Later discovered records. If the agency becomes aware of the existence of records responsive to a request which were not provided, the agency should notify the requestor in writing, and provide a brief explanation of the circumstances, and provide the non-exempt records with a written explanation of any redacted or withheld records.

(14) Maintaining a log. Effective July 23, 2017, the agency must maintain a log of public records requests to include the identity of

the requestor if provided by the requestor, the date the request was received, the text of the original request, a description of the records redacted or withheld and the reasons therefor, the date of the final disposition of the request. Section 6, chapter 303, Laws of 2017 (to be codified in chapter 40.14 RCW).

Notes: ¹See also Op. Att'y Gen. 2 (1998).

²*West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014).

³See *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004, n.12 (2014) (Court of Appeals encouraged requestors to communicate with agencies about issues related to their records requests).

⁴See *Smith v. Okanogan County*, 100 Wn. App. 7, 13, 994 P.2d 857 (2000) ("When an agency fails to respond as provided in RCW 42.17.320 (42.56.520), it violates the act and the individual requesting the public record is entitled to a statutory penalty."); *West v. State Dep't of Natural Res.*, 163 Wn. App. 235, 243, 258 P.3d 78 (2011) (failure to respond within five business days); *Rufin v. City of Seattle*, X Wn. App. X, X P.3d X (2017) (failure to respond within five business days entitles plaintiff to seek attorneys' fees but not penalties).

(⁵While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.

⁶) ⁵*Smith*, 100 Wn. App. at 14.

(⁷) ⁶*Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 326 P.3d 688 (2014).

⁷*Ockerman v. King County Dep't of Dev. & Envtl. Servs.*, 102 Wn. App. 212, 214, 6 P.3d 1215 (2000) (agency is not required to provide a written explanation of its reasonable estimate of time when it does not provide records within five days of the request).

⁸*Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94 (2014) (the act recognizes that agencies may need more time than initially anticipated to locate records).

⁹An exception is some state-agency employee personnel records. RCW ((42-17-295f)) 42.56.110.

(¹⁰*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

¹¹) ¹⁰*Neighborhood Alliance v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012).

¹¹*O'Neill v. City of Shoreline*, 170 Wn.2d 138, 240 P.3d 1149 (2010); *Nissen v. Pierce County*, 182 Wn.2d 363, 357 P.3d 45 (2015); *West v. Vermillion*, 196 Wn. App. 627, 384 P.3d 634 (2016).

¹²*Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010); *Neighborhood Alliance*, 172 Wn.2d at 728.

¹³*Neighborhood Alliance*, 172 Wn.2d at 728.

¹⁴*Andrews v. Wash. State Patrol*, 183 Wn. App. 644 at 653; *Hikel v. Lynnwood*, 197 Wn. App. 366, 389 P.3d 677 (2016).

¹⁵The agency holding the record can also file a RCW ((42-17-330f)) 42.56.540 injunctive action to establish that it is not required to release the record or portion of it. An agency can also file an action under the Uniform Declaratory Judgments Act at chapter 7.24 RCW. *Benton County v. Zink*, 191 Wn. App. 194, 361 P.2d 283 (2015).

Allied comments: The categorization scheme should be stricken in accordance with the comments above. Pulling data from a larger database does not create a new record. The discussion of third-party injunction suits should be revised to reflect the statutory language and case law, and to be more protective of the right of requesters to prompt responses. If an agency actually believes a record is exempt, it should withhold the record itself rather than force a third party and requester to engage in litigation, wasting time and resources.

AMENDATORY SECTION (Amending WSR 07-13-058, filed 6/15/07, effective 7/16/07)

WAC 44-14-040 Comment 04 Responsibilities of agency in providing records.

(1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or email briefly describing the records provided and informing the requestor that the request has been closed. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or email might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests. An agency can, of course, provide the records sooner than five

business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW ((42.17.270/)) 42.56.080. An agency is only required to make records "available" and has no duty to explain the meaning of public records.¹ Making records available is often called "access."

Access to a public record can be provided by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). An agency must mail a copy of records if requested and if the requestor pays the actual cost of postage and the mailing container.² The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its public internet web site. Once an agency provides a requestor an internet address and link on the agency's web site to the specific records requested, the agency has provided the records, and at no cost to the requestor. RCW 42.56.520. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency ((is not required to do so. Despite the availability of the record on the agency's web site, a requestor can still make a public records request and inspect the record or obtain a copy of it by paying the appropriate per page copying charge)) shall not impose copying charges for access to or downloading records that the agency routinely posts on its web site prior to receipt of a request unless the requestor has specifically requested that the agency provide copies of such records through other means. RCW 42.56.120 (2)(e).

(3) **Providing records in installments.** The act ((new)) provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW ((42.17.270/)) 42.56.080. An installment can include links to records on the agency's internet web site. The purpose of this installments provision is to allow requestors to obtain records in installments as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see

if the requestor claims or reviews it before assembling the next installments. An agency can assess charges per installment for copies made for the requestor, unless it is using the up to two-dollar flat fee charge. RCW 42.56.120(4).

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once. Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests" when processing requests. RCW ~~((42.17.290/))~~ 42.56.100.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

~~((Does not have the record/))~~ Fails to respond to a request;
Claims an exemption of the entire record or a portion of it;
~~((or))~~

Without justification, fails to provide the record after the reasonable estimate of time to respond expires ~~((-~~

~~((a) When the agency does not have the record)); or~~

Determines the request is an improper "bot" request. An agency is only required to provide access to public records it has or has used.³ An agency is not required to create a public record in response to a request.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency (agency A), ~~((the first))~~ agency A cannot respond to the request by telling the requestor to obtain the record from the second agency (agency B). Instead, an agency must provide access to a record it holds regardless of its availability from another agency.⁴

However, an agency is not required to go outside its own public records to respond to a request.⁵ If agency A never prepared, owned, used or retained a record, but the record is available at agency B, the requestor must make the request to agency B, not agency A.

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

~~((b))~~ (5) **Claiming exemptions.**

~~((i))~~ (a) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required

to redact (black out) the exempt portion and then provide the remainder. RCW ((42.17.310(2)/)) 42.56.210(1). There are a few exceptions. ((5)) ⁶ Withholding an entire record where only a portion of it is exempt violates the act. ((6)) ⁷ Some records are almost entirely exempt but small portions remain nonexempt. For example, information revealing the identity of a crime victim is exempt from disclosure if certain conditions are met.

RCW ((42.17.310(1)(e)/)) 42.56.240(2). If a requestor requested a police report in a case in which charges have been filed, and the conditions of RCW 42.56.240(2) are met, the agency must redact the victim's identifying information but provide the rest of the report.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW ((42.17.310(2)/)) 42.56.210(1). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. For paper records, an agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. Another approach is to scan the paper record and redact it electronically. It is often a good practice to keep the initial copies which were redacted in case there is a need to make additional copies for disclosure or to show what was redacted; in addition, an agency is required under its records retention schedules to keep responses to a public records request for a defined period of time. For electronic records such as databases, an agency can sometimes redact a field of exempt information by excluding it from the set of fields to be copied. For other electronic records, an agency may use software that permits it to electronically redact on the copy of the record. However, in some instances electronic redaction might not be feasible and a paper copy of the record with traditional redaction might be the only way to provide the redacted record. If a record is redacted electronically, by deleting a field of data or in any other way, the agency must identify the redaction and state the basis for the claimed exemption as required by RCW 42.56.210(3). ((See (b)(ii) of this subsection.

((ii))

~~(b)~~ **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW ((42.17.310(4)/)) 42.56.210(3). The brief explanation should cite the statute the agency claims grants an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld

record or redaction is for the agency to provide a withholding (~~index~~) ~~It~~) log, along with the statutory citation permitting withholding, and a description of how the exemption applies to the information withheld. The log identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).⁽⁷⁾ ⁸ The withholding (~~index~~) log need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

Another way to properly provide a brief explanation is to use another format, such as a letter providing the required exemption citations, description of records, and brief explanations of how the exemption applies to the withheld content. Another way to properly provide a brief explanation is to have a code for each statutory exemption, place that code on the redacted information, and attach a list of codes and the brief explanations with the agency's response.

~~(5)~~ (6) Notifying requestor that records are available. If the requestor sought to inspect the records, the agency should notify him or her that the entire request or an installment is available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.⁽⁸⁾ ⁹⁻ The notification

should recite that if the requestor fails to inspect or copy the records or make other arrangements within thirty days of the date of the notification that the agency will close the request and refile the records. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it.

If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. Such notice by the agency with a summary of applicable estimated charges is required when the requestor asks for an estimate. RCW 42.56.120 (2)(f). The notification can be oral to provide the most timely possible response, although it is recommended that the agency document that conversation in its file or in a follow-up email or letter.

~~((+6))~~ **(7) Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided; and, an agency is required to keep copies of its response to a request for the time period set out in its records retention schedule. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so. For example, it may not be necessary to affix a number on the pages of records provided in response to a small request.

If memorializing which specific documents were offered for inspection is impractical, an agency might consider documenting which records were provided for inspection by making ~~((an index or))~~ a list of the files or records made available for inspection.

Notes: ¹*Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), review denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

²*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d 1176 (1997); RCW 42.56.120.

³*Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

⁴*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

⁵*Limstrom v. Ladenburg (Limstrom II)*, 136 Wn.2d 595, 963 P.2d 896 (1998) n.3 ("On its face the Act does not require, and we do not interpret it to require, an agency to go outside its own records and resources to try to identify or locate the record requested."); *Koenig v. Pierce County*, 151 Wn. App. 221, 232-33, 211 P.3d 423 (2009) (agency has no duty to coordinate responses with other agencies, citing to and quoting *Limstrom II*).

⁶The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997)) *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

⁽⁶⁾⁷*Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

⁽⁷⁾⁸*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("*PAWS II*").

⁽⁸⁾⁹For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

Allied comments: Merely citing an exemption statute is not enough. The agency needs to explain how the exemption applies to the content withheld.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-040 Comment 05 Inspection of records. (1) Obligation of requestor to claim or review records. After the agency notifies the

requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW ((42.17.300/)) 42.56.120. If the requestor cannot claim or review the records him or herself, a representative may do so. ~~within the thirty-day period.~~ Other arrangements can be mutually agreed to between the requestor and the agency.

If a requestor fails to claim or review the records or an installment ~~after the expiration of thirty days,~~ an agency is authorized to stop assembling the remainder of the records or making copies. RCW ((42.17.300/)) 42.56.120. If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW ((42.17.290/)) 42.56.100.

If a requestor fails to claim or review the records or any installment of them within the ~~prescribed thirty-day notification~~ period, the agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost

identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors (see WAC 44-14-040), can process the repeat request for the now-re-filed records as a new request after other pending requests.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW ((42.17.280/)) 42.56.090. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW ((42.17.290/)) 42.56.100. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW ((42.17.270/)) 42.56.080.

An agency may have an agency employee observe the inspection or copying of records by the requestor to ensure they are not altered, destroyed ((or)), disorganized, or removed. RCW ((42.17.290/))

42.56.100. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a paper record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: ¹See, e.g., WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

Allied comment: The Act does not impose a 30-day time limit.

WAC 44-14-050 Comment 02 ~~"Reasonably locatable" and "reasonably translatable" electronic records. (1) "Reasonably locatable" electronic records. The act obligates an agency to provide nonexempt "identifiable records." RCW 42.56.080. An "identifiable record" is essentially one that agency staff can "reasonably locate." WAC 44-14-0402(2). Therefore, a general summary of the "identifiable record" standard as it relates to electronically locating public records is that the act requires an agency to provide a nonexempt "reasonably locatable" record. This does not mean that an agency can decide if a request is "reasonable" and only fulfill those requests. Rather, "reasonably locatable" is a concept, grounded in the act, for analyzing electronic records issues.~~
In general, a "reasonably locatable" electronic record is one which can be located with typical search features and organizing methods contained in the agency's current software. For example, a retained email containing the term "XYZ" is usually reasonably locatable by using the email program search feature. However, ((an)) some email search ((feature has)) features have limitations, such as not searching attachments, but ((is)) are a good starting point for the search. Information might be "reasonably locatable" by methods other than a search feature. For example, a request for a copy of all retained emails sent by a specific agency employee for a particular date is "reasonably locatable" because it can be found utilizing a common organizing feature of the agency's email program, such as a chronological "sent" folder. Another indicator of what is "reasonably locatable" is whether the agency keeps the information in a particular way for its business purposes. For example, an agency might keep a database of permit holders including the name of the business. The agency does not separate the businesses by whether they are publicly traded corporations or not because it has no reason to do so. A request for the names of the businesses which are publicly traded is not "reasonably locatable" because the agency has no business purpose for keeping the information that way. In such a case, the agency should provide the names of the businesses (assuming they are not exempt from disclosure) and the requestor can analyze the database to determine which businesses are publicly traded corporations.

(2) "Reasonably translatable" electronic records. The act requires an agency to provide a "copy" of nonexempt records (subject to certain copying charges). RCW 42.56.070(1) and 42.56.080. To provide a photocopy of a paper record, an agency must take some reasonable steps to mechanically translate the agency's original document into a useable copy for the requestor such as copying it in a copying machine, or scanning it into Adobe Acrobat PDF®. Similarly, an agency must take some reasonable steps to prepare an electronic copy of an electronic record or a paper record. Providing an electronic copy is analogous to providing a paper record: An agency must take

((reasonable)) steps to translate the agency's original into a useable copy for the requestor, ~~if it is reasonable and feasible for it to do so.~~

The "reasonably translatable" concept typically operates in three kinds of situations:

- (a) An agency has only a paper record;
- (b) An agency has an electronic record in a generally commercially available format (such as a Windows® product); or
- (c) An agency has an electronic record in an electronic format but the requestor seeks a copy in a different electronic format.

The following examples assume no redactions are necessary.

(i) **Agency has paper-only records.** When an agency only has a paper copy of a record, an example of a "reasonably translatable" copy would be scanning the record into an Adobe Acrobat PDF® file and providing it to the requestor. The agency could recover its actual or statutory cost for scanning. See RCW 42.56.120 and WAC 44-14-07003.

While not required, providing a PDF copy of the record is analogous to making a paper copy. ~~However, if the agency lacked a scanner (such as a small unit of local government), the record would not be "reasonably translatable" with the agency's own resources. In such a case, the agency could provide a paper copy to the requestor.~~

(ii) **Agency has electronic records in a generally commercially available format.** When an agency has an electronic record in a generally commercially available format, such as an Excel® spreadsheet, and the requestor requests an electronic copy in that format, no translation into another format is necessary; the agency should provide the spreadsheet electronically. Another example is where an agency has an electronic record in a generally commercially available format (such as Word®) and the requestor requests an electronic copy in Word®. An agency cannot instead provide a WordPerfect® copy because there is no need to translate the electronic record into a different format. In the paper-record context, this would be analogous to the agency intentionally making an unreadable photocopy when it could make a legible one. Similarly, the WordPerfect® "translation" by the agency is an attempt to hinder access to the record. In this example, the agency should provide the document in Word® format. Electronic records in generally commercially available formats such as Word® could be easily altered by the requestor. Requestors should note that altering public records and then intentionally passing them off as exact copies of public records might violate various criminal and civil laws.

(iii) **Agency has electronic records in an electronic format other than the format requested.** When an agency has an electronic record in an electronic format (such as a Word® document) but the requestor seeks a copy in another format (such as WordPerfect®), the question is whether the agency's document is "reasonably translatable" into the requested format. If the format of the agency document allows it to "save as" another format without changing the substantive accuracy of the document, ~~and the agency has a WordPerfect® license,~~ this would be "reasonably translatable." The agency's record might not translate

perfectly, but it was the requestor who requested the record in a format other than the one used by the agency. Another example is where an agency has a database in a unique format that is not generally commercially available. A requestor requests an electronic copy. The agency can convert the data in its unique system into a near-universal format such as a comma-delimited or tab-delimited format. The requestor can then convert the comma-delimited or tab-delimited data into a database program (such as Access®) and use it. The data in this example is "reasonably translatable" into a comma-delimited or tab-delimited format so the agency should do so. A final example is where an agency has an electronic record in a generally commercially available format (such as Word®) but the requestor requests a copy in an obscure word processing format. The agency offers to provide the record in Word® format but the requestor refuses. The agency can easily convert the Word® document into a standard text file which, in turn, can be converted into most programs. The Word® document is "reasonably translatable" into a text file so the agency should do so. It is up to the requestor to convert the text file into his or her preferred format, but the agency has provided access to the electronic record in the most technically feasible way and not attempted to hinder the requestor's access to it.

(3) **Agency should keep an electronic copy of the electronic records it provides.** An electronic record is usually more susceptible to manipulation and alteration than a paper record. Therefore, an agency should keep ~~((, when feasible,))~~ an electronic copy of the electronic records it provides to a requestor to show the exact records it provided, for the time period required in its records retention schedule. Additionally, an electronic copy might also be helpful when responding to subsequent electronic records requests for the same records.

Allied comments: The subsection on "reasonably locatable" records is outdated and should be stricken. The standard for a reasonable search was established by the Washington Supreme Court in *Neighborhood Alliance v. Spokane County*. Similarly, the suggestion that an agency can function without a scanner is seriously outdated and should be removed. Also, providing a "useable copy" of a requested record is not optional, and the suggestion that it depends on what's "feasible" should be deleted.

~~AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)~~

~~WAC 44-14-08004 Judicial review. While a full discussion of judicial review is not provided in these comments, a few processes in the act are described.~~

~~(1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW ((42.17.320/)) 42.56.520.¹ Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review~~

process.² An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW ((42.17.320/)) 42.56.520 allows judicial review two business days after the initial denial.

The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2). The court proceeding is a civil action, seeking judicial review. The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.³ To speed up the court process, a public records case may be decided merely on the "motion" of a requestor and "solely on affidavits." RCW ((42.17.340 (1) and (3)/)) 42.56.550 (1) and (3).

(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of exemption or the last production of a record on a partial or installment basis. RCW ((42.17.340(6)/)) 42.56.550(6).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the agency did not violate the act. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2).

⁴ A requestor can also file a summons and complaint, initiating the civil action, and then file a motion. The case must be filed in the superior court in the county in which the record is maintained. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW ((42.17.340(5)/)) 42.56.550(5). The show cause procedure is designed so that a nonattorney requestor can obtain judicial review himself or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.⁵ (However, most cases are decided on a motion to show cause.⁶)

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW ((42.17.340 (1) and (2)/)) 42.56.550 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW ((42.17.340(1)/)) 42.56.550(1). This is the most common kind of case.

(b) **(("Reasonable estimate.)) Estimates.** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response or estimated charges for copies. RCW ((42.17.340(2)/)) 42.56.550(2).

(c) **Injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW ((42.17.330/)) 42.56.540. An action under this statute can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party seeking to prevent disclosure has the burden of proving the record is exempt from disclosure.⁽⁷⁾ ⁶ The party seeking to

~~prevent disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.~~^{((8)) 7}

~~(6) "In camera" review by court. The act authorizes a court to review withheld records or portions of records "in camera." RCW ((42.17.340(3)/)) 42.56.550(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.~~^{((9)) 8}
~~However, in camera review is not always required, and it is up to the discretion of the trial court.~~⁹

~~A court may have local court rules on Public Records Act cases and in camera review procedures. In the alternative, an agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the unredacted record or portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.~~

~~The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.~~

~~(7) Attorneys' fees, costs, and penalties to prevailing requestor. The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees((,)) and costs((, and)). In addition, it is within the discretion of a court to assess a daily penalty against the agency, considering several factors. RCW ((42.17.340(4)/)) 42.56.550(4).¹⁰ Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.~~^{((10)) 11}

~~A special process regarding attorneys' fees and penalties applies to actions involving the disclosure of body worn camera recordings governed by RCW 42.56.240. Another process applies to requests by inmates; penalties may not be awarded to an inmate unless a court determines the agency acted in bad faith. RCW 42.56.565.~~

~~A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.~~^{((11)) 12} ~~In an injunctive action under RCW ((42.17.330/)) 42.56.540, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the~~

agency took the position that the record was subject to disclosure.¹³

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.¹⁴ However, a court is only authorized to award "reasonable" attorneys' fees. RCW ((42.17.340(4)/)) 42.56.550(4). A court has discretion to award attorneys' fees based on an assessment of reasonable hourly rates and which work was necessary to obtain the favorable result.¹⁵

The award of "costs" under the act is for all of a requestor's nonattorney fee costs and is broader than the court costs awarded to prevailing parties in other kinds of cases.¹⁶

(A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."¹⁶ An agency's "bad faith" can warrant a penalty on the higher end of this scale.¹⁷ The penalty is per day, not per record per day.¹⁸) The penalty range is up to one hundred dollars a day. RCW 42.56.550(4). Courts will consider a nonexclusive list of penalty factors in determining whether to assess a penalty, and the amount.¹⁷

Notes: ¹³*Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 242, 253, 884 P.2d 592 (1994) ("PAWS II") (RCW ((42.17.320)) 42.56.520 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days."); a request is required to have a "final action" taken on it by the agency denying the record, prior to a requestor filing a lawsuit. *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014).

¹⁴See, e.g., WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

¹⁵*Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA [PRA] is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.")

¹⁶See generally *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

¹⁷*Id.* at 106.

¹⁸(*Wood v. Thurston County*), 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

¹⁹*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

²⁰*PAWS II*, 125 Wn.2d at 257-58. See also *SEIU Healthcare 775 NW v. State et al.*, 198 Wn. App. 745, X P.3d X (2017) (party seeking injunction under RCW 42.56.540 must show that (1) record pertains to that party, (2) exemption applies, and (3) disclosure would not be in the public interest and would substantially and irreparably harm the party or a vital governmental function)

²¹*Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

²²*Block v. City of Gold Bar*, 189 Wn. App. 262, 355 P.3d 122 (2015); *Nixon v. Pierce County*, 182 Wn.2d 863, 357 P.3d 45 (2015).

²³*Yousoufi v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004) (factors).

²⁴RCW ((42.17.340(4)/)) 42.56.550(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

²⁵*Volante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 104, 117 P.3d 1117 (2005).

²⁶*Confederated Tribes*, 135 Wn.2d at 757; *Doe v. Washington State Patrol*, 185 Wn.2d 362, 374 P.3d 63 (2016).

²⁷*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("ACLU II") ("permitting a liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.")

²⁸*Id.* at 118.

²⁹*Id.* at 115.

³⁰*American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("ACLU I").

³¹*Id.*

³²*Yousoufi v. Office of Ron Sims*, 152 Wn.2d 421, 436, 98 P.3d 463 (2004).

Allied comments: Litigation is beyond the scope of model rules.

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cordings, and other documents including existing data compilations from which information may be obtained or translated." RCW ((42.17.020(48))) 42.56.010(4). An email (~~is a "writing"~~), text, social media posting and database are therefore also "writings."

(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW ((42.17.020(41))) 42.56.010(3).¹ Almost all records held by an agency relate to the conduct of government; however, some do not. A purely personal record having absolutely no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be if its existence was used for a governmental purpose.² For example, a record showing the existence of a purely personal email sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the email itself were not.⁽²⁾ ³

(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW ((42.17.020(41))) 42.56.010(3).

A record can be "used" by an agency even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."⁽³⁾ ⁴ For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.⁽⁴⁾ ⁵ The agency could be required to obtain the public record, unless doing so would be impossible. An agency cannot send its only copy of a public record to a third party for the sole purpose of avoiding disclosure.⁽⁵⁾ ⁶

Sometimes agency employees or officials may work on agency business from home computers (~~These home computer~~) or on other personal devices, or from nonagency accounts (such as a nonagency email account), creating and storing agency records on those devices or in those accounts. When the records are prepared, owned, used or retained within the scope of the employee's or official's employment, those records (including emails, texts and other records) were "used" by the agency and relate to the "conduct of government" so they are "public records."⁷ RCW ((42.17.020(41))) 42.56.010(3). However, the act does not authorize unbridled searches of agency property.⁽⁶⁾ ⁸ If agency property is not subject to unbridled searches, then neither is the home computer, or personal device or personal account of an agency employee or official. Yet, because the (~~home computer documents~~) records relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees and officials that all public records, regardless of where they were created, should eventually be stored on agency computers. Agencies should ask employees and officials to keep agency-related documents with any retention requirements on home computers or personal devices in separate folders (~~and~~) temporarily, until they are provided to the agency. An agency could also require an employee or official to routinely blind carbon copy ("bcc") work emails in a personal account back to (~~the employee's~~) an agency email account. If the agency receives a request for records that are located solely on employees' or officials' home computers or personal devices, or in personal accounts, the agency should direct the (~~employee~~) individual to (~~for~~

correct

take this out

"relating to the conduct of government"

view the documents available on the web site prior to submitting a records request.

(4) **Making a request for public records.**

(a) Any person wishing to inspect or copy public records of the (name of agency) should make the request in writing on the (name of agency's) request form or through an online portal, or by letter, fax (if the agency uses fax), or email addressed to the public records officer at the email address publicly designated by (name of agency), or by submitting the request in person at (name of agency and address) and including the following information:

- Name of requestor;
- Address of requestor;
- Other contact information, including telephone number and any email address;
- Identification of the public records adequate for the public records officer or designee to locate the records; and
- The date and time of day of the request.

(b) If the requestor wishes to have copies of the records made instead of simply inspecting them, he or she should so indicate and make arrangements to pay for copies of the records or a deposit. Pursuant to section (insert section), (~~standard photocopies will be provided at (amount) cents per page~~) charges for copies are provided in a fee schedule available at (agency office location and web site address).

(c) A records request form is available for use by requestors at the office of the public records officer and online at (web site address).

(d) The public records officer or designee may accept requests for public records that contain the above information by telephone or in person. If the public records officer or designee accepts such a request, he or she will confirm receipt of the information and the substance of the request in writing.

AMENDATORY SECTION (Amending WSR 06-04-079, filed 1/31/06, effective 3/3/06)

WAC 44-14-03001 "Public record" defined. For most public records, the courts use a three-part test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency. (([±])) Effective July 23, 2017, records of certain volunteers are excluded from the definition. RCW 42.56.010(3) (chapter 303, Laws of 2017).

(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW ((~~42.17.020(41)~~)) 42.56.010(3). "Writing" is defined very broadly as: "... handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation((~~7~~)) including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound re-

PUBLIC RECORDS ACT MODEL RULES PUBLIC HEARING

6:00 p.m.
Wednesday, October 4, 2017
416 Sid Snyder Avenue Southwest
Olympia, Washington

LINDA WARMUTH, CCR

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PROCEEDINGS

NANCY KRIER: Good evening, everyone. My name is Nancy Krier. I am the Assistant Attorney General for Open Government in the Washington State Attorney General's Office.

Today is October 4th, 2017. It's about 6:03, according to the clock up there. We're here to conduct the public hearing in order to receive comments on proposed amendments to several public records model rules and comments in Chapter 44-14 WAC. We filed what's called a CR 102, proposed rule making, in the Washington State Register. Copies of the CR-102 are available on the table or when you come up and speak, and then we have spare ones in the back. They're also available on our website.

I'm the delegated hearing officer to take your testimony here today. We will accept both oral comments, and we'll have you come up and speak at the mike, as well as written comments. So if you brought copies of written comments, go ahead and drop them off with us. We'll take those as well. You can also do both written and oral. That's fine too.

We have a court reporter here today, so we are making a record of this. And the comments that you make here today, oral or in writing will be part of the rule making record. So we will close the record after this

1 hearing.

2 If you're going to do oral comments, we have
3 sign-up sheets at the back. As people come in, they'll
4 also probably be signing up. Make sure you speak your name
5 clearly and spell it for the record so we have a correct
6 spelling. And if you use any unusual phrases in your
7 testimony also, it would be a good idea to spell those as
8 well. And speak clearly and slowly enough so we can make a
9 clear record and so we can all hear you. I would also ask
10 if you are speaking of a specific WAC, and if you have the
11 WAC number handy, that would be a helpful part of the
12 record as well.

13 We're going to start off with a 12-minute time
14 limit per person. I want to make sure everybody has a
15 chance to talk. And then apparently some people are also
16 still on their way. We will be here until 8:00, so if you
17 wanted to add additional comments after your initial time,
18 that's fine too. Again, we will end by eight o'clock. If
19 needed, we will take a short stretch break. I don't know
20 if we'll need it, but that may happen. And we will be
21 putting the written comments on our office's website.

22 So I hope that's pretty clear and pretty
23 straightforward. So I have the first list here, and then
24 I'm going to sit down so I can listen to all of you more
25 comfortably. So Mr. Howard Gale?

1 HOWARD GALE: Howard Gale, G-a-l-e, from
2 Seattle. I did send in written comments by the deadline of
3 the 29th. And what I would like to do is just expand on
4 that a little bit. Unfortunately, I'm not going to be able
5 -- I can refer to the pages. I'm not going to be able to
6 refer to the actual WAC numbers.

7 What I would like to do is just step back for a
8 second. Three of the items that I pulled out are actually
9 related in my written comments, and that has to do with
10 what are called customized services that an agency might
11 provide, original digital format for records, and also the
12 way searches are done, what the methods are, the
13 methodology of a search.

14 The way these are related is, for example, right
15 now in Seattle in July there were new orders put in place,
16 which very much mirror these current proposed rules. They
17 have a provision for customized services, which can become
18 very expensive. The problem with customized services is
19 oftentimes what is called a customized service is actually
20 the proper way one should do a search.

21 So as a concrete example, I had a problem back in
22 2014 with the City in which I was looking for a set of
23 emails on the topic of home -- They actually went to
24 individuals within the Department of Seattle Center and
25 asked them to look for these different terms and asked them

1 to search their e-mails. The result was a very incomplete
2 production of records, because people failed to search
3 attachments. They didn't look at documents. A lot of
4 things were missed.

5 Now what ended up happening is I went to court.
6 The City in court claimed that the reason that they
7 couldn't produce documents is because they had to use very
8 expensive and very specialized forensic tools. So what
9 this is trying to claim is to search an e-mail, we need
10 very specialized forensic tools.

11 I have been working with computers since the '70s.
12 Very commonly available free software can be gotten to do
13 these kind of searches. So I'm concerned about the issue
14 of customized services because of that, because very often
15 it's abused as a way of avoiding what would be a simple
16 search method. So this gets me to the antiquated search
17 methods which are actually elaborated on, on page 20, 26,
18 and 27. Actually, page 20. I'm sorry. A lot of these
19 search methods would be appropriate if we were living in
20 the '70s or '80s, but certainly by the time the '90s, 2000s
21 came, almost everything is done in Word documents,
22 PowerPoint, databases, e-mail. Those are searchable on a
23 server, and they can be searchable independent of the
24 operating system, how the server is run, or what the nature
25 of the records are. And I can get into more details, if

1 it's required, but that's a way to simplify searches
2 instead of actually trying to somehow mesh what would be a
3 '70s file cabinet approach with the reality of the digital
4 world that we live in now. And so a lot of these rules, I
5 think, are somewhat antiquated because they really are
6 trying to bridge a gap which shouldn't exist.

7 Which gets to my other point. On page 36, 37 it
8 talks about nothing in the PRA obligates an agency to
9 disclose records electronically. That is completely wrong.
10 It has to be wrong. Metadata is not something mystical.
11 So, for example, Seattle right now has a provision where,
12 if you want metadata, that's something subject to a
13 customized charge. That is wrong. The reason when I get
14 an e-mail I want the e-mail in a digital format is I can
15 tell who actually sent the e-mail, who it was sent from,
16 the actual time. There is a lot of information in the
17 digital format which is not obtainable if e-mails are
18 simply printed out.

19 So I would argue that actually there is numerous
20 supreme court decisions that say the opposite. There is
21 something that obligates the record be disclosed
22 electronically, and that actually is a Spokane case, the
23 Neighborhood Alliance. There is something that requires
24 electronic disclosure. If that's the way the record was
25 made, that's the way it should be produced for public

1 records. So just to sum up what I was trying to say here,
2 issues of digital format and electronic production,
3 customized services and the method and the way in which a
4 search is done are all intricately tied together. A lot of
5 the problems that stem from those issues could be obviated
6 if searches were done correctly. And that is what I would
7 suggest is initial searches should always be done on a
8 server. There is going to be very, very rare cases now
9 where an agency doesn't have a central server that provides
10 everything. So that's one point.

11 The other thing I wanted to talk about is there is
12 also the notion of treating multiple requests from a
13 requester as a single request. That is highly problematic.
14 In 2014 I presented in one e-mail four very separate
15 independent requests that were itemized and bulleted. The
16 City decided to sum all that up in one word, and the Court
17 actually found that the City had the right to do that.
18 This is now codifying a very bad tendency that agencies
19 have, which is to say I can ignore what the four
20 things are. I think it's this. So treating multiple
21 requests from requesters as a single request is bad.
22 Seattle has already put that provision in place in July.
23 The issue of bot requests is also poorly defined. In the
24 proposed rules on page 16, it says potentially two requests
25 in 24 hours could be considered a bot request. You do have

1 wording in there that suggests that one has to think a
2 little more about more than just the number of requests.
3 Seattle has taken that format rule and actually codified it
4 in July. Multiple requests from the same requester within
5 24 hours can be considered a bot request. That's a
6 problem. I often have four or five requests, because I
7 want to make them limited and clear and separate. So the
8 bot issue, I think, is a problem.

9 And one other very important thing: There's a
10 statement in there for agencies to use subjective
11 discretion in deciding what records relate to a specific
12 request. So, again, I'm sorry. I don't have the exact WAC
13 or page. But your rules state: When a request uses an
14 inexact phrase such as, quote, all records relating to a
15 topic such as property tax increase, the agency may
16 interpret the request to be for records which directly and
17 fairly address the topic.

18 That can't possibly be good. I think if someone
19 asks for all records related to a property tax increase, I
20 think that stands by itself. So do we really want to give
21 the agency the opportunity to actually say, oh, the e-mail
22 for the meeting with Mr. Smith to talk about tax increase
23 for property taxes isn't related to the tax increase. So
24 this is very problematic if we're giving an agency the
25 ability to decide what is related. And, again, there is

1 actually supreme court decisions on that.

2 And the final thing, I just want to get back to the
3 search issue. Very often -- in the proposed rules is a
4 suggestion. And we have the same thing. We have modelled
5 a lot of this in the City of Seattle. There is a
6 suggestion for protocol in a big agency to go to executive
7 aides, secretaries, and assistants and say these are the
8 things we need to look for. The problem that raises is am
9 I going to be willing, if I know someone is trying to
10 embarrass my boss, am I going to be willing to actually
11 freely search and disclose those records. It puts
12 employees in a very -- in an impossible position. So,
13 again, I go back to what I suggested at the beginning.
14 When you do have blind, simple algorithmic searches based
15 on the terms that are supplied on a server, you obviate a
16 lot of the problems. You're not relying on ten different
17 assistants in ten different offices trying to figure out
18 what they are looking for. Because again, in 2014 when
19 that procedure was done in Seattle, it failed miserably.
20 About 80 percent of the records that were ultimately
21 disclosed in the first three tries with the City failed to
22 disclose for those reasons. I'll stop there.

23 NANCY KRIER: Thank you. Mr. Crittenden?

24 Yes. My name is William John Crittenden. I'm
25 an attorney in Seattle, and I am also a board member of the

1 Washington Coalition for Open Government, which is called
2 WAYCOG (phonetic) or WCOG. The Washington Coalition
3 submitted written comments earlier today, and I delivered a
4 paper copy to the Attorney General as well at the beginning
5 of this hearing.

6 The big point I would like to make is that the
7 existing rules are actually considerably narrower in scope
8 than the rules that are required by the plain language of
9 RCW 42.56.100. I think every hearing officer and city
10 attorney in the state needs to go back and actually read
11 that statute carefully and see what it says. If you delete
12 out the language that was added in the '90s related to the
13 legislature, it says: "Agencies shall adopt and enforce
14 reasonable rules and regulations" consonant with the intent
15 of this chapter to provide full public access to public
16 records, to protect public records from damage and
17 disorganization, and to prevent excessive interference with
18 the essential functions of an agency. Such rules and
19 regulations shall provide for the fullest assistance to
20 inquirers, and the most timely action upon request for
21 information.

22 This provision of the PRA is from the original 1972
23 initiative. It's never been changed. The PRA was enacted
24 at a time, as Howard pointed out, that we had paper records
25 in file cabinets, and we got very comfortable with the idea

1 that, if we go down to the DCLU on Second Avenue and pull a
2 file out of a file cabinet and find out everything that
3 anyone who works for the City of Seattle had said about my
4 client's project. To do the same inquiry in 2017 is a
5 nightmare, because the records are scattered all over the
6 place. They're in e-mail, which no one bothers to
7 organize. There are e-mails that don't even have proper
8 subject lines. The drafters expected public records to be
9 kept organized. They could not have envisioned that you
10 would deploy e-mail systems and let people pile up 30- 40-
11 50,000 items in their inboxes without clearing them out.
12 But that is not what the PRA contemplated, and it is not
13 lawful.

14 To comply with Section 100 of the act, agencies
15 must adopt and enforce rules that keep their records
16 organized. And these rules need to take into account the
17 possible need to redact and reduce those records in
18 response to a PRA request. That is what the statute means
19 by the most timely possible action on a public records
20 request. It means if your process, the way you are
21 creating and organizing records, is a nightmare to produce
22 under the PRA, you're doing it wrong.

23 Now, the statute clearly says -- I believe this is
24 section 120 -- that agencies are not permitted to charge
25 requesters for locating records or preparing for

1 inspection. The agency bears that cost, and that should
2 give the agencies the incentive to keep their records
3 organized. Unfortunately, in many cases where there's a
4 public official who is not actually going to pick up the
5 tab, they don't organize them, because that just makes it
6 harder to find out what they're doing. And they don't care
7 if ten years from now they get a \$150,000 PRA judgment
8 against them because their e-mail didn't get disclosed at a
9 time it mattered.

10 We have not actually found any agency that has
11 actually adopted the rules contemplated by Section 100 in
12 the PRA. I have made explicit requests for your rules
13 adopted under RCW 42.56.100 to any number of agencies and
14 never received anything. What I get is retention schedules
15 and things like that.

16 Now, we have proposed a new section 3004 that will
17 actually put some teeth into the requirement that agencies
18 organize their records. We also propose a section 060 that
19 addresses the problem subject to common exemptions. Now,
20 this is just a first cut. It's important to note that it's
21 not my job and it's not Washington Coalition's job to tell
22 agencies how to organize their records. I'm here to point
23 out that agencies are not complying with Section 100 of the
24 act, because they don't have these rules, and their records
25 are a mess.

1 Existing 44-14-3001 has a problematic discussion of
2 searching in it, and that needs to be eliminated. "Search"
3 is a legal term of art that means very different things
4 under the PRA, and it doesn't put forth the method. And I
5 don't like to see people arguing with lawyers and throwing
6 these terms around loosely.

7 And this brings me to one of the most significant
8 problems that we see with the way agencies interpret the
9 PRA. Over the past few years, I have seen several
10 erroneous constitutional attacks on the PRA, all of them on
11 a similar theory that somehow the PRA is unconstitutional
12 or unenforceable because the records are in the possession
13 of some public official who has them on their iPhone, even
14 though they know they're not supposed to do that. There's
15 even a Law Review article that takes the position that the
16 PRA is unenforceable with respect to such records.

17 In our comments we explain, hopefully for the last
18 time, that the right and duty of agencies to maintain
19 control of their own records is a function of other areas
20 of the law. The right of an agency to own, control, and
21 retrieve its own records did not pop into existence in
22 1972. Agencies have overlooked their obligation to assert
23 control over their own records, because the main agency
24 lawyers who are involved in this area of practice have
25 spent the last four or five years trying to kill the PRA.

1 So it's no accident that they have totally forgotten that,
2 oh, yeah, there's proper law. There's employment law.
3 There's a criminal statute that makes it illegal to destroy
4 or abscond with public records.

5 One little comment in there. It says an agency
6 might be required to get the records back. We don't know
7 how that happens. Take that out. The purpose of the model
8 rules is to tell agencies how to comply with the PRA. And
9 those rules should address not having records on someone's
10 smart phone in the first place. If a public records
11 officer finds that someone has been using their smart phone
12 and won't let them search it, talk to your legal advisor,
13 and they can deal with the problem.

14 I would make this point one more time, just in case
15 anybody is listening. The Public Records Act creates a
16 legal obligation to go and get the records and produce a
17 copy. Don't go looking for how you get the records back
18 from a crooked public official who is using their i-Phone
19 under the PRA, because it's not there. Charge them with a
20 crime. Threaten to fire them. Take them to the auditor.
21 Do whatever you have to, to get your records back. Stop
22 attacking the PRA.

23 I would like to touch on a few other details.
24 There's actually several provisions of the existing rules
25 and they are listed on page 5 of our letter that actually

1 misstate what Section 100 says. In several cases they
2 paraphrase the requirement of adopting rules out of
3 existence. They turn them into a principle of false
4 assistance and blah, blah, blah. No. The statute says
5 what it says, and we propose revising the rules so they
6 actually do what they're supposed to do.

7 We have proposed a clarification to section
8 44-14-020(3) to state that the PRA officer will ensure that
9 the rules adopted by the agency are actually enforced.
10 Gasp. We propose a Section 3004 which says, for the most
11 part, agencies should prohibit the use of personal
12 electronic devices and accounts. If a public official
13 needs a device or account to do their job, they should have
14 one provided by the agency, and it should be maintained by
15 the agency, and they have no expectation of privacy in it.

16 Moving forward to 4006(3). Agencies should always
17 make an electronic copy of whatever they produce, period
18 stop, no exceptions. If you do it any other way, they're
19 doing it wrong. Paper is a dying, antiquated technology
20 that belongs in boxes. When you get a PRA request for
21 paper, you scan it once and put the paper back in the file
22 never to be disturbed ever again.

23 Unfortunately, the existing records still have a
24 discussion of this concept of "reasonably translatable,"
25 which is not really a correct conceptual framework when

1 you're talking about paper. And we have proposed revising
2 the rules when they talk about paper records. What the
3 rules say is you scan them. Now you've got a PDF. You
4 don't have to ever talk about what paper is under the PRA
5 ever again, because paper is back in the box. So the rule
6 is in 2017, I don't care if you are a fleet control
7 district in the tiniest part of Washington state, go get a
8 scanner and a copy of Acrobat.

9 And, finally, I propose revisions to Section 0504
10 to clarify something that I had to sue Snohomish County
11 over ten years ago, which is a database is a public record.
12 It can be copied onto a large hard drive. It can be
13 redacted by someone who knows what they're doing. And in
14 several places there are rules that are written in such a
15 way that it implies that that's not possible or that what a
16 requester has to do is ask for customized access. And that
17 is not correct. A database can be copied, and a database
18 can be redacted. In fact, a database is by definition the
19 easiest type of record to redact, because it is a giant
20 electronic matrix of already normalized data.

21 Unfortunately, somebody convinced the court of
22 appeals in 2012 that you can redact the database by
23 printing it out on paper. To that I would make the point
24 that incorrect statements of fact about technology in a
25 judicial opinion are not precedent. They're just wrong.

1 If a Luddite judge says I think we redact it by firing up
2 the old steam engine, you ignore them, because they don't
3 know what they're talking about. As soon as they say
4 something about the law, we have to listen to them. But
5 all the incorrect statements about technology in all of our
6 existing judicial opinions are just junk that we can ignore
7 because -- you look it up -- legal points have precedent,
8 not erroneous factual statements like you redact a database
9 by printing it on paper.

10 I think I have covered all the points I wanted to
11 cover, and it looks like I have used up my 12 minutes. So
12 I thank the Attorney General for considering all these
13 comments. They were quite a lot of work by a number of
14 people. Thank you.

15 NANCY KRIER: Next we have Toby Nixon.

16 TOBY NIXON: Good evening. I'm Toby Nixon.
17 I'm the president of the Washington Coalition for Open
18 Government and also a member of the Kirkland City Council.
19 I'm here tonight in my capacity as president of the
20 coalition. I greatly appreciate the effort that has gone
21 into preparing this draft update of the model rules to
22 align them with recent statutory and case law changes. And
23 I especially want to acknowledge all the efforts that Nancy
24 Krier has put into this effort. Thank you for seeking to
25 make it easier for both agencies and requesters to

1 understand how this important part of our government
2 accountability system is supposed to work.

3 Some of my colleagues, including Mr. Crittenden,
4 who has already spoken, will discuss the coalition's
5 comments on other areas of the rules, but I would like to
6 focus my remarks on the management of work queues for
7 public records requests.

8 I was deeply involved personally in creating
9 Kirkland's system for processing records requests, and it
10 was one of my top priorities when I ran for city council.
11 I appreciate that the Attorney General recognizes the work
12 we have done in Kirkland is a best practice to the extent
13 that you would admit some of it in the model rules and
14 promote it to other agencies to make it easier to adopt as
15 their own.

16 I am concerned that the description of what we do
17 in Kirkland is incomplete as the proposed rules are now
18 drafted. Only really one part of the Kirkland way of doing
19 things is described, and I have some concerns about that
20 one. That part has to do with the categorization of
21 requests, which is in Section 40. It is referred to in
22 several places as prioritization or priority categories.
23 The fact is that a categorization, as we practice it in
24 Kirkland, is not prioritization. The only category that
25 has an implication of priority is category 1, which is only

1 used to designate requests that are kind of a drop
2 everything life or death emergency. These are extremely
3 rare. In fact, they are so rare that in the four years
4 Kirkland has been using our system, we have never had a
5 category 1 request. And I verified that at 3:00 p.m. today
6 by calling our city clerk.

7 All the other categories are not about priority at
8 all but about assessing the volume of records, the
9 complexity of retrieval, the amount of review and redaction
10 required, if attorneys are likely to be involved, those
11 sorts of things. And in fact the proposed rules include a
12 very complete list of those considerations. But I think
13 it's important to emphasize -- and there may be some just
14 minor wording changes that could be made. The
15 categorization of a request is not an excuse to delay
16 unpleasant requests. You don't get to ignore category 5
17 requests. Category 5 means big and complicated, not lowest
18 priority. It's not a way to delay requests. Categories
19 are a way to ensure that small routine requests don't get
20 blocked behind large complex requests in the work queue.

21 So I would really like to see the implications in
22 the current text that categorization is equivalent to
23 prioritization be omitted. But I also want to add that --
24 and this is my main point. In addition to categorization,
25 there are a number of other things that agencies need to do

1 if they want to handle public records requests the way
2 Kirkland does. First and foremost, they must culturally
3 commit to the principle that providing public records is an
4 essential service to the public that shows the agency's
5 commitment to accountability and builds trust that enables
6 doing all the other important things the agency does.

7 Agencies must understand there is demand for public records
8 and being committed to keeping up with that demand over
9 time, even though in some instances some delays may occur
10 when there are spikes in demand. Agencies must thoroughly
11 understand the resources used for records requests and be
12 committed to providing the resources to meet the ongoing
13 average level of demand. They can't be allowed to delay
14 production of records by chronically and intentionally
15 under-resourcing their public records function.

16 Agencies must carefully measure their performance
17 in producing public records and track it over time. In
18 Kirkland, our public records staff presents a performance
19 report to the city council every six months, including the
20 number of requests outstanding at the beginning and at the
21 end of the period so we can see whether the queue is
22 growing or shrinking, the number of requests that were
23 processed, the average time needed to respond to requests
24 by category. The council uses this data to ensure that
25 resources are allocated to meet the demands as they trend

1 over time. Agencies must have clearly defined processes
2 for how the queue of pending work is managed, including
3 some principles like first-in, first-out.

4 Nondiscrimination is a key principle of the Public Records
5 Act. They do, of course, need to be able to process
6 requests out of sequence when work gets blocked on earlier
7 requests, but they do have to ensure that they aren't
8 accused of favoring or disfavoring particular requests when
9 they do that.

10 Agencies must be fully transparent with requesters
11 and the general public about their public records request
12 function, such as posting logs of pending requests so the
13 public can see for themselves where their requests are in
14 the work queue so it's not a mystery. The agencies must be
15 as accurate as possible in estimating the time required to
16 produce records and keep requesters informed of changes in
17 those estimates. I think that last part is addressed in
18 the draft rules now.

19 So to pull all that together, the real key is
20 tracking of performance and having a commitment to level of
21 service. And that's really kind of missing from the rules
22 right now. But without that, if an agency were to be sued
23 under RCW 42.56.550(2) for making an unreasonable time
24 estimate, they would not be able to show to the Court that
25 they have applied a reasonable level of resources to meet

1 their typical level of demand for disclosure of records.
2 They also would not be able to show that they had met the
3 mandate in 42.56.100 to adopt and enforce reasonable rules
4 and regulations that provide full public access to public
5 records or that provide the fullest assistance to inquirers
6 and the most timely possible action on request. If people
7 aren't tracking their performance, they won't be able to
8 demonstrate any of those things.

9 So whether or not you decide to retain the
10 categorization element in the model rules, I would
11 recommend that you include more about the measurement of
12 demand and performance and the importance of regular review
13 by the governing body or authority of the agency to ensure
14 that sufficient resources are available to the agency's
15 public records function to meet the typical and expected
16 demand for records. And this should include agencies that
17 are spending less than \$100,000 a year processing public
18 records, which is the vast majority in the state.

19 The new bills that were passed earlier this year
20 did create some new reporting requirements for those
21 agencies that process a large volume, but that doesn't mean
22 only those agencies should be tracking that data,
23 particularly when it comes to their level of performance.

24 You have received a ton of comments, some of which
25 will surely conflict. And I don't envy your task of trying

1 to get through them all. There are probably people who
2 would have commented but just didn't get the word in time.
3 In some sense, I think that we ought to think about
4 upgrading the State's mechanism for informing people about
5 rule-making actions. But to the extent the process permits
6 it, I will commit that the coalition would gladly
7 collaborate with the Attorney General's Office on resolving
8 the comments that you have received and producing the next
9 draft. We are at your disposal. Thank you very much.

10 NANCY KRIER: Thank you. I may be
11 mispronouncing your name. I'm sorry. Shadrach?

12 SHADRACH WHITE: Shadrach. I'm just here to
13 observe.

14 NANCY KRIER: Oh, you're just here to observe.
15 No problem. Kathy George.

16 KATHY GEORGE: K-a-t-h-y, G-e-o-r-g-e. And
17 I'm speaking tonight on behalf of Allied Daily Newspapers
18 of Washington. And I do have a written submission, which I
19 will hand to you after I'm done reading from it. The
20 general theme of the comments revolves around using these
21 model rules to convey to agencies that their primary
22 purpose is to provide the fullest assistance to requesters
23 and the most timely possible action on request.

24 So you will see in our rather lengthy attachment a
25 number of suggested revisions that reiterate and expand

1 upon what that responsibility should look like. I won't go
2 into every comment in detail, but I'll touch on some of the
3 larger points. One of the suggestions in the letter is,
4 first of all, to more clearly distinguish between the model
5 rules and the comments that are intended to provide
6 explanation of the rules. Another recurring suggestion in
7 these comments is to clearly distinguish, more clearly
8 distinguish among the separate duties imposed by 42.56.100
9 and that is to distinguish between providing full access to
10 public records, preventing disorganization of records,
11 preventing damage to records, and providing the most timely
12 possible action, which are all distinct responsibilities
13 that are sometimes conflated in the existing and proposed
14 model rules.

15 The comments also suggest giving more heft to these
16 model rules as they pertain to those duties. So, for
17 example -- and I think you heard Bill talk about this --
18 the model rules dealing with preventing disorganization of
19 records should prescribe that agencies will use filing and
20 labeling and searchable technology to make it easier to
21 find records that are requested. The existing rules on
22 preventing damage to records are aimed, it seems, mostly at
23 requesters and not letting requesters damage records. I
24 think the intent of that statute is that the agency is
25 going to prevent damage to records by following retention

1 schedules and by preserving records while requests are
2 pending. So there are some suggestions to make that more
3 clear.

4 Another thing that the comments highlight is the
5 need to distinguish between the responsibilities in
6 42.56.040 and the responsibilities under Section 100. 040
7 is a statute that is designed to prevent the need to even
8 make a records request. It obligates agencies to
9 proactively make available, either as part of their own WAC
10 regulations or in a prominent place at their central
11 office, those rules and policies and plans and adoptive
12 goals that affect the public. And the model rules seem to
13 misconstrue the statute as something that merely requires
14 identifying a records officer and saying how public records
15 can be requested. So the comments suggest that 040 should
16 be implemented through model rules that make clear what the
17 responsibility is.

18 And the comments also proposed to eliminate the new
19 sections on categorization due to a number of concerns
20 about them, one of which is that the proposed rules seem to
21 assume that every request is going to go into the queue and
22 is going to be categorized before any even initial search
23 takes place. The model rules should actually encourage
24 agencies to answer every request immediately, if possible,
25 or within five days, if possible, because that's consistent

1 with providing the most timely possible action and the
2 fullest assistance.

3 So the categorization scheme, if you will, that's
4 laid out in the model rules basically needs to be
5 overhauled or just eliminated. And as Toby said, I think
6 that you will find a willingness to work with you on that
7 overhaul.

8 Another recurring concern throughout these model
9 rules is that they don't recognize that requesters do have
10 the option of being anonymous. And another set of comments
11 addresses retrieving records from personal devices. As it
12 is, the proposed model rules discuss records on personal
13 devices as part of the definition of public records. It
14 really should be a separate model rule, and it should be a
15 rule that is expressed in imperative terms, not what
16 agencies should do but what their employees and officials
17 shall do to ensure that public records on personal devices
18 are made available upon request.

19 Another concern explained in the comments has to do
20 with the discussion of a third-party notice. The proposed
21 rules are concerning for a number of reasons. In general,
22 they seem to encourage notification of third parties for
23 the purpose of shifting the burden of proving exemptions
24 from the agency to a private party. In particular, there
25 is a statement that a third party notice shouldn't be given

1 unless the agency reasonably believes the records are
2 exempt. But if the agency reasonably believes the records
3 are exempt, it should be asserting that exemption itself,
4 and that gives the requester the choice of either
5 challenging that exemption claim or not. But if the
6 agencies simply shifts the burden to a third party to
7 assert that exemption, then everybody ends up in court,
8 which is inefficient and a way of slowing down access to
9 records, should they prove to be not exempt.

10 There are also some comments about emphasizing the
11 need for specific explanation of exemptions when records
12 are withheld. And I would just reiterate what Toby and
13 Bill said about the process. That is, Allied Daily
14 Newspapers of Washington is concerned that at this public
15 hearing there is a rather small number of people who are
16 able to make it here at 6 o'clock on a weeknight, and these
17 are rules that will affect the entire state, the entire
18 public. And so we would encourage you to continue the
19 process, at a minimum to circulate a revised proposal,
20 before making a final decision. Thank you for listening.

21 NANCY KRIER: That's our last speaker who
22 signed up, but I understand one is -- oh, no.

23 MR. THOMPSON: I'm Rowland Thompson,
24 R-o-w-l-a-n-d, T-h-o-m-p-s-o-n. I'm executive director of
25 Allied Daily Newspapers and the Washington Newspaper

1 Publishers Association. I don't want to go over the points
2 that were raised by the previous speakers, including our
3 attorney, who was speaking for us, but I would like to
4 expand a little bit on the last point that she made, and I
5 asked her to do that.

6 I'm a denizen of this process, and I'm here in
7 Olympia all the time. And I go to rule-making hearings
8 often, a couple of times a month, and those hearings are
9 discrete to that agency. They might be about a process
10 involving a discharge permit, or they might be about how
11 interest is calculated on a Department of Revenue issue, or
12 they might be about how construction is going to be done on
13 a particular project or a standard of some kind of a
14 singular agency. This is a unique process, and it's unique
15 in its breadth and its recommendation to be used throughout
16 state government and throughout local government. When I
17 talk to my members and to the members of the Washington
18 Newspaper Publishers Association, not one of them was aware
19 that this was happening, and it will have major impact on
20 them and on their readers. And it behooves the Attorney
21 General as the people's lawyer, I think, to take this
22 farther afield and to publicize it further. The
23 implications of this are wide reaching, and they're wide
24 reaching and they're long reaching in time. This last set
25 of rules was in place for almost a decade, and these will

1 probably be in place for about that similar period of time.
2 And the larger amount of input that you can get and buy-in
3 from the public ahead of them being finalized and published
4 I think is very important here, because local governments
5 from the largest to the smallest will be relying upon
6 these. Agencies of a single person up to King County will
7 use these as the model for them to rely upon when they
8 adopt their rules, their governing boards will.

9 I actually talked to a couple of people involved in
10 local government, and they were not aware that this was
11 going on. This is a process that's sufficient for people
12 who are practitioners in an area with an agency. It's
13 really not sufficient for something that's of this breadth.
14 It may fulfill the requirements of your agency, but I
15 really don't think it fulfills the requirement of the
16 Attorney General as the arbiter of these issues and you as
17 a public counsel for that office. And I hope that you
18 would consider as you move forward with this that you would
19 actually hold further hearings around the state for people
20 locally to be able to get them, rather than to having a
21 travel a great distance and not having them publicized as
22 fully as they probably should be.

23 We have submitted written comments. You'll get
24 them electronically, and that will make it easier to work
25 with. We're critical, but we want to be helpful, and

1 hopefully we can come to something that we can all agree
2 on, hopefully in this process we will look at like the desk
3 books that were done by the bar association back in
4 previous iterations. We have some strong opinions, and we
5 would like to be heard, needless to say. Thank you.

6 There is someone who is coming and is stuck on the
7 other side --

8 NANCY KRIER: That's what I heard. I don't
9 know if anyone else wants to speak. We can take a stretch
10 break.

11 SHADRACH WHITE: My name is Shadrach White,
12 S-h-a-d-r-a-c-h, last name White like Snow White. I know
13 there is a lot of strong opinions about the Public Records
14 Act. In full disclosure, I own a software company, and I
15 have been following this quite closely. There's other
16 software companies that have a lot bigger head start in
17 trying to help solve this problem. But I just wanted to
18 state for the record, I spent two and a half weeks
19 traveling around our state. I went to every county. I
20 went to as many incorporated cities as I could, and I met a
21 lot of really, really great city clerks, public records
22 officers, and records managers who work extremely hard.
23 They are overwhelmed, and they are in a lot of cases
24 overworked. And so I just -- I don't hear that voice here
25 at this hearing. I think it's important that it's put on

1 the record that there are a lot of public servants that are
2 trying to do a very diligent job. And I think that they
3 deserve recognition. And that's all.

4 NANCY KRIER: Okay. I think we'll take a
5 break.

6 (Break in proceedings from 6:54 p.m. to 7:03 p.m.)

7 NANCY KRIER: We're back on the record. If
8 you can state your name and spell anything you think might
9 be need to be spelled.

10 JOAN MELL: Thank you. My name is Joan Mell.
11 I'm an attorney in Fircrest, Washington. I am here before
12 you to really encourage careful consideration of any rule
13 making around the Public Records Act based on my advocacy
14 for individuals who believe in transparency. It has been
15 my experience that transparency makes a tremendous
16 difference in holding government officials accountable.

17 I am the attorney who represents Mike Ames and
18 Glenda Nissen in Pierce County. I wanted you to be aware
19 of the background of what's currently happening in Nissen
20 II so you can make sure to be attentive to the arguments
21 that Pierce County is bringing forward and how those might
22 influence how you finally implement any of your rule
23 changes. I think Pierce County has taken the unique
24 position of arguing that post Nissen I the supreme court
25 has created a new definition of the rule of public record.

1 And they so argue. It's a very interesting briefing that's
2 before Judge Lanese here in Thurston County on whether or
3 not Mark Lindquist has sufficiently met the affidavit
4 requirements in Nissen II that were set forth in Nissen I.
5 And their contention is that Nissen I, the supreme court
6 upheld the privacy of public officials and that they had
7 determined that the only basis for disclosure of any text
8 messages that were on a personal device would be measured
9 by whether or not that public official used the device,
10 slash, technology, slash, individual text for purposes of
11 carrying out the duties of the prosecutor as defined by the
12 prosecutor. So we are engaged in quite a discussion before
13 Judge Lanese on whether or not that's what the supreme
14 court did and then how he's going to then enforce his
15 determination that Mark's declaration was insufficient.

16 So we're waiting to see. But that's why I'm here.
17 I want to make sure that, one, the AG is nowhere near
18 adopting that principle, because it's wrong. It's wrong in
19 so many ways. The supreme court did not redefine the
20 meaning of a public record. The "prepared," "used,"
21 "retained," "owned" still are in the statute, and the
22 supreme court never applied the definition to any texts.
23 So that's important to me.

24 It's also important to me to share my personal
25 belief that Nissen I didn't open up the universe to

1 obtaining text messages. In a practical matter, it said
2 personal devices aren't a way that you can hide public
3 records. But at the same time, the practical reality of
4 being able to obtain text messages, it's virtually
5 impossible to get them. And that's why -- the reason that
6 texts are even employed in Nissen I and II is that I have
7 been trained to notify the carrier when you were interested
8 in phone records and text messages as soon as you knew you
9 were interested in them so that the carrier would have put
10 a hold on them.

11 Now, I didn't know when I did it that somehow the
12 universe where that goes to at Verizon was established for
13 criminal law enforcement purposes, but the prosecutor's
14 office threw in my face at the Nissen litigation that
15 somehow I had done a heinous offense by sending a
16 preservation request to Verizon because I wasn't a law
17 enforcement agency and I had no right to do so.

18 The supreme court never touched that issue, and I
19 don't think it's going to be an ongoing issue. But as a
20 practical matter, unless you send a preservation hold
21 request to a phone company and you know who the phone
22 company carrier is for the text messages, those text
23 messages are gone. It's very rare for a public official,
24 even in a personal capacity, to have a continuous storage
25 capacity with their phone company where they're saying hold

1 my text messages. And my experience in interaction with
2 Verizon, in fact, in that case has been that they don't
3 want to be in this universe either. They don't want to be
4 sitting on a bunch of personal information for individuals.

5 So in the context of private technology, we're
6 still dealing with a very volatile record that's easily
7 dispensed with. And that's why I am supportive of the
8 agencies taking a very firm stance and elected officials
9 taking a very firm stance that they just simply are not
10 going to text when they're conducting the public's
11 business. It's hard for them to manage. It's hard for the
12 agency to manage, and it's better to just not create that
13 kind of record.

14 And that's also the bottom line. It's the choice
15 to actually communicate in writing that gives us the right
16 to look at their activities. So it's the fact that we're
17 dealing with a record as opposed to some sort of nebulous
18 communications or oral communications. So if they're going
19 to decide that they need to convey information in words on
20 paper in a digital format, it should be done in a digital
21 format that can be recovered and stored and preserved for
22 as long as the retention requirements allow or require.

23 I think there should be some precautions in these
24 rules adopted. And training should necessarily include and
25 recommend that public officials recognize that the mere

1 fact that it's transitory, as they like to tell me all the
2 time, isn't a reason to delete it and get rid of it after a
3 request has been made in particular. And it's not a reason
4 to just completely dispense with your text right after it's
5 created.

6 I don't know if people have talked about the
7 Sacramento case that came out today, but I read a review
8 this morning that there is a judicial determination about
9 spoilage of evidence at issue down in Sacramento where an
10 official for the second time deleted text messages in
11 relationship to his communications about a developer who
12 was trying to get the permitting requirements. The first
13 time he did it, the judge said shame on you. This time
14 they are saying sanction and spoliation. But again, the
15 government lawyers are involved saying that's the most
16 speculative accusation to make against this public
17 official, that he deleted these transitory text messages
18 intentionally knowing that he was destroying a public
19 record, even though he had been told not to do it
20 previously.

21 So I'm seeing in this universe a lot of histrionics
22 around whether you need to keep things and don't need to
23 keep things. And you do. You just do, and it shouldn't be
24 about, oh, it's just quickly deleted or it was just a quick
25 little message. I am embroiled in whether or not a

1 communication relates to or was used by a public official.

2 And I think the state archivist has done a really
3 good job in adapting the retention schedule definition of
4 what is a public record and merging that with the PRA
5 definition in a way that just says, if you're talking about
6 work, it's work related. And this whole concept that
7 something is political or not, everything in government is
8 political, especially with something like Mark Lindquist.
9 So to the extent you can incorporate in your rules the
10 education and training, and recommendations for policies
11 that simply put off limits destroying this kind of stuff or
12 not retaining this kind of stuff is really essential. And
13 then please, please, please don't buy into the fact that
14 there is a narrower definition of a public record.

15 NANCY KRIER: Thank you.

16 JOAN MELL: I'm happy to answer any questions.

17 NANCY KRIER: No, this is your chance.

18 JOAN MELL: Okay.

19 NANCY KRIER: Thank you. We are going to be
20 here until 8:00 just in case anybody else -- just for the
21 record, we did not only provide notice by formal filings,
22 but we did, as I was discussing with some others on the
23 break, media releases. We tweeted out about these rules.
24 We sent e-mails. We posted it on our website. So there
25 has been multiple platforms to get the word out to

1 associations as well as individuals about these rules. So
2 I appreciate all of you coming here tonight, but there were
3 many notices.

4 HOWARD GALE: Thank you for a second bite of
5 the apple. Howard Gale from Seattle. So I just want to
6 get three things that I didn't really address, and they're
7 kind of slightly more complex issues. One is the -- it's
8 been touched on today, repeated confusion around 42.56.100,
9 the protection of public records and public access. In
10 your rules and again in your proposed rules -- I don't have
11 the page -- you state, quote, an agency should devote
12 sufficient staff time to processing requests consistent
13 with the act's requirement that fulfilling requests should
14 not be an excessive interference with the agency's other
15 essential functions.

16 I think that is actually a gross misrepresentation
17 of 42.56.100. 42.56.100 says: Consonant with the intent
18 of this chapter to provide full public access to records,
19 to protect public records from damage or disorganization,
20 and to prevent excessive interference with the other
21 essential functions of the agency.

22 I think another way of reading that is that there's
23 a duty to preserve and organize records -- and this was
24 spoken to a number of times today -- there's a duty to
25 preserve records to not excessively interfere with the

1 other functions of an agency. I think the way that it's
2 worded in your current proposed rules, it actually
3 encourages an agency to hire maybe one incompetent person
4 that can't get the job done, and then they can appeal to
5 the Court and say, you know, this is just interfering with
6 our function.

7 So it goes back to the issue that's been raised
8 repeatedly, and that is this is kind of an essential part
9 of democracy. It's about transparency. We wouldn't say in
10 a fire district we're having too many fires, so we just
11 can't provide fire services. If there's a need for
12 transparency, then agencies need to figure out a way to get
13 that fulfilled. And, again, it was spoken to earlier, a
14 lot of these problems could be resolvable by proper
15 searches and proper organization of records.

16 And then the other thing I want to get to is
17 installments. Installments is noted on page 20, 26, 27.
18 And there's a conflict here. The original PRA, up until
19 2005, so from '72 to 2005, it stated: Public records shall
20 be available to any person for inspection or copy. An
21 agency shall, upon request for identifiable records, make
22 them properly available to any person. That's the full
23 statement.

24 In 2005, 33 years later, there was one clause
25 including: If applicable, on a partial or installment.

1 basis as records that are a part of a larger set. This is
2 the problem. I have now submitted numerous public records
3 requests to Seattle, and I'm hit with, here's your first
4 installment. In two months, you'll get your first
5 installment. I'm now working on my third installment, and
6 after five months, no indication when the last installment
7 will be. No indication of how many installments there will
8 be. Now the problem is I don't think that clause that was
9 added in 2005 somehow subverts "make them promptly
10 available." I know there's a recent decision in both Hikel
11 and Hobbs that says your only requirement right now, as the
12 appeals court understands it, is for an agency to provide
13 the first installment in a timely fashion. That is a
14 problem, and that is encouraging agencies to use this
15 installment ploy to avoid production.

16 So right now I'm on my third installment, and I
17 have no idea. It could be a year, two years off. And what
18 do I do? If I take the City of Seattle to court, they say
19 Mr. Gale hasn't been patient. He's not waiting for
20 installment number 563. So I think the installments issue
21 is a very serious concern.

22 And then the last point briefly is the 30-day issue
23 of picking up documents I think for -- we have lawyers. We
24 have newspaper organizations. There's also average
25 citizens. That's why the Public Records Act was passed in

1 '72, to empower average citizens. If an average citizen
2 goes on vacation, if there is health issues, if there is
3 family issues, having that 30-day requirement is an
4 unnecessary burden, and it often gives an agency the chance
5 to do a reset and say, okay, we're going to start over. So
6 that's it. Thank you.

7 NANCY KRIER: Do we have any other sheets? I
8 don't think so. So we'll go off the record now and see if
9 anyone -- I'll stay here until 8:00 to see if anyone else
10 comes. If you want to stay with us, that's fine. I
11 haven't ordered pizza, but if you don't want to stay, I
12 won't take any offense. So we'll go off the record.

13 (Off the record from 7:18 p.m. to 8:00 p.m.)

14 NANCY KRIER: So we're back on the record.
15 It's now 8:00 p.m., and there is no one else signed up to
16 testify, so we're closing out this evening's hearing
17 record. Thank you.

18 (Proceedings concluded at 8:00 p.m.)
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